

The Sanitized Workplace

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The workplace is not designed to accommodate people falling in love. Love is an irrational emotion; the workplace is . . . built on a foundation of rationality.

—Bureau of National Affairs¹

Now, we have this officer telling a dirty joke, which he . . . admits to have sexual overtones

. . . .

. . . [I]n our workplace, one of the most serious offenses somebody can commit is sexual harassment. It is something that is pervasive in our society . . . and it's something that we as people want to stop

—Argument of the County Attorney
*In re County of Cook/Sheriff of Cook County*²

Somebody ought to get worried about the fact that no work is getting done.

—Catharine MacKinnon³

I. INTRODUCTION

Does sex have a place in the workplace? According to most management theorists and feminist lawyers, the answer is a resounding no. Progress, they say, means precisely driving sex out of the workplace—whether in the name of efficiency or equality.

It may seem paradoxical that such strange bedfellows would endorse the same sanitizing impulse; feminists are rarely viewed as close companions of corporate management. But upon further examination, it isn't ironic or strange at all. One of American society's most cherished beliefs is that the workplace is—or should be—asexual. The dominant ethic says, "Work is work, and sex is sex, and never the twain shall meet." Call it the ethic of workplace asexuality.

One may be tempted to attribute this ethic to Americans' prudishness, and, of course, conservative sexual sensibilities probably have played a

1. BUREAU OF NAT'L AFFAIRS, CORPORATE AFFAIRS: NEPOTISM, OFFICE ROMANCE & SEXUAL HARASSMENT 35 (1988).

2. 115 Lab. Arb. Rep. (BNA) 1346, 1350 (2001) (Wolff, Arb.).

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

role. But our commitment to workplace asexuality is, even more directly, a legacy of our historic commitment to a certain conception of organizational rationality. It wasn't Victorian churchwomen, but twentieth-century organization men who took the lead in creating the asexual imperative: men like Frederick Winslow Taylor, who saw managers as rational "heads" who would control the unruly "hands" and irrational "hearts" of those who assumed their places as workers in the modern organization. Although the necessity of bureaucratic organization has come under challenge in recent years, the drive toward asexuality is not fading along with it. Today, as much as ever, sexuality is seen as something "bad"—or at least beyond the bounds of professionalism—that should be banished from organizational life. If sexuality cannot be banished entirely, then those who embody or display it must be brought under tight control and subjected to discipline.

Although the drive to sanitize the workplace raises a range of fascinating issues about the place of sexuality and other affective elements of human life in contemporary organizations, it is beyond the scope of this Article to deal with most of them here. My goal is more modest: to show how sexual harassment law, as envisioned by some feminist reformers and implemented by many human resource (HR) managers, has become an important justification for a neo-Taylorist project of suppressing sexuality and intimacy in the workplace. To put it plainly, sex harassment policies now provide an added incentive and an increased legitimacy for management to control and discipline relatively harmless sexual behavior without even inquiring into whether that behavior undermines gender equality on the job.

This development was not (and I hope still is not) inevitable. Indeed, it is part of my aim to trace how it came about in order to reclaim some lost possibilities and chart a more promising path for the future. Although organizations are the main actors driving the sanitization process, the legal system has played an important role in providing incentive and cover for sanitization. In the United States, sex harassment has been viewed primarily as a form of sex discrimination under Title VII of the Civil Rights Act, the federal statute that prohibits sex discrimination in employment.⁴ Title VII says nothing about sexuality; it simply prohibits discrimination based on

4. 42 U.S.C. § 2000e-2(a) (2000). Title VII reads in relevant part:

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

Id.

sex. Thus, under the statute, the concept of sex harassment might have been elaborated to cover the full range of hostile and discriminatory actions—both sexual and nonsexual—that tend to keep women (or men who fail to conform to prescribed gender roles) in unequal jobs or work roles. Such an approach would have paralleled developments in race discrimination law, where courts had already adopted a broad view of racial harassment that recognized its role in reproducing patterns of racial segregation and hierarchy that relegate minorities to lower-paid positions.

Instead, the federal agency and the lower courts charged with interpreting Title VII defined harassment primarily in terms of sexual advances and other sexual conduct—an approach I call the sexual model. In earlier work, I showed that this sexual model is too narrow, because the focus on sexual conduct has obscured more fundamental problems of gender-based harassment and discrimination that are not primarily “sexual” in content or design.⁵ In this Article, I show that the sexual model is also too broad, because the same focus on sexual conduct that has led *courts* to ignore these larger patterns of sexism and discrimination is also leading *companies* to prohibit a broad range of relatively harmless sexual conduct, even when that conduct does not threaten gender equality on the job.⁶ In the name of preventing sexual harassment, many companies are proscribing sexual conduct that would not amount to sexual harassment, let alone sex discrimination, under the law. Many firms are even banning or discouraging intimate relationships between their employees. Worst of all, companies are disciplining (and even firing) employees for these perceived sexual transgressions without bothering to examine whether they are linked to sex discrimination in purpose or effect.

The story of the development and implementation of sexual harassment law is an account of one of the most ambitious recent attempts to use legal liability to transform workplace relations. Understanding how the process has played out provides us with critical insight into the dynamics of legal reform. How can we understand the campaign to sanitize the workplace that employers are undertaking in the name of sexual harassment law? Libertarian critics claim that the threat of employer liability under Title VII, combined with a vague definition of harassment, gives employers an incentive to go overboard in regulating employee conduct. But this explanation fails to account for the central puzzle of this reform effort: Why are employers cracking down on *sexual* conduct, rather than equally serious

5. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

6. Throughout the Article, I use the terms “company” and “firm” as well as the more general “organization” and “workplace.” Unless specifically noted, I do not mean to limit my observations to particular types of employment settings; rather, I mean to denote all types of settings, including white-collar, blue-collar, and pink-collar fields; private- and public-sector employers; mental and manual labor; and workplaces that are male-dominated, female-dominated, as well as relatively integrated.

nonsexual forms of harassment and discrimination for which they are also liable? Firms often simply go through the motions or even resist legal mandates; why have they responded so enthusiastically, even overzealously, to this body of law?

As Part II shows, the answer lies in the fact that sexual harassment law resonated with a widely shared conception of organizational rationality. The legal system's focus on the harmfulness of sexual conduct tapped into an age-old view of sexuality that was deeply ingrained in managerial ideology and successfully exploited by feminist leaders. Classical organizational theory holds that sexuality and other "personal" forces are at odds with productivity and out of place in organizational life. Rather than challenging this conception, many feminists who campaigned against sexual harassment explicitly drew on it. They argued that men's sexual conduct subverted women's equal standing as employees, while at the same time undermining organizational productivity. Like classical organizational theory, feminist arguments pitted workplace sexuality, and professional competence and productivity, against each other.

As I elaborate in Section III.A, the confluence of legal, feminist, managerial, and popular ideals created an environment in which organizational actors have been able to steer the law to serve their own ends. As sociologists of law have shown, human resource managers—the inside managers and outside consultants who specialize in helping organizations handle personnel matters—and management-side labor lawyers consistently shape understandings of law and compliance with it in a direction that emphasizes organizational aims, especially efficiency. In the context of a legal system that highlighted the harm of workplace sexual conduct, a feminist campaign that condemned it as inconsistent with women's equality, a managerial tradition that defined it as in conflict with organizational rationality, and a news media that sensationalized it, it was almost predictable that HR managers and lawyers would mobilize sexual harassment law in the service of suppressing sexual conduct. As Sections III.B through III.E document, these experts have encouraged companies to punish sexual conduct without attending to the larger structures of gender inequality in which genuine harassment flourishes. They urge "zero-tolerance" policies and "cultural sensitivity" approaches that err on the side of prohibiting sexual conduct that might subjectively be perceived as offensive (such as sexual jokes and remarks), or that might even conceivably lead to sexual harassment claims (such as office romances).

Aided by extensive press coverage that has popularized the idea of harassment-as-sexual-conduct and generated an intense fear of legal liability, these experts' views are taking hold in organizational life, as Part III shows. The motivations of these experts, and the employers who rely on their advice, are complex. Obviously, it is in the experts' self-interest to

interpret the law in a way that allows them to create a market for their own services (such as sexual harassment policies and training programs). But self-interest can coexist with idealistic, or at least ideological, impulses. Perhaps, like early feminists, many professionals and managers genuinely believe that workplace sexual conduct harms women. Perhaps many of them see sexual harassment law as an acceptable—even progressive—justification for imposing prohibitions that serve other management interests. Perhaps both. Troublingly, as Section III.D shows, there are hints that employers sometimes seize on accusations of sexual harassment as a pretext for less benign motives for firing employees, such as age discrimination or sexual orientation discrimination. In other cases, employers seem to be acting in good faith to enforce sexual harassment policies that simply reach too far. Either way, no effort is made to determine whether the alleged harassment was linked to sex discrimination. In the hands of organizational actors, the concept of sex harassment has been given a direction of its own, diverted from the larger goals of employment discrimination law.

Although the reasons may not be obvious, I believe the attempt to banish sexuality from the workplace threatens many important social interests. Sanitization does not eliminate sex discrimination, but it may unleash some discriminatory forces of its own. As Section III.F shows, the focus on sexual conduct has encouraged organizations to treat harassment as a stand-alone phenomenon—a problem of bad or boorish men who oppress or offend women—rather than as a symptom of larger patterns of sex segregation and inequality. As a result, companies can feel good about punishing individual employees for sexual offenses while doing little or nothing to address the overarching dynamics of harassment and discrimination that preserve gender hierarchy at work. By displacing attention away from genuine problems of sex discrimination and associating feminism with a punitive stance toward sexuality, I believe the drive toward sexual sanitization may even undercut the goal of achieving gender equality.

To add to the problem, the emphasis on eliminating sexual conduct encourages employees to articulate broader workplace harms as forms of sexual harassment, obscuring more structural problems that may be the true source of their disadvantage. Thus, women may complain about sexual jokes, when their real concern is a caste system that relegates them to low-status, low-pay positions, as Section IV.C shows. Even more worrying is the prospect that some employees may make allegations of sexual harassment that disproportionately disadvantage racial and sexual minorities. As Section IV.D suggests, white women who enjoy sexual banter and flirtation with their white male coworkers may regard the same conduct as a form of sexual harassment when it comes from men of color.

Heterosexual men who willingly engage in sexual horseplay with men whom they regard as heterosexual may be quick to label the same overtures as harassment when they come from openly gay men. These results are unsurprising, for regulatory initiatives to stamp out sexual conduct are often mobilized disproportionately against stigmatized minorities. But they do suggest that one-size-fits-all, acontextual prohibitions on sexual conduct may give individual employees, and management as a whole, too much power to enforce sexual conformity in the name of pursuing a project of gender equality that has been all but abandoned.

The truth is that managers cannot succeed in banishing sexuality from the workplace: They can only subject particular expressions of it to surveillance and discipline. Although some groups suffer more than others when this occurs, everyone loses. It may well be true, as the libertarian critics of harassment law have charged, that punishing sexual language and conduct can infringe on employees' free expression,⁷ and, where that occurs, it is not a harm to be taken lightly.⁸ But, as Section V.A elaborates,

7. As many readers are undoubtedly aware, a number of libertarian writers have criticized sexual harassment law on the ground that it has led employers to adopt restrictions that compromise employees' freedom of expression. For an example of such a critique by one of the most prolific and influential libertarian writers, see Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819-43, 1846 (1992) (arguing that current sexual harassment law constrains protected speech in a content- and viewpoint-based manner, and proposing that harassing speech directed at a particular individual be subject to liability, but that undirected speech should remain free of constraints). For other examples, see JEFFREY ROSEN, *THE UNWANTED GAZE* 78-127 (2000) (arguing that sexual harassment law leads to the invasion of employee privacy and prevents employees from having private space for expression); CATHY YOUNG, *CEASEFIRE! WHY WOMEN AND MEN MUST JOIN FORCES TO ACHIEVE TRUE EQUALITY* 173 (1999) (stressing that current sexual harassment law "abridges freedom of speech"); and Walter Olson, *Shut Up, They Explained*, REASON, June 1997, at 54, 54 (criticizing "zero tolerance" sexual harassment policies that give no benefit of the doubt to debatable or borderline speech), available at <http://www.reason.com/9706/col.olson.html>. For a more extreme view, see Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 491-510 (1991) (arguing that Title VII hostile work environment liability leads to prohibitions on verbal harassment that amount to unconstitutional viewpoint-based restrictions on expression).

8. A growing number of feminist writers have begun to express concern that certain interpretations of sexual harassment law may undermine employees' freedom of expression. See NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* 125-32 (1995) (arguing that harassment law gives employers incentives to create and overzealously enforce policies that infringe on employees' expression); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 698-99 (1997) (making a similar point); cf. JUDITH BUTLER, *EXCITABLE SPEECH* 97 (1997) (arguing against censorship of hate speech for a number of reasons, including that "hate speech arguments have been invoked against minority groups," including homosexuals and African Americans). Because people spend so many of their waking hours at work and rub shoulders with a variety of other people there, the workplace may have become a new public square in which it is especially important that people be able to express themselves. See Estlund, *supra*, at 732-33; cf. J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2304-06, 2319 (1999) (agreeing that harassment law may tread upon free expression, but arguing that this collateral censorship is justified, and criticizing the libertarians for ignoring broader problems of employer censorship and control of employees). Although I share the concern that employers may be exercising too much control over people's ability to

I am equally concerned about the threats to human intimacy and the negative politics of sexuality that are ushered in by the drive toward sanitization. With the decline of civil society, the workplace is one of the few arenas left in our society where people from different walks of life can come to know one another well.⁹ Because people who work together come into close contact with each other for extended periods for the purpose of achieving common goals, work fosters extraordinarily intimate relationships of both the sexually charged and the more platonic varieties. When managers prohibit or discourage employees from dating each other, they deprive people of perhaps the single most promising avenue available for securing sexual partners. And, when managers punish employees for sexualized interactions with each other, they create a climate that may stifle workplace friendships and solidarity more generally. Evidence suggests that many employees fear that a simple expression of personal interest in a coworker may prompt an accusation of sexual harassment. We cannot expect diverse groups of people to form close bonds and alliances—whether sexual or nonsexual—if they must be concerned that reaching out to one another puts them at risk of losing their jobs or their reputations. Along with the loss of individual free expression comes an interference with intimacy and bonding.

Even more is at stake than whether or not people can form close friendships at work: The larger question is whether we as a society can value the workplace as a realm alive with personal intimacy, sexual energy, and “humanness” more broadly. The same impulse that would banish sexuality from the workplace also seeks to suppress other “irrational” life experiences such as birth and death, sickness and disability, aging and emotion of every kind. But the old Taylorist dream of the workplace as a sterile zone in which workers suspend all their human attributes while they train their energies solely on production doesn’t begin to reflect the rich, multiple roles that work serves in people’s lives. For most people, working isn’t just a way to earn a livelihood. It’s a way to contribute something to the larger society, to struggle against their limits, to make friends and form communities, to leave their imprint on the world, and to know themselves and others in a deep way. As I have explained elsewhere, work isn’t simply

express themselves at work, it is not my goal to analyze the degree to which current interpretations of sexual harassment law infringe on First Amendment law. Instead, I propose a vision of the law that promotes employees’ ability to form their own workplace cultures—including cultures that involve sexual conduct and expression—provided that those cultures are formed within broader structures of gender equality that give men and women equal ability to shape them.

9. See Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 17 (2000) (asserting that “[t]he single most important arena of racial and ethnic integration is the workplace” and that “even the partial demographic integration that does exist in the workplace yields far more *social* integration—actual interracial interaction and friendship—than any other domain of American society”).

a sphere of production. It is also a source of citizenship, community, and self-understanding.¹⁰

By encouraging and licensing management to punish sexual conduct, our society contributes to a negative politics of sexuality as well as an impoverished view of working life. The drive to sanitize the workplace assumes that sexuality is properly a private element that will assume a destructive quality if unleashed in a public setting. But as Section IV.A argues, sexuality isn't simply an attribute of individual people—it's a dynamic force that finds life in social relations shaped in institutional spaces. Nor is sexuality always discriminatory or destructive to organizational life: It can serve a variety of positive ends. Just as individual employees may express themselves or embroider intimate relations through sexual language and conduct, so too may employees as a group resort to sexual interactions to alleviate stress or boredom on the job, to create vital forms of community and solidarity with each other, or to articulate resistance to oppressive management practices. Research suggests that workplace romance may even increase productivity in some circumstances.

Contrary to prevailing orthodoxy, such uses of workplace sexuality do not always harm or disadvantage women: A lot depends on the larger structural context in which the sexuality is expressed, as Section IV.B shows. As a well-accepted body of systematic social science research demonstrates, women who enter jobs in which they are significantly underrepresented often confront hostility and harassment from incumbent male workers, and in some settings the men use sexual conduct as a means of marking the women as "different" and out of place. However, a new body of sociological research suggests that women who work in more integrated, egalitarian settings often willingly participate and take pleasure in sexualized interactions—probably because their numerical strength gives them the power to help shape the sexual norms and culture to their own liking. Rather than presuming that women will always find sexual conduct offensive, this research suggests that we should ensure that women are fully integrated into equal jobs and positions of authority, thus giving them the power to decide for themselves what kind of work cultures they want to have.

This analysis leads me to the conclusion that, in a pluralistic society, we should neither encourage nor cede to management the unilateral power to censor sexual conduct. Instead, we should strive to create structurally egalitarian work settings in which employees can work with management to forge their own norms about sexual conduct. With this goal in mind, current sexual harassment law creates perverse incentives. The fear of liability for specifically *sexual* forms of harassment legitimates the drive to

10. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000).

desexualize—while there is little countervailing pressure to integrate jobs that remain stratified along gender lines. Thus, Section V.B proposes some changes to sex harassment law that would give organizations greater incentive to desegregate—rather than simply desexualizing. Under my approach, an employer who continues to operate a sex-segregated workplace would face a more stringent set of liability rules that make it easier than it is now for plaintiffs to prove that nonsexual, as well as sexual, forms of harassment are sex-based and sufficiently harmful to be actionable. On the other hand, if an employer succeeds in creating a well-integrated, structurally egalitarian workplace, the firm would face a more lenient set of liability rules that would relieve it of responsibility for sexually offensive conduct unless a plaintiff could show that the conduct was used for the purpose of discriminating against her and actually affected her ability to do the job. This is a simple set of reforms that could be urged by enforcement agencies and crafted by judges in the relevant case law; no legislative action would be required.

Section V.C proposes some compatible organizational reforms. For example, I would like to see organizations abandon sensitivity training in favor of incorporating their harassment policies into broader efforts to achieve integration and equality throughout the firm. Along similar lines, I urge that employers forgo measures to prohibit or discourage sexual or dating relationships among employees and refuse to intervene, just as they do with nonsexual friendships, unless there is clear evidence that a particular relationship is undermining specific organizational goals. Ultimately, my hope is that many organizations will rethink the traditional conception of rationality in favor of a broader understanding that recognizes sexuality and intimacy as part of the fabric and foundation of organizational life. But my approach does not require companies to share this vision. My goal isn't to use the law to require all organizations to permit open expressions of sexuality, but rather to eliminate the existing legal pressures toward desexualization in favor of opening up new possibilities of pluralism and experimentation. In my view, employees and supervisors should be free to work together to create a variety of different work cultures—including more and less sexualized ones—so long as that process occurs within a larger context of structural equality that provides all women and men the power to shape those cultures. Once they are given a meaningful choice, I believe many of today's managers and employees will choose workplaces in which they are more, rather than less, free to express their full humanity and to form close connections with each other.

Ultimately, however, as I emphasize in the Conclusion, legal reforms alone will not alter the status quo. If I have learned anything from doing this study, it is that the law can make a difference, but only if it resonates with, and can inspire others to demand the realization of, broader cultural,

political, and organizational visions. The contemporary drive to sanitize the workplace came about through a complex interplay of forces in which feminists, judges, HR managers, lawyers, and the news media all helped create an understanding that sexuality disadvantages women and disrupts productivity. In my view, we can only hope to halt the sanitization process by articulating a more appealing vision in which sexuality and intimacy can coexist with, and perhaps even enhance, gender equality and organizational rationality. This is a tremendous task, but, for reasons I hope emerge clearly from this Article, one I believe is worthy of the efforts of the next generation of scholars, feminists, lawyers, and managers.

II. THE HISTORICAL DREAM OF A SANITIZED WORKPLACE

A. *Divorcing Productivity and Passion*

The idea that sex has no place in the workplace is not new. At least since the early 1900s, corporate managers have seen sexuality as something that properly lies “outside” the workplace—something that preexists and threatens it. This imperative was part of a larger wave of bureaucratization that rolled in with the twentieth century. The emergence of giant corporations with far-flung operations to be coordinated gave rise to a new class of professional managers. Lacking legitimacy rooted in firm ownership or ruling-class birthright, the new managers rested their authority on their technical expertise: As managers, they knew the “one best way” to organize work efficiently.¹¹

In contrast to the freewheeling intuitivism of some nineteenth-century entrepreneurs,¹² the founding fathers of modern organizational theory imagined firms as spheres of “passionless” rationality.¹³ In the division of labor they invented, managers would use their brains to do the logical thinking-through and planning of organizational goals, and workers would use their bodies to implement them. In the words of Frederick Winslow Taylor, the steel company engineer-turned-consultant who invented the

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

12. Consider, for example, railroad magnate Cornelius Vanderbilt:

[H]e seemed to act almost on impulse and intuition. He could never explain the mental processes by which he arrived at important decisions He seems to have had, as he himself frequently said, a seer-like faculty. He saw visions, and he believed in dreams and in signs. . . . Before making investments or embarking in his great railroad ventures, Vanderbilt visited spiritualists

BURTON J. HENDRICK, *THE AGE OF BIG BUSINESS: A CHRONICLE OF THE CAPTAINS OF INDUSTRY* 21 (1919).

13. I am indebted to Rosabeth Moss Kanter for the description of Max Weber’s conception of the organization as “passionless.” ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 22 (1993).

theory of scientific management, “[T]he workman who is best suited to actually doing the work is incapable of fully understanding [the science underlying it], without the guidance and help of those who are working with him or over him.”¹⁴ Managers were to be the “heads” and workers the “hands” of the organization.

But as Max Weber recognized, it wasn’t just people’s hands that were to be controlled; it was also their hearts. Just as the proper use of the assembly line and time motion studies would help management harness workers’ bodily capacities to the ends of production, so too could proper organizational structure suppress the personal elements of people’s lives that threatened the smooth functioning of the firm. Work organizations were conceived as hierarchies of “jobs” or “slots” to be filled by generic “workers,” who would suspend their human qualities while they were at work and focus their energies solely on production. According to Weber, such depersonalization was bureaucracy’s special brilliance:

Its specific nature . . . develops the more perfectly the more bureaucracy is “dehumanized,” the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is the specific nature of bureaucracy and it is appraised as its special virtue.¹⁵

Classical management theorists did not speak to sexuality explicitly, but the implications of their analysis are clear. If work is the sphere of rationality and order, and if the irrational side of life must be kept at bay, then it is clear that sexuality must be banished. Few forces are perceived as more at odds with rationality than sexuality. In our culture, sexuality is seen as “part of an animal nature—biologically or psychodynamically driven, irrational, innate—that exists prior to (and is at war with) civilization, society, and the forces that would repress or tame it.”¹⁶ Sexuality is perhaps perceived as the supreme threat to all that is rational and ordered—the antithesis of the passionless logic that is supposed to rule organizational life. Thus, except when it is commodified and made part of the product or service to be sold, sexuality is viewed as external to the organization—something to be purged and prohibited, or at the very least disciplined and controlled. In the words of one prominent organizational theorist, Gibson

14. THOMAS C. COCHRAN, *AMERICAN BUSINESS IN THE TWENTIETH CENTURY* 76 (1972) (quoting FREDERICK W. TAYLOR, *SCIENTIFIC MANAGEMENT* 25-26 (1911)).

15. MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 215-16 (H.H. Gerth & C. Wright Mills eds. & trans., Routledge 1991) (1948).

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

Burrell, "[T]he suppression of sexuality is one of the first tasks the bureaucracy sets itself."¹⁷

Given the predominance of this way of thinking, it is little wonder that the massive movement of women into the workforce seemed to pose a problem for modern organizations. In an organizational environment that regarded male workers as elements of potential volatility, the entrance of women could only magnify and intensify the risk. For, within the collective social psyche, women represent the emotional, "irrational" side of existence.¹⁸ Women are closely associated with the processes of life and death: reproduction and birth, nurturance and rejection, sickness and disease, aging and death—and, of course, sexuality. For this reason, as sociologist Rosabeth Moss Kanter has noted, Weber's defense of passionless bureaucracy can be seen to converge with Freud's contention that women—the bearers of passion and sexuality—are out of place in the working world of men: "Resisting female enticements, men carry on the burdens of government and rational thought; rationality is the male principle, in opposition to the female principle of emotionality. Men master their sexuality, . . . whereas women 'live dangerously close to the archaic heritage.'"¹⁹

Decades later, this historical way of thinking about the place of sexuality in work organizations would provide challenging terrain for a women's movement that wanted to integrate women into equal roles at work. In a culture that viewed women as the walking embodiments of sexuality and regarded sexuality as a threat to organizational life, feminists faced a difficult choice: They could challenge the notion that the workplace is (or should be) asexual—and insist that sexuality is a common, not necessarily undesirable feature of organizational life that exists whether or not women are present. Or, they could embrace the ethic of asexuality—and join the struggle to stamp out sexual behavior, in the name of ensuring parity for women and productivity for the firm.

B. *Equating Sexism and Sexuality*

For the most part, the American women's movement has pursued the latter strategy. Instead of challenging the ethic of asexuality, a powerful strand of the movement mounted a legal campaign to curb men's sexual conduct. Feminist activists and lawyers invented a claim for sexual harassment, which holds companies responsible for unwanted sexual conduct as a form of sex discrimination in employment. Through this

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

18. See, e.g., Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 *J. PERSONALITY & SOC. PSYCHOL.* 491, 492 (1996).

19. KANTER, *supra* note 13, at 306 n.29 (quoting Sigmund Freud).

approach, feminists joined management's traditional drive to desexualize the workplace and demanded its contemporary completion. Management might believe the workplace was asexual, feminists claimed, but women's entrance had occasioned overt displays of heterosexual male predation. Men's sexual overtures subverted gender equality, feminists contended, for women could never be respected as employees so long as they were regarded as sexual objects. Not only did male sexuality threaten women's interests, it also interfered with everyone's productivity—men and women alike. Thus, feminists could claim, rationalizing the workplace required reining in male sexuality.

The centerpiece of this feminist strategy was equating unwanted sexual conduct with sex discrimination—a powerful maneuver that has crowded out other notions of workplace harassment and justified the drive to root sex out of the workworld. Feminist lawyers focused on Title VII of the Civil Rights Act, which holds employers liable for sex discrimination and other forms of discrimination in employment. But Title VII does not mention sexuality or even sex harassment; its purpose was to end discriminatory job segregation.²⁰ Thus, feminists might have pushed for a broad concept of sex harassment that encompassed the entire range of hostile and discriminatory actions—both sexual and nonsexual—through which supervisors and coworkers labeled women workers “different” and inferior, thereby helping to preserve historic patterns of sex segregation in employment that consigned women to lower-status, lower-paying, female-dominated jobs. Such an approach would have paralleled developments in race discrimination law, where courts had already taken such a broad view of racial harassment.²¹ In addition to this race discrimination precedent, there was a body of theoretical work,²² and at least one important precedent

20. Those who spoke in favor of the amendment adding the prohibition against sex discrimination to the original 1964 Act focused primarily on the injustice of sex segregation in the labor market. See 110 CONG. REC. 2579-80, 2580-81 (1964) (statements of Reps. Griffiths and St. George). Moreover, when Congress amended Title VII in 1972, both the House and the Senate made clear that they considered sex segregation to be the primary evil that the statute was designed to address. See H.R. REP. NO. 92-238, at 4-5 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2140 (“[W]omen are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.”); S. REP. NO. 92-415, at 7 (1971) (including similar statements).

21. See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (recognizing a cause of action for hostile work environment harassment based on race); see also Schultz, *supra* note 5, at 1715-16 (explaining that judges created the theory of hostile work environment in order to prevent employers from perpetuating racial segregation through informal means of racial intimidation and harassment).

22. Psychiatrist and anthropologist Dr. Carroll Brodsky's book, *The Harassed Worker*, for example, is an early source that used the term “sexual harassment.” See CARROLL M. BRODSKY, *THE HARASSED WORKER* 27-28 (1976). In contrast to early feminist work that defined sexual harassment as a form of sexual exploitation, Brodsky defined the term in broad, nonsexual terms: “Harassment behavior involves the repeated and persistent attempts . . . to torment, wear down,

secured by a feminist lawyer in a sex discrimination case,²³ that would have supported such a broad vision of sex harassment and its link to larger gender-based inequalities. That some lower courts would continue to adopt such a broad approach suggests that it would have been a viable strategy for feminists to pursue.²⁴

But as I have recounted elsewhere, most feminists did not pursue this path.²⁵ Instead, feminist activists and lawyers pushed for a narrower understanding of sex harassment, defining the concept in terms of unwanted male-female sexual advances. They argued that such sexual advances were

frustrate, or get a reaction from another. It is treatment that persistently provokes, pressures, frightens, intimidates, or otherwise discomforts another person." *Id.* at 2. Brodsky observed that "[h]arassment is a mechanism for achieving exclusion and protection of privilege in situations where there are no formal mechanisms available." *Id.* at 4. Thus, to Brodsky, the term "sexual harassment" referred not only to sexual advances, but to all uses of sexuality as a way of tormenting those who felt "discomfort about discussing sex or relating sexually." *Id.* at 28. In Brodsky's conception, sexual harassment could be directed not only from men to women, but from men to men, *id.*, and not only from supervisor to subordinate, but also horizontally, from peer to peer, and even bottom-up, from subordinate to boss, because competition for privilege occurs in all these directions, *id.* at 48-59.

23. In *Kyriazi v. Western Electric Co.*, Judith Vladeck, one of the first women to attend Columbia Law School and a pioneering Title VII plaintiff's lawyer, proved that the defendant had discriminated against one of its first female engineers, Cleo Kyriazi, and other women by (1) relegating them to the lowest-graded jobs, (2) promoting them in fewer numbers and with less frequency than men, (3) foreclosing them from participating in job programs that would help them ascend from the low ranks, and (4) laying them off in greater numbers than men. 461 F. Supp. 894, 902 (D.N.J. 1978). Vladeck also showed that, as part of this broader pattern of sex segregation and discrimination, Kyriazi's supervisors had allowed her male coworkers to harass and humiliate her through sexual taunts and ridicule and comments denigrating women's abilities. *Id.* at 934-35. In an inspiring opinion, Judge Stern found that the company's failure to address the harassment directed at Kyriazi was an instance of sex-based discrimination that was connected to a much larger pattern of illegal discrimination against her and the other women in the firm. *Id.* at 926. Judge Stern's analysis did not highlight the harassment's sexual content or inquire into whether the harassers were motivated by sexual desire, but instead rightly stressed that the conduct was designed to denigrate Kyriazi as a woman, *see id.* at 934, and that the company's failure to address it "left [her] with the understanding that her superiors were discriminating against her and in favor of her male co-workers," *id.* at 935.

24. *See, e.g., Rimedia v. Revlon, Inc.*, 528 F. Supp. 1380, 1383 (S.D. Ohio 1982) (holding a company liable under Title VII where an account manager charged that her supervisor "harassed her, threatened her with loss of her job, prevented her from exercising the authority and responsibility commensurate with her position and generally treated her without respect"); *EEOC v. Judson Steel Co.*, 33 Fair Empl. Prac. Cas. (BNA) 1286, 1295 (N.D. Cal. 1982) (holding a company liable where women bricklayers were treated differently in the assignment of work, overtime, breaks, and other day-to-day conditions of employment, and were also subjected to harassment and sexual advances by their supervisor, because such actions "created a working environment fraught with sex bias... thus violating [the plaintiffs'] right to work in a nondiscriminatory environment"); *Berkman v. City of New York*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd*, 755 F.2d 913 (2d Cir. 1985) (holding a fire department liable where recently hired female firefighters were subject to a litany of both sexual and nonsexual forms of harassment, and explicitly recognizing that the harassment was intended to drive the women away and preserve the all-male composition of the department).

25. *See Schultz, supra* note 5, at 1696-701 (explaining how activists and lawyers influenced by radical feminist ideas formed arguments that emphasized the harm of sexual harassment as a form of sexual exploitation, rather than adopting a broader definition that linked harassment to sex segregation in employment and other gender-based inequalities in the workplace).

discriminatory and harmful to women—an argument that inspired sympathy among both liberal and socially conservative judges. Courts first accepted this line of argument in an early group of cases commonly known as quid pro quo harassment cases, in which male supervisors fired female subordinates for refusing their sexual advances. Although alternative lines of reasoning were available,²⁶ the lower courts located the source of sex discrimination in the *sexual desire* presumed to motivate the supervisor's sexual advances. A heterosexual male boss's sexual come-on toward a female employee is discriminatory, said the courts, because the boss would not have been attracted to—and thus would not have made a sexual advance toward—a male employee. In the words of Judge Spottswood Robinson, writing for the D.C. Circuit in 1977, “[B]ut for her gender [the plaintiff] would not have been importuned . . . [T]here is no suggestion that the allegedly amorous supervisor is other than heterosexual.”²⁷

The 1980 guidelines adopted by the Equal Employment Opportunity Commission (EEOC), the major federal agency responsible for enforcing and creating policies to implement Title VII, consolidated this approach. Building on the reasoning in the early quid pro quo cases, the guidelines defined sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.”²⁸

26. For example, judges might have located sex bias in a male boss's exercising his authority to punish someone, as a worker, for refusing to perform a non-job-related service that was expected of her, as a woman, if it would never have been expected of a male employee. This line of reasoning would have applied to both sexual demands and to other *nonsexual* demands bosses have been known to make of their female (but not their male) employees, such as cleaning, serving food, or displaying properly “feminine” demeanor. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (holding that it is sex discrimination to require a female candidate for partner in a Big Eight accounting firm to “walk more femininely, talk more femininely, dress more femininely, [and] wear make-up” when this was not required of the men (citation omitted)); *cf. Slack v. Havens*, 7 Fair Empl. Prac. Cas. 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975) (finding that it is race discrimination to require Black women to do heavy cleanup work that is not part of their job description, while exempting white female employees from the task). On a related note, judges might also have located the sex bias in quid pro quo harassment in its link to vertical sex segregation. As discussed more fully below, *see infra* notes 321-326 and accompanying text, the fact that women are so often supervised by male bosses facilitates the exercise of sexist forms of authority and abuse.

27. *Barnes v. Costle*, 561 F.2d 983, 989-90 & n.49 (D.C. Cir. 1977) (holding, for the first time in an appellate case, that quid pro quo harassment is a form of sex discrimination actionable under Title VII).

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

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

Although these guidelines did not have the force of law, they were given broad deference by the lower courts—many of which read them to *limit* sex harassment to sexual conduct.²⁹ By the time the Supreme Court decided its first sex harassment case in 1986, *Meritor Savings Bank v. Vinson*,³⁰ the equation of sexual harassment with sexual advances was firmly established. Thus, the Justices could simply assume, without having to explain, why a bank manager's unwelcome sexual advances against a female employee would amount, if proven to be sufficiently hostile or abusive, to discrimination "because of sex" within the meaning of Title VII.³¹ In these sexually hostile work environment cases, as in the earlier quid pro quo harassment cases, it was the presumed presence of sexual desire that provided the inference of discriminatory intent necessary under the statute.³² As a result, the Court had no trouble reaching a unanimous decision holding that sexual harassment violated Title VII.

Over time, the sexualized understanding of harassment that arose out of the quid pro quo cases came to overwhelm the concept of hostile work environment harassment as well. As a result, courts have tended to single out sexual advances and other conduct of a sexual nature for disapproval, and have tended to exonerate even serious patterns of sexist misconduct that could not be easily characterized as sexually motivated.³³ Thus, despite the fact that the Supreme Court has never expressly held that a Title VII claim for sex harassment requires conduct of a sexual nature for purposes of a harassment claim,³⁴ systematic empirical research confirms that

29. See, e.g., *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438, 1441-42 (S.D. W. Va. 1985) (relying on the EEOC guidelines to dismiss the claim of a woman who alleged that her foreman picked on her all the time and treated her differently from the male employees); see also Schultz, *supra* note 5, at 1717-20 (citing other cases ruling against plaintiffs because their harassment claims did not involve readily recognizable sexual advances or sexually motivated conduct).

30. 477 U.S. 57 (1986).

31. *Id.* at 64 ("Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." (alteration in original)).

32. The Seventh Circuit's explanation in one hostile work environment case makes the reasoning clear: "Sonstein wanted to have an affair, a liaison, illicit sex, a forbidden relationship. His actions are not consistent with platonic love. His actions were based on her gender and motivated by his libido. . . . [His] sexual desire does not *negate* his [discriminatory] intent; rather it affirmatively *establishes* it." *King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 539 (7th Cir. 1990) (emphasis added).

33. In earlier work, I documented this pattern in great detail. See Schultz, *supra* note 5, at 1706-38.

34. In *Oncale v. Sundowner Offshore Drilling Services*, the Supreme Court expressly stated, for the first time, that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 523 U.S. 75, 80 (1998). But see *infra* note 64 and accompanying text (discussing limits to this principle). Neither of the two sexual harassment cases decided by the Supreme Court before 1998 discussed this issue, although the fact that both cases included sexual conduct may have tended to confirm in the eyes of the lower courts the impression created by the EEOC guidelines that sexual harassment refers to such conduct. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (involving allegations of sexual acts such as

historically, in the lower federal courts, sexual harassment plaintiffs who complain about sexualized forms of behavior have been significantly more likely to win than plaintiffs who complain about other forms of sex-based misconduct.³⁵

As I have explained in earlier work, this legal emphasis on sexual advances was supported—and promoted—by some powerful strands of radical feminism that influenced feminist lawyers.³⁶ Deeply concerned about the privatized abuse that characterized many women's lives, during the mid-1970s, many radical feminists moved toward the view that heterosexual sexual relations (or, in the language of the day, "compulsory heterosexuality"³⁷) were the main source of women's inequality. These feminists, who inspired a grass-roots activist campaign to define and politicize the problem of "sexual harassment,"³⁸ saw workplace sexual advances as a form of sexual dominance, akin to rape, and this view shaped the form of the legal argument. In *Sexual Harassment of Working Women*, law professor Catharine MacKinnon argued that such advances constitute

suggesting that a female rental manager must have had sex with a client in order to land an account); *Meritor Sav. Bank*, 477 U.S. 57 (involving allegations that a female bank teller was subject to numerous sexual assaults, including rape).

35. Law professors Ann Juliano and Stewart J. Schwab analyzed every federal sex harassment case decided between 1986 and 1996. They found that "[p]laintiffs alleging 'harassment as sexualized behavior' have significantly higher win rates than other sexual harassment plaintiffs." Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 580 (2001).

36. See Schultz, *supra* note 5, at 1697-99 (describing the view of sexual harassment subscribed to by early feminist activists who were influenced by radical feminist ideas); *id.* at 1702-03, 1704-05 (explaining how radical feminist views were translated into legal arguments).

37. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983); see also KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 164-65 (1979) ("*Sex is power* is the foundation of patriarchy. . . Institutionalized sexism and misogyny—from discrimination in employment, to exploitation through the welfare system, to dehumanization in pornography—stem from the primary sexual domination of women in one-to-one situations."); ANDREA DWORKIN, INTERCOURSE 126 (1987) ("Intercourse as an act often expresses the power men have over women. Without being what the society recognizes as rape, it is what the society—when forced to admit it—recognizes as dominance.").

38. The first group known to have used the term "sexual harassment" were the members of Working Women United (WWU), who in a May 1975 "Speak-Out on Sexual Harassment" defined sexual harassment as "the treatment of women workers as sexual objects." Dierdre Silverman, *Sexual Harassment: Working Women's Dilemma*, QUEST: FEMINIST Q., Winter 1976-1977, at 15, 15. Dierdre Silverman, a WWU founder, argued that harassment exists "when job retention, raises or promotions depend on tolerating, or submitting to, unwanted sexual advances," and varies in form "from clearly suggestive looks and/or remarks, to mild physical encounters (pinching, kissing, etc.) to outright sexual assault." *Id.* Another WWU founder, Lin Farley, defined harassment as "any or all of the following: staring at, commenting upon, or touching a woman's body; requests for acquiescence in sexual behavior; repeated nonreciprocated propositions for dates; demands for sexual intercourse; and rape." LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 15 (1978). For a more complete account of the early feminist campaign against sexual harassment, see Schultz, *supra* note 5, at 1696-701.

sex discrimination precisely *because* they are sexual in nature³⁹—and because heterosexual sexual relations are the primary mechanism through which male dominance and female subordination are maintained.⁴⁰ She was not alone. During this era, as feminist writer Ellen Willis has shown, rape became the central metaphor for women's disadvantage, and "all sexist behavior . . . an extension of the paradigmatic act of rape."⁴¹ From this perspective, it was a short step to the proposition that sex in the workplace—at least between men and women in unequal positions⁴²—is a form of discrimination that should be abolished.

Although this position originated with a certain strand of radical feminist politics, over time it began to resonate with a more moderate generation of liberal feminists who accepted the idea that sexuality was a set of shackles that women should be able to remove upon entering the neutral sphere that is supposed to guarantee equality: the workplace. In the name of securing progress for women, these feminists joined the campaign to eliminate sexuality from the work-a-day world. In 1978, for example, anthropologist (and cultural icon) Margaret Mead wrote an article for *Redbook* in which she urged society to protect women from sexual harassment by establishing a taboo against male-female sexual relations in the workplace—just like the incest taboo within families. She stated her

39. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 174 (1979).

40. MacKinnon's critique of the feminist proposition that rape is violence, not sex, exemplifies this view:

The radical distinction between rape and intercourse—rape is violence, intercourse is sexuality—is both the most basic and the least examined premise of this approach.

. . . .

. . . But is ordinary sexuality, under conditions of gender inequality, to be presumed healthy? What if inequality is built into the social conceptions of male and female sexuality, of masculinity and femininity, of sexiness and heterosexual attractiveness? Incidents of sexual harassment suggest that male sexual desire itself may be aroused by female vulnerability.

Id. at 218-21. This analysis foreshadowed the more trenchant statement in MacKinnon's later essay: "Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 531-33 (1982).

41. ELLEN WILLIS, *Radical Feminism and Feminist Radicalism*, in *NO MORE NICE GIRLS: COUNTERCULTURAL ESSAYS* 117, 144 (1992).

42. Since men tend to hold superior positions in most workplaces (whether as bosses or as more senior workers), this logic easily led to a sex-has-no-place-in-the-workplace view. See JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* 132 (2002) ("The obvious conclusion to draw from [MacKinnon's] analysis is that so long as gender inequality exists, sex must be kept out of the workplace, particularly where there are power differentials between the workers.").

position clearly and unequivocally: “You don’t make passes at or sleep with the people you work with.”⁴³

More than a decade later, law professor Susan Estrich, who had once criticized MacKinnon for questioning the meaningfulness of a woman’s consent to sex,⁴⁴ adopted a similar position. In an important article published in 1991, Estrich criticized the courts for failing to recognize that sexual harassment is

more offensive, more debilitating, and more dehumanizing to its victims . . . precisely [because] it is *sexual*. Not only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double standard, itself a reflection of the extent to which sexuality is used to penalize women.⁴⁵

Based on this view, Estrich had no trouble arguing that sexuality should be banned from the workplace. She wrote:

As things stand now, we protect the right of a few to have “consensual” sex in the workplace (a right most women, according to the studies, do not even want), at the cost of exposing the overwhelming majority to oppression and indignity at work. . . . For my part, I would have no objection to rules which prohibited men and women from sexual relations in the workplace, at least with those who worked directly for them. Men and women could, of course, violate the rule; but the power to complain, once in the hands of the less powerful, might well “chill” sexual relations by evening the balance of power between the two.⁴⁶

Estrich’s position was linked to that of social psychologist Barbara Gutek, whose “sex-role spillover theory” posits that sexual harassment occurs because men inappropriately bring with them into the workplace egalitarian attitudes and actions—namely, habits of sexual objectification—that they learned in the domestic sphere.⁴⁷ In this early feminist construction of the problem, sexuality was treated as a badge of

43. Margaret Mead, *A Proposal: We Need Taboos on Sex at Work*, REDBOOK, Apr. 1978, at 31, 33. It is interesting to note that Mead felt no compulsion to observe these taboos in her own life. She conducted substantial research with Reo Fortune, her second husband. She met and fell in love with her third husband, Gregory Bateson, while all three were doing fieldwork in New Guinea. After Mead married Bateson, the couple did fieldwork together and collaborated on a number of projects. See MARY CATHERINE BATESON, WITH A DAUGHTER’S EYE 19 (1984).

44. See SUSAN ESTRICH, REAL RAPE 82 (1987).

45. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 820 (1991) (emphasis added).

46. *Id.* at 860.

47. See BARBARA A. GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS 15-16 (1985).

servitude, formed *outside* the workplace, that shouldn't be permitted to mark women *inside* it.

Not only did this feminist rhetoric resonate with (even while it flipped inside out) a social conservatism that has long sought to protect women from sexual predation in the labor market,⁴⁸ the rhetoric also harkened back to, and heralded a new incarnation of, the age-old Taylorist dream of a sexless organization. Like the management theorists who preceded them, these feminists justified prohibitions on sexual harassment in terms of the "industrial logic"⁴⁹ of asexual professionalism and productivity. Based on a series of in-depth interviews with feminist public figures and activists who spearheaded the movement against sexual harassment, sociologist Abigail Saguy found:

Many of the American activists use arguments about professionalism and productivity to condemn sexual innuendo in the workplace that falls short of sexual harassment. For instance, when probed about the risk that over-zealous employers might stamp out playful, harmless, fun flirtation in the workplace, one respondent explains: "Why do people have to . . . ? Really they don't have to have everyday seduction and flirtation in the workplace . . . Has it been proven that that helps productivity?"⁵⁰

Strikingly, when MacKinnon was asked whether she was worried about the risk of chilling sexual expression in the workplace, she responded, "Somebody ought to get worried about the fact that no work is getting done. And the workplace is not a place for sexual recruitment exclusively."⁵¹ Even Camille Paglia—who has made a career out of attacking MacKinnon's stance on most sexual issues—agreed that middle managers should not "sexualize their jobs," because to do so would be "unprofessional."⁵² As Gutek put it, "Professionalization and desexualization of work are not just worthy goals for their own sake; they are good for business, for effective work organizations."⁵³ Thus, the feminist campaign against sexual harassment successfully tethered radical feminist arguments about equality to traditional managerial conceptions of efficiency.

Drawing on the idea that sexuality undermines productivity and professionalism, many feminists extended their arguments for prohibiting

48. See Ellen Carol DuBois & Linda Gordon, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 31 (Carole S. Vance ed., 1984).

49. Saguy, *supra* note 3, at 63.

50. *Id.* at 66 (alterations in original).

51. *Id.*

52. *Id.* at 68.

53. GUTEK, *supra* note 47, at 128.

sexual harassment more broadly to condemn a wide range of sexual conduct, even consensual conduct that would not meet the legal definition of harassment.⁵⁴ In some sense, it is not surprising that these feminists marshaled the language of efficiency to suggest that sex had no place in the workplace; Americans are deeply accustomed to thinking about reforms in terms of their impact upon productivity. Of course, some of these feminists used this language strategically, believing it would make courts and companies more likely to take the problem of sexual harassment seriously.

In either case, their campaign succeeded. The news media helped reinforce this broad view of harassment-as-sexual-conduct in the popular imagination.⁵⁵ The press has uncritically characterized everything from consensual sex to forcible rape under the common label “sexual harassment,”⁵⁶ while devoting far less attention to the nonsexual forms of sex harassment and discrimination that many working women and men experience every day.⁵⁷ Reporters covered cases involving sexual misconduct extensively and publicized large (and perhaps unrepresentative) jury awards for sexual harassment⁵⁸—a focus that has probably only served to fuel the greater fear of sexual harassment claims that companies seem to have in comparison to other forms of workplace sex discrimination.⁵⁹ In

54. Saguy, *supra* note 3, at 66-67.

55. See, e.g., Schultz, *supra* note 5, at 1692-96 (showing how the news media has helped diffuse the sexual model into popular consciousness by devoting extensive coverage to cases alleging sexual pursuit and predation, such as the Anita Hill-Clarence Thomas controversy, the Tailhook incident, and the Stroh's Brewery case).

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

57. See generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 77-111 (1992) (showing how the news media exaggerated the women's movement's gains and failed to cover discrimination against women in various spheres of life, including employment).

58. Frank Dobbin & Erin Kelly, A Tale of Two Sectors: The Spread of Anti-Harassment Remedies Among Public and Private Employers 10, 15-16, 21, 24, at <http://www.princeton.edu/~dobbin/sehxharrpap1.doc> (last visited Mar. 19, 2003) (noting that the press covered early plaintiff victories in sexual harassment cases in the late 1970s, publicized several high-profile settlements and awards with large cash values around the time of the Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson*, and advertised the passage of the 1991 Civil Rights Act and its provision of punitive damages in sexual harassment cases).

59. Although there is some evidence that employers' greater fear of liability for sexual harassment may be warranted, I have come across no evidence that sexual harassment claims are more costly than other discrimination claims—and have found some evidence that they may actually be *less* costly. In a study of every California employment-law jury verdict reported in one of three major reporters for 1998 and 1999, Professor David Oppenheimer found that plaintiffs were significantly more likely to win in sexual harassment cases (68% success rate) than in other employment discrimination cases (40% success rate) or in other sex discrimination cases (43% success rate in pregnancy discrimination cases and a 38% success rate in other cases). David Oppenheimer, Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Juror Bias Against Women and Minorities 31-32, 36-37 (Aug. 11, 2002) (unpublished manuscript, on file with author). On the other hand, in Oppenheimer's study, the median verdict in sexual harassment cases filed by women against men was \$224,933—a figure considerably lower than the \$556,722 median verdict in pregnancy discrimination cases or the \$331,500 median in other sex discrimination cases (all of which were filed by women). *Id.* at 37.

such a climate, it is not surprising that many organizations began to adopt prohibitions on sexual conduct that exceed the legal definition of sexual harassment.⁶⁰

Under the judicial decisions interpreting Title VII, a number of constraints apply.⁶¹ For one thing, Title VII doesn't prohibit all sexual

60. Media coverage has a great deal of influence on employers, who learn about the law through press coverage, and respond to the perceived risk of litigation and bad publicity as much as to the objective risk of legal sanction. *See, e.g.*, Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 AM. J. SOC. 455, 460 (1999) ("Press attention to legal battles increases the perceived risk of sanction, in part because it increases the visibility of the law and in part because negative publicity is a potent sanction in itself."); *id.* at 482 (reporting that, in their own study analyzing employers' adoption of maternity leave policies, employers responded "not to the objective risk of being sued but to press coverage that [made] them aware of new legal standards"); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 918-20 (1996) (arguing that employment law may work through informal processes such as bad press as well as through such formal sanctions as costly litigation); *cf.* JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 64 (1992) (finding that employers respond to wrongful-termination liability by cutting employment far beyond the costs associated with defending lawsuits, and speculating that "[p]ersonnel managers may be reacting to perceived rather than actual legal risks"). This tendency may be exacerbated by what psychologists call the "availability heuristic," in which people tend to overestimate the risk of salient objects or events. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11 (Daniel Kahneman et al. eds., 1982). This heuristic would predict that, when managers consider the risk of harassment liability, they will be more likely to recall the vivid, unusual, and extreme examples that they have heard about in the media than the actual outcomes of court cases.

61. Traditionally, the courts have articulated three types of broad elements of a claim for hostile work environment harassment. A plaintiff must prove: (1) actionable conduct that occurred because of sex within the meaning of Title VII, *see* *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998); (2) that the conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); and (3) that the employer is legally responsible for the conduct, *see* *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

In truth, the legal requirements are more complex than this streamlined description suggests. For example, there is no uniform agreement about what conduct is required to prove actionable harassment, even at the level of stating the formal elements of a claim. Some court of appeals decisions still seem to expressly require conduct of a sexual nature. *See, e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065 (9th Cir. 2002) (stating that "'a hostile environment exists when an employee can show (1) that he or she was subjected to . . . physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment'" (quoting *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991))), *cert. denied*, 71 U.S.L.W. 3609 (U.S. Mar. 24, 2003) (No. 02-970); *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 354-55 (7th Cir. 2002) ("[T]o establish a prima facie case of hostile environment sexual harassment, a plaintiff must demonstrate that: '(1) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) the harassment was based on [the individual's] sex . . .'" (quoting *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998) (second alteration in original))).

More ambiguously, other circuit decisions require proof of "unwelcome sexual harassment" in addition to proof that the harassment was "based upon sex." *See, e.g.*, *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 523-24 (5th Cir. 2001) ("[P]laintiff in a hostile work environment claim must establish that: (1) he belongs to a protected class; (2) was subjected to

conduct—only “unwelcome” sexual conduct.⁶² For another, the conduct must be sufficiently severe or pervasive to “create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.”⁶³ In addition, a recent Supreme Court decision states that hostile work environment harassment need not be motivated by sexual desire, although the decision still makes it easier to prove harassment where the case involves conduct that is thought to be so motivated.⁶⁴

unwelcome sexual harassment; (3) the harassment was based on his sex”); *O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (same); *Succar v. Dade County Sch. Bd.*, 229 F.3d 1343, 1344-45 (11th Cir. 2000) (same).

Some circuits seem to have moved entirely away from the idea that harassment must be sexual, and require only proof that the conduct was “based upon sex,” *see, e.g.*, *Gregory v. Daly*, 243 F.3d 687, 691-92 (2d Cir. 2001) (stating that “harms suffered in the workplace are cognizable under Title VII” when they “create[] [an otherwise actionable] environment because of plaintiff’s sex (or other characteristic protected by Title VII)”), while other decisions seem to suggest that nonsexual conduct is actionable only if it rises to the level of gender-based animus, *see, e.g.*, *Stewart v. Evans*, 275 F.3d 1126, 1133 (D.C. Cir. 2002) (holding that the plaintiff had failed to establish a prima facie case with respect to hostile work environment because her supervisor’s foul language “cannot reasonably be construed as having any sexual connotation or having been motivated by a discriminatory animus” and that “there is no basis upon which to infer from the telephone call that Mr. DeGeorge’s hostility was motivated by Ms. Stewart’s sex”); *Deflon v. Danka Corp. Inc.*, 1 Fed. Appx. 807, 814 (10th Cir. 2001) (affirming summary judgment for the employer because the employee “fails to link [acts] to the fact that she is a woman” and “does not show a gender-based discriminatory animus on the part of [the harassers]”).

62. *See, e.g., Meritor Sav. Bank*, 477 U.S. at 68; *see also Schultz, supra* note 5, at 1729-32 (collecting cases and explaining how the unwelcomeness requirement presumes that harassment consists of sexual conduct and works against women who are not viewed as properly deserving of sexual protection).

63. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *see also Meritor Sav. Bank*, 477 U.S. at 67. In addition to being objectively unreasonable, the conduct must also be subjectively objectionable to the victim. *See Harris*, 510 U.S. at 21-22.

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

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

Id. at 81. By contrast, although the Court did not foreclose such a result, the Justices did not expressly approve the same inference of causation with respect to other conduct that is likely to occur because of sex, such as hostility directed at women who are severely underrepresented in traditionally male-dominated fields. In this sense, *Oncale* does nothing to disturb the two-tiered structure of causation that makes it easier to prove a harassment claim based on sexually motivated conduct that I discussed in earlier work. *See Schultz, supra* note 5, at 1739-44. Furthermore, it is worth noting that, long before *Oncale* was decided, a number of courts of appeals had already adopted the principle that conduct need not be sexual in nature in order to constitute actionable harassment. *See, e.g., McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985); *see also Schultz, supra* note 5, at 1733 n.250 (collecting additional cases). But, even in circuits that had adopted this principle, as I showed in earlier work, subsequent courts tended to

But these definitional limits at most work to constrain what judges and juries can consider “sexual harassment” for purposes of awarding victories in lawsuits; they do not constrain what managers may do in the name of preventing “sexual harassment” in their own companies.⁶⁵ The problem is not simply that Title VII does not constrain organizational action. The law may actually create incentives for companies to go overboard in curtailing conduct that does not meet the legal definition. As the critics of harassment law have pointed out, the threat of employer liability that can be avoided only by taking prompt remedial action may create pressure for companies to punish employees who are accused of sexual harassment, even if an investigation hasn’t yet fully substantiated the allegation.⁶⁶ In addition, as the libertarian critics charge, the fact that numerous instances of conduct may be aggregated for purposes of creating a hostile work environment, together with a vague standard for determining when that has occurred, gives employers an incentive to censor individual employees’ conduct well before the legal threshold is met.⁶⁷ In contrast to these pressures to sanitize, there are few, if any, effective counterincentives. Although some employees who have been disciplined for alleged sexual misconduct bring suit, there are few if any legal limits on companies’ power to punish such conduct.⁶⁸

ignore or undermine it by continuing to give greater weight to sexual conduct for purposes of establishing a hostile work environment claim. *See id.* at 1732-38. Although I have not systematically analyzed more recent cases, a quick review suggests that the lower courts have not uniformly begun to take nonsexual conduct as seriously as sexual conduct for purposes of proving harassment claims. *See supra* note 61.

65. *See, e.g.,* *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1346 (7th Cir. 1995) (taking for granted the proposition that employers are permitted to adopt sexual harassment policies more stringent than what Title VII requires).

66. For a particularly thorough and insightful analysis of the legal incentives, see Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers’ Paradox in Responding to Hostile Environment Sexual Harassment—a Proposed Way out*, 67 *FORDHAM L. REV.* 1517, 1549-57 (1999). *See also* Browne, *supra* note 7, at 504-05 & n.162; Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 *CONN. L. REV.* 375, 412 (1998).

67. *See* Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 *GEO. L.J.* 627, 638-39 (1997); *see also* COHEN, *supra* note 42, at 134; Browne, *supra* note 7, at 502-03; Jeffrey Rosen, *In Defense of Gender-Blindness*, *NEW REPUBLIC*, June 29, 1998, at 25, 26.

68. *See* COHEN, *supra* note 42, at 147-48. Cohen notes:

If the workplace is not unionized or covered by civil service law, then there are very few legal protections for the average employee against punishment or being fired. In such a context, the employer cannot lose by taking action against an at-will employee accused of harassment. . . . The employee who believes s/he was unjustly retaliated against, penalized, fired, or silenced, either for making a harassment complaint or for alleged harassment, has no realistic legal recourse or effective remedies.

Id.; *see also* Victor Schachter, *No Longer the Fall Guy: The Accused Demand Fair Treatment in Sexual Harassment Cases and Assert Their Rights*, in *SEXUAL HARASSMENT IN THE WORKPLACE—PROCEEDINGS OF NEW YORK UNIVERSITY 51ST ANNUAL CONFERENCE ON LABOR* 447, 465 (Samuel Estreicher ed., 1999) (arguing that “the groundswell of judicial opinion is to give companies significant latitude to define misconduct and to determine if it has taken place”); Alan L. Rolnick, *Making Sure Your Sexual Harassment Response Is Fair*, *BOBBIN*, Apr. 1997, at 92, 92-93 (stating that “[i]f you have conducted a decent investigation that gives you

Within organizations, as we shall see, the limits on the legal definition of harassment have proven no match for the managerial impulses and cultural logics that the law and those who championed it have set in motion. In the popular imagination, and in many workplaces across America, the campaign to end sexual harassment has come to stand for ridding the workplace of sexual conduct.

III. THE CONTEMPORARY CAMPAIGN

A. *The Legal and Cultural Environment*

A few years ago, when I first wrote about sex harassment, I showed that the lower courts' focus on sexual advances and other conduct of a sexual nature had led them to neglect equally serious, nonsexual forms of harassment and exclusion that work to preserve traditional gender roles at work. As I demonstrated, many women experience subtle and not-so-subtle forms of hostility and denigration that make it difficult for them to succeed in—and for others, even to aspire to—traditionally male-dominated lines of work they would otherwise pursue.⁶⁹ In other cases, male bosses reinforce paternalistic authority by harassing or belittling women in traditionally female fields who dared to step out of their proper place.⁷⁰ As research in sociology has shown, sex harassment is a mechanism for labeling women as different and inferior, and for claiming favored jobs and positions of authority as preserves of men who embody an idealized masculinity. By neglecting these sorts of motives and actions, I argued, courts were missing the important link between sex harassment and sex segregation in employment.

At the same time, I was also concerned that the legal emphasis on the potential harm of sexual conduct might lead some companies to overreach and prohibit even benign forms of sexual conduct that are not linked to sex discrimination on the job. I speculated that the same sense of paternalism that had led courts to punish “bad” women who do not comport with the image of a proper victim might also encourage managers to protect “good” women’s sexual sensibilities from sexual talk and interaction that does not threaten gender equality in the workplace. As part of this concern, I worried that sexual minorities, and other employees who are viewed as sexually deviant, might be singled out for accusation and punishment.⁷¹

some reason to believe that the harassment actually occurred, and if you strictly limit communications about the reasons for the alleged harasser’s discharge, you probably will not find yourself on the losing end of a lawsuit”).

69. See Schultz, *supra* note 5, at 1764-67.

70. See *id.* at 1757.

71. Vicki Schultz, *Talking About Harassment*, 9 J.L. & POL’Y 417, 428-30 (2001).

Today, I am more confident of, and truly alarmed about, these developments. After a thorough review of the relevant literature and case law, including arbitration decisions involving grievances by employees who were fired or otherwise disciplined for engaging in sex harassment,⁷² I am persuaded that significant overreaching is occurring. Although there is a need for more systematic evidence analyzing the magnitude of the problem, my reading of the available evidence is that the libertarian critics of sexual harassment law are partly right: In the name of preventing sexual harassment, many companies *are* punishing benign forms of sexual conduct that would not amount to sexual harassment or sex discrimination under the law.⁷³ These critics claim that the threat of strict liability for sex harassment, combined with uncertainty about when individual instances of conduct might combine to create an actionable environment, creates an incentive for companies to go overboard in curtailing sexual conduct, as noted above. Yet these factors cannot explain why organizations are curtailing *sexual* conduct, as opposed to equally serious *nonsexual* forms of harassment and discrimination. Only the fact that the legal system has highlighted the harm of sexual conduct helps explain this trend. The sexual model is the engine of sanitization.

Thus, although the libertarian critics are right about *what* is happening, they are wrong about *why*: There *is* organizational overreaching, but it is not an inevitable consequence of treating sex harassment as a violation of Title VII. Instead, it is an example of a process that is more akin to what sociologist Lauren Edelman has termed the “managerialization of law.”⁷⁴ Sociologists of law have emphasized how organizations respond to legal environments by reinterpreting legal ideals and infusing them with managerial values. They have shown that, particularly when the law is

72. As part of the work for this Article, I have reviewed numerous harassment policies, read volumes of literature from the fields of human resources and the law (including the “how-to-avoid-liability” literature), digested scores of newspaper stories and ethnographic accounts of what is happening in workplaces, interviewed a number of prominent consultants who advise companies about how to deal with sexual harassment, attended conferences at which employment lawyers have discussed the problem, and analyzed an enormous body of judicial and arbitration decisions. I have also reviewed all the relevant empirical and academic literature I could find. In this Article, I have attempted to place all this literature into a larger theoretical and historical account of sex harassment law, an account I began elaborating elsewhere. See generally Schultz, *supra* note 5 (documenting the historical development of sex harassment law in the U.S. courts); Vicki Schultz & Eileen Goldsmith, *Sexual Harassment: Legal Perspectives*, in 21 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL & BEHAVIORAL SCIENCE 13,982 (Neil J. Smelser & Paul B. Baltes eds., 2001) (providing a definition of the term “sexual harassment” as it has evolved in American legal and social culture).

73. See, e.g., Eugene Volokh, *Freedom of Speech vs. Workplace Harassment Law—a Growing Conflict*, at <http://www.law.ucla.edu/faculty/volokh/harass/> (last visited Mar. 19, 2003) (cataloguing examples); Walter Olson, *Fear of Flirting: Harassment Law Resources*, at <http://www.overlawyered.com/topics/harass.html> (last visited Mar. 19, 2003) (same).

74. Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1592 (2001).

ambiguous, managerial actors will actively work to shape the meaning of the law and compliance “through a set of managerial lenses chiefly designed to encourage smooth employment relations and high productivity.”⁷⁵ They have highlighted the role of HR managers, and, to a lesser extent, lawyers, in this translation process, showing how these professionals interpret the law to maximize their own self-interest while at the same time serving organizational ends.⁷⁶ They have also shown how the press contributes to the process, by bringing lawsuits to the attention of HR professionals and managers and generating a fear of bad publicity that is perhaps as powerful as the fear of liability itself.⁷⁷

This sociological account has force in explaining the drive toward sexual sanitization, though it underestimates the role of courts and social movement actors in jump-starting the process. As we have seen, the body of judge-made law handed down to organizational actors was not ambiguous: Influenced by feminist arguments, judges had defined sexual harassment in a way that highlighted the harm of sexual conduct. Thus, the law already had what I call a “cultural tilt” toward eliminating sexuality. The fact that this legal ideal meshed with preexisting managerial values made it possible—perhaps even easy—for HR managers and lawyers to argue that the best way to protect organizational interests is to curb employees’ sexual conduct. These experts have warned companies to take such action or else risk legal liability and crushing financial penalties, as we shall see, and these warnings have not fallen on deaf ears. Promoting the need to control employees’ sexual conduct serves the experts’ own self-interest, of course, because it creates a market for their own services; yet my reading of the literature and interviews with prominent HR consultants convinces me that they also believe they are on the side of equality and justice. The fact that a feminist-inspired body of law supports their position has provided them with a legitimate justification to urge, and to implement, a new set of historically unpopular controls on workplace sexuality. Ironically, then, a legal and cultural campaign championed by some feminists has provided a

75. *Id.* at 1599.

76. See, e.g., Dobbin & Kelly, *supra* note 58, at 38-39 (showing how employers responded to sexual harassment law by adopting grievance procedures and training programs developed by “self-interested [personnel] managers with a particular form of expertise to sell”); see also Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441 (1998) (showing that, by the 1980s, middle managers had reconstructed equal employment opportunity departments as components of human resources management and begun to justify their projects in terms of productive efficiency); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC’Y REV. 47, 49 (1992) (showing how personnel managers and practicing lawyers act as “filters” by interpreting, and exaggerating, the magnitude of the threat posed by wrongful discharge law in a way that serves their own interests).

77. See *supra* note 60.

new progressive rationale for an age-old managerial drive to create an asexual workplace. The Sections that follow describe the emerging trends.

B. *Sanitizing the Workplace:*

A Summary of Current Developments

It would be one thing for companies to use sex harassment policies to create workplaces in which all men and women can work together as equal partners. To rid workplaces of sex-based harassment that conditions employment on sexual favors or creates a hostile work environment under Title VII would be something of which American companies—and, as a society—could be rightly proud. But it is another thing for organizations to prohibit or discourage workers from engaging in conduct simply because it is considered “sexual”—without regard to whether the conduct impinges on gender equality or rises to the level of sex discrimination under the law.

Yet, our nation’s employers are being pressured to do just that. A huge (and growing) literature warns companies that they should go beyond the dictates of the law to curtail broad forms of sexual conduct—including conduct that does not satisfy the legal definition of sexual harassment and that does not necessarily undermine gender equality on the job—in order to avoid liability for sexual harassment.⁷⁸ The bulk of this “how-to-avoid-liability” literature is put out by managers and HR professionals, but much of the legal literature also sounds this theme.⁷⁹

78. For examples of this literature, see Gary M. Kramer, *Limited License To Fish off the Company Pier: Toward Express Employer Policies on Supervisor-Subordinate Fraternalization*, 22 W. NEW ENG. L. REV. 77, 138-43 (2000); E.E. Mazier, *Love at Work: Hotbed of Woes for Employers and Insurers*, NAT’L UNDERWRITER, Jan. 15, 2001, at 3; Stephenie Overman, *When Labor Leads to Love*, HR FOCUS, Nov. 1998, at 1; Ed Piantck, *Flirting with Disaster*, RISK & INS., May 2000, at http://www.findarticles.com/cf_0/m0BJK/2000_May/62408701/print.jhtml; and Cindy M. Schaefer & Thomas R. Tudor, *Managing Workplace Romances*, SAM ADVANCED MGMT. J., Summer 2001, at 4.

79. Some of the sociological literature suggests that HR managers may be more likely than lawyers to promote solutions that go beyond the clear requirements of the law. For example, Dobbin and Kelly report that, in the years leading up to the Supreme Court’s decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), HR managers touted sexual harassment grievance procedures and training programs as methods to avoid legal liability, while legal journals emphasized that these mechanisms had not been approved by the courts. Dobbin & Kelly, *supra* note 58, at 17-20. In line with this distinction, Frank Dobbin and Erin Kelly found that, in their sample of 389 employers, “[o]rganizations that depend on the HR profession for advice [were] significantly more likely to adopt grievance procedures and training, and those that depend on lawyers [were] significantly less likely to adopt . . . grievance procedures.” *Id.* at 32. On the other hand, they report that, contrary to expectation, organizations that used lawyers were no less likely to implement training programs, perhaps because “while the law journals were clear that training had not been found by the courts to insulate employers from liability, some lawyers did a brisk business in training.” *Id.* at 34. In a slightly different context, Lauren Edelman, Steven Abraham, and Howard Erlanger found that personnel journals were more likely than law reviews to inflate the risk of legal liability for wrongful discharge. Edelman et al., *supra* note 76, at 67-68. Upon closer inspection, however, these authors found more refined distinctions. Although both

A 1992 article entitled *Avoid Costly Lawsuits for Sexual Harassment*, which appeared in the American Bar Association (ABA) publication, *Law Practice Management*, provides an illustration of the larger trends. It begins by cautioning managers that even benign, fully consensual sexual interactions can get the company into trouble:

Sure, your office may be free from the traditional form of such harassment: an attorney or manager demanding sexual favors from an unwilling paralegal or subordinate in exchange for promotion or job retention. Yet courts across the land are now deciding that a surprisingly wide range of other situations constitute sexual harassment, for which employers are assessed big fines.

. . . [S]uccessful harassment lawsuits are now resulting even when a subordinate was the willing sexual partner of a supervisor. Or when an office is deemed to be “hostile” because of the presence of sexual joking, flirting or pin-ups. Or even when one employee makes a practice of staring suggestively at a co-worker.⁸⁰

In response to legal incentives the Supreme Court established as long ago as 1986 (and strengthened in 1998),⁸¹ the article counsels companies to establish a policy to prohibit sexual harassment and to set up a grievance procedure to punish those who engage in it. The article recommends prohibiting and punishing sexual conduct that, in and of itself, would not necessarily amount to sexual harassment under Title VII. “Nip These Activities in the Bud!” warns the bolded heading—and then, relying on MacKinnon’s expertise, goes on to command companies not to let their employees “[t]ell sexual jokes or make innuendoes,” “[p]ost pin-up

personnel managers and practicing lawyers were more likely than academics to portray the threat of liability as serious, the lawyers and academics were more likely to do so when they were writing for personnel journals than when they wrote for law reviews or practice journals. *Id.* at 73. Perhaps the real distinction lies less in a fundamental difference in the advice given by HR managers as opposed to lawyers, and more in the forum or audience to which either group of experts was dispensing the advice.

80. Phillip M. Perry, *Avoid Costly Lawsuits for Sexual Harassment*, LAW PRAC. MGMT., Apr. 1992, at 18, 18.

81. In *Meritor Savings Bank*, the Supreme Court held that companies are not automatically liable for hostile work environment harassment created by supervisors, and it suggested that companies may be able to avoid liability by establishing policies and procedures to police harassment on their own. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 71-73 (1986). In *Burlington Industries v. Ellerth*, 524 U.S. 742, and *Faragher v. City of Boca Raton*, 524 U.S. 775, the Court strengthened the incentive for companies to set up such policies and procedures by establishing an affirmative defense to automatic liability for employers whose supervisors engage in hostile work environment harassment that does not result in tangible employment actions. The defense requires proof “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Indus.*, 524 U.S. at 765.

photographs on the walls,” “[r]omance subordinates,” or “[r]equest sexual favors, touch or *flirt with* either *willing or unwilling* subordinates.”⁸²

The article comes down hard on sexual joking, which it refers to as “[i]nsensitive [s]ocializing.”⁸³ “Recent court cases have shot down some workplace traditions many people thought were good clean fun or part of the normal socialization process,” the article warns.⁸⁴ It then quotes Robert McCalla, the chairman of the Labor and Employment Law Section of the ABA, as saying: “Suggestive joking of any kind simply must not be tolerated.”⁸⁵ Even if “the joking occurs only with an employee who openly welcomes the joking and joins in,” the business is still not protected against a sexual harassment suit, the article cautions, because “[o]ther employees in the office may file suit, claiming the joking creates a hostile work environment.”⁸⁶

But it isn’t simply sexual joking and interaction that must be curtailed. Companies must also clamp down on consensual sexual relationships. Even if an employee’s affair is entirely welcome, that doesn’t mean the firm is protected from sexual harassment lawsuits—quite the contrary. “If the woman who engages in an affair receives favors such as professional advancement, then other women have causes of action, if they did not submit and were not promoted,” warns Lawrence Katz, a partner in a Phoenix law firm (giving advice contrary to the EEOC guidelines and some major court decisions).⁸⁷ Furthermore, if the relationship goes sour, the subordinate can retaliate by claiming that the supervisor’s advances were unwelcome, or charging that a later failure to be promoted was retaliation for her refusal to continue the relationship. Because of this threat of liability, the piece cautions, companies must take steps to monitor whether employees are intimately involved. With this information in hand, management can separate the lovers, or, if they cannot be separated, “one of the pair may be terminated.”⁸⁸

82. Perry, *supra* note 80, at 20 (emphasis added).

83. *Id.* at 24.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* The EEOC has long taken the position that where a female subordinate enters into a sexual relationship with her male supervisor consensually and the female subordinate is later promoted, other subordinates may not challenge the promotion as motivated by sex discrimination because both male and female subordinates alike have been foreclosed from the opportunity to advance by having an affair with the supervisor. See EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC Notice 915.048 (Jan. 12, 1990). Most circuit courts agree. See, e.g., *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986). Apparently, only the D.C. Circuit has found employers liable where supervisors favored employees with whom they were having a sexual relationship. See *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985).

88. Perry, *supra* note 80, at 24.

This statement is part of a larger trend toward using discipline to drive sex out of the workplace. To enforce the ban on sexual conduct, the article says, attorney Katz advises that the sexual harassment policy should “state that anyone who harasses will be dealt with very harshly—up to and including termination.”⁸⁹ Indeed, if companies are to fulfill Title VII’s mandate to take appropriate steps to remedy harassment, they must be willing to discipline both supervisors and coworkers who engage in sexual misconduct. How severe should the discipline be? According to a partner at Morgan, Lewis & Bockius in Philadelphia, “[Y]ou must be sure the person raising the complaint feels there is an adequate response.”⁹⁰ Supervisors who make sexual threats should be fired because, “[i]f the supervisor sues, it is a lot easier to defend than a sexual harassment case.”⁹¹ But even in the “troublesome grey area” of sexual joking, the use of progressive discipline—reprimand, suspension, and ultimately termination—is warranted.⁹² Nowhere does the article suggest that preventive or remedial measures other than punishing individual harassers might be considered.

The effort to eliminate sex harassment by punishing individual transgressors neglects larger structural issues, such as the link between sex segregation and sex harassment. Nowhere does the article encourage companies to consider whether the sexual conduct they are punishing is motivated by sex bias or is a manifestation of larger forms of sex discrimination in the company. Instead, echoing Susan Estrich’s position, the article suggests that sex harassment is *different from* sex discrimination—and that it is precisely the *sexual nature* of sex harassment that presents the threat that must be contained. “‘Sexual harassment has the potential to be so inflammatory that it presents a bigger risk than most other kinds of discrimination,’ says Nancy Williams, a partner with the Seattle law firm of Perkins Coie.”⁹³ Williams warns that “‘increasingly, the courts are saying, ‘Mister Employer, you have to provide a pretty sterile workplace.’”⁹⁴ In language that sounds in legal panic, the article urges: “‘Take action now to cleanse your workplace of any sexual harassment.’”⁹⁵

There is growing evidence that companies are heeding such advice. The 1992 *Law Practice Management* article illustrates the four major developments that emerge from the literature. First, in the name of preventing sexual harassment, many companies are adopting broad prohibitions on sexual conduct that does not rise to the level of actionable harassment under Title VII, as I discuss more fully in Section C below.

89. *Id.* at 20.

90. *Id.* at 22.

91. *Id.* (quoting Nancy Williams, Partner, Perkins Coie, Seattle, Wash.).

92. *Id.*

93. *Id.* at 20.

94. *Id.* at 24.

95. *Id.* at 20.

Second, companies are enforcing these policies by disciplining and firing employees who violate them, as elaborated in Section D. Third, some companies are banning, discouraging, or otherwise moving to control sexual relationships between their employees—even when those relationships are consensual, as documented in Section E. Crucially, companies are taking these steps to prohibit sexual conduct without examining whether that conduct undermines gender equality, as I explain in Section F.

In the Sections that follow, I discuss not only the evidence from the professional literature, but also the relevant empirical data. At this point, a cautionary note is in order. It is true that there is less systematic empirical data than one would hope for analyzing the extent to which companies are actually clamping down on these various types of sexual conduct. We clearly need more research into this set of issues, and I do not claim that the existing empirical evidence alone constitutes ironclad proof. But I do hope to persuade readers that, when considered in the context of the strong legal incentives, traditional organizational imperatives, and current cultural pressures to control employees' sexual behavior, the available empirical data tend to confirm rather than disconfirm the wealth of anecdotal proof that many companies are curtailing broad forms of sexual conduct. It seems telling that virtually all the available evidence points in *favor* of the proposition that companies are following the experts' advice to curtail such conduct—and little or no evidence cuts against it.

C. *Prohibiting Sexual Conduct*

Although the available empirical research does not pinpoint precisely how many companies prohibit sexual conduct that does not meet the legal definition of sexual harassment, it is clear that a significant number are doing so. Surveys confirm that the overwhelming majority of American companies have policies prohibiting sexual harassment,⁹⁶ and these policies

96. See, e.g., AM. MGMT. ASS'N, SEXUAL HARASSMENT: POLICIES AND PROCEDURES 1 (1996) (reporting that 89% of firms surveyed had formal sexual harassment policies and 65% had training programs); SOC'Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 6, 8 (1999) (reporting that 97% of the 496 members that responded to a faxed survey indicated that they had written sexual harassment policies and 62% indicated that they had training programs, where 53% of the respondents had only between 1 and 250 employees); Dobbin & Kelly, *supra* note 58, at 2 (reporting that in a sample of 389 employers contacted in 1997, 95% had adopted sexual harassment grievance procedures and more than 70% had training programs). There is some potential that these estimates may be inflated because larger companies, who may be more likely to have adopted sexual harassment measures, might be more likely to respond to survey inquiries. However, at least one earlier study of federal agencies that did not rely on self-selection found similar results. See U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 40, 42 (1994) (reporting that of the 22 federal agencies contacted, 100% had sexual harassment policies and all had training programs, one-third of which made training mandatory for all employees). Studies of potentially

tend to reach broadly to forbid many forms of potentially harmless sexual conduct without demanding inquiry into the surrounding factors that would determine legal liability. To begin with, the policies define harassment exclusively in terms of sexual conduct (as opposed to conduct that discriminates on the basis of sex more generally).⁹⁷ In fact, most of the surveys and policies track the language of the EEOC guidelines, which, as we saw earlier, define harassment in terms of “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁹⁸ In 1987, for example, a large national survey conducted by the Bureau of National Affairs (BNA) reported that 90% of sexual harassment policies contain a definition of sexual harassment, and that “[t]he vast majority of company policies . . . define sexual harassment in language that is identical or similar to the guidelines formulated by the EEOC in 1980.”⁹⁹

More recent studies suggest that this focus on sexual conduct has continued, and has been further extended and elaborated. In 1999, the Society for Human Resource Management (SHRM) reported that 93% of the 496 HR professionals who responded to its randomly distributed survey said their firms’ harassment policies defined the term sexual harassment, and that 67% provided examples of conduct that constitutes harassment.¹⁰⁰ The survey did not ask for the respondents’ definition, but instead asked respondents to check off the “primary type of harassment” alleged in complaints received by their companies, with the following forms of sexual conduct provided as choices:

smaller organizations have yielded somewhat lower estimates, but even these studies suggest that the clear majority of organizations have adopted sexual harassment policies. *See, e.g.,* James S. Bowman & Christopher J. Zigmond, *Sexual Harassment Policies in State Government: Peering into the Fishbowl of Public Employment*, SPECTRUM, Summer 1996, at 24, 25 (reporting that 68% of the 50 states, whose departments of administration were surveyed in 1994, had sexual harassment policies); Bureau of Nat’l Affairs, *Policies and Special Programs*, DAILY LAB. REP., Dec. 28, 2000, at 30 (reporting that 64% of employers surveyed had sexual harassment policies in their collective bargaining agreements).

97. It is clear that both those who conduct the surveys and those who respond to them define harassment in terms of sexual acts, language, and materials. *See, e.g.,* SOC’Y FOR HUMAN RES. MGMT., *supra* note 96; U.S. MERIT SYS. PROT. BD., *supra* note 96, at 5; Bowman & Zigmond, *supra* note 96, at 24. One exception to the focus on sexual conduct appeared in the American Management Association (AMA) survey, which included “[g]ender-related comments or physical descriptions”—a phrase that could be interpreted to include some behaviors that are not specifically sexual in nature. Interestingly, only 85% of the respondents classified this set of behaviors as sexual harassment, compared to 91% who did so for “[s]exually explicit language,” 94% who did so for “[d]isplays of sexually oriented photos or clippings,” and 98% who did so for “[r]equests for sex in exchange for any consideration.” Although other interpretations are possible, the survey responses may indicate the extent to which the AMA members who responded have internalized a sexualized definition of harassment. AM. MGMT. ASS’N, *supra* note 96, at 1.

98. 29 C.F.R. § 1604.11(a) (2001).

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

100. SOC’Y FOR HUMAN RES. MGMT., *supra* note 96, at 7.

- ___ sexual jokes, remarks, teasing
- ___ sexual touching
- ___ negative sexual remarks about a group
- ___ pressured or asked for sexual favors
- ___ threatened or actual sexual assault
- ___ displaying or distributing sexual materials or pictures
- ___ inappropriate e-mails
- ___ inappropriate use of the Internet
- ___ pressured or asked for a date¹⁰¹

The fact that all of the specified categories involved sexual forms of conduct shows that the SHRM—the leading organization of professionals responsible for designing and implementing sexual harassment policies—continues to see sex harassment in exclusively sexual terms. Furthermore, the SHRM’s definition covers some activities that rarely, if ever, rise to the level of legally actionable sexual harassment, such as “sexual jokes, remarks, or teasing.” In fact, these activities “were the *primary* types of harassment alleged in nearly half (48 percent) of the 1,214 sexual harassment complaints” in the companies surveyed¹⁰²—a finding that shows many employees now conceive of sexual harassment in the terms established by the HR professionals.

A 1994 survey of federal employees conducted by the U.S. Merit Systems Protection Board (MSPB), the agency charged by Congress to study and report on sexual harassment in the federal workforce, confirms this point. Like the SHRM study, the MSPB study finds that “[b]y far the most commonly experienced harassing behavior reported by our survey respondents is unwanted sexual teasing, jokes, remarks, or questions.” In the MSPB report, “Nearly 37 percent of women and 14 percent of men reported experiencing this sort of verbally harassing behavior.”¹⁰³ A comparison of the MSPB’s 1994 survey with its earlier surveys shows that the number of employees who say they define these and other behaviors as sexual harassment has risen significantly over time.¹⁰⁴ “For example,” the

101. *Id.* at 11.

102. *Id.* at 4 (emphasis added). The next most frequent category was “sexual touching,” an offense that was the primary type of harassment alleged in only 12% of all complaints. *Id.*

103. U.S. MERIT SYS. PROT. BD., *supra* note 96, at 14. In addition to these types of harassment, the incidence of federal employees who reported other potentially “gray area” forms of harassment was also high: 29% of women, and 9% of men, said they had experienced “[s]exual looks, gestures,” and another 10% of women, and 4% of men, reported receiving “[s]uggestive letters, calls, materials.” *Id.* at 16.

104. *Id.* at 7.

study reports, “the percentage of women who consider coworkers’ sexual remarks to be sexual harassment increased from 54 percent of respondents in 1980, to 64 percent in 1987, to 77 percent in 1994.”¹⁰⁵ A similar increase occurred among men, with the number who consider sexual remarks by coworkers harassment rising from 42% in 1980, to 47% in 1987, to 64% in 1994.¹⁰⁶ In all likelihood, employees’ greater willingness to define these forms of conduct as sexual harassment occurred at least partly in response to their employers’ initiatives to define them as such, as the MSPB suggests.¹⁰⁷ The MSPB approves of these trends, stating:

There is no doubt that people today are interpreting what happens in the workplace differently from the way they did in the 1980’s. The offensive comment or offcolor story that might have been tolerated in the 1980 workplace may in the 1995 environment be reinterpreted as suggestive speech, and be categorized and reported as an incidence of sexual harassment.¹⁰⁸

Although in some circumstances sexual remarks or jokes might legitimately rise to the level of sexual harassment under Title VII—if, for example, they were repeatedly used to intimidate employees because of their sex, and were sufficiently harmful to undermine their ability to do their jobs—this sort of conduct does not typically amount to actionable harassment. In fact, the MSPB explicitly *defends* adopting a definition of sexual harassment that is broader than the legal definition—and encourages the federal agencies under its jurisdiction to adopt such a broader definition—on the ground that doing so not only avoids legal liability, but also eliminates “unpleasant” conditions that make the workplace unproductive. It is worth quoting the report in full:

It’s important to note, in considering the meaning of the term “sexual harassment” in this report, that not all the behaviors that we are calling harassment, and that Federal workers identify as sexual harassment in our survey, would necessarily qualify as sex discrimination in a legal sense. The behaviors described may include instances of offensive conduct, not necessarily pervasive or extreme, that Federal workers find unacceptable but that are not necessarily cause for legal action.

But focusing exclusively on sexual harassment so extreme as to meet a legal test was never the aim of the Government’s information and prevention programs. In confronting the issue of

105. *Id.* at 5.

106. *Id.* at 7.

107. *Id.* at vii.

108. *Id.* at 6.

sexual harassment, the Federal Government is interested not only in avoiding situations in which a court would find a violation of law, but also in preventing the creation of an unpleasant, unproductive work atmosphere. The sexually harassing behaviors reported by survey respondents and discussed in this report—whether or not they are cause for legal action—can most definitely create an unproductive working environment and thus are an appropriate focus of our attention.¹⁰⁹

Just as the available empirical evidence suggests that leading organizations (such as the SHRM and the MSPB), company policies, and even many employees have adopted understandings of sexual harassment that may exceed the legal definition, so too does a wealth of less systematic research. My review of numerous sex harassment policies adopted by companies or proposed by experts confirms that most prohibit a broad range of sexual conduct that would not necessarily be legally actionable. Most policies begin by citing the EEOC guidelines' definition, and then expand upon it by listing various forms of covered conduct, including sexual joking and banter, visual displays, and various forms of touching. The Bureau of National Affairs book, *Preventing Employment Lawsuits*, for example, includes a sample sexual harassment policy that begins by quoting the definition from the EEOC guidelines.¹¹⁰ The policy elaborates on the definition by stating that sexual harassment includes, but is not limited to, "sexual innuendoes, sexual propositions, jokes of a sexual nature, sexually suggestive cartoons, suggestive or insulting sounds, leers, sexually related whistles, and obscene gestures. In addition, pinching, brushing against another person's body, and subtle pressure for sexual favors is [sic] considered harassment."¹¹¹ The discussion section notes that "different people have different ideas as to what constitutes sexual harassment" and warns that

the following acts may be considered harassment by some, even if not considered harassment by others:

- A male manager habitually puts his hand on the shoulder of a female employee while explaining something to her.
- An employee tells dirty jokes to co-workers.
- A supervisor or co-worker repeatedly asks an employee for a date.

109. *Id.* at 2-3.

110. JAMES G. FRIERSON, PREVENTING EMPLOYMENT LAWSUITS: AN EMPLOYER'S GUIDE TO HIRING, DISCIPLINE, AND DISCHARGE 350 (1994).

111. *Id.* at 352.

- A co-worker constantly talks about his or her sexual experiences or dreams.¹¹²

The BNA's approach to defining sexual harassment is ubiquitous—so common that it can be verified by pulling up almost any website posting a sexual harassment policy. Though the inclusion of a broad range of sexual conduct is standard, an examination of sex harassment policies suggests that there are two slightly different approaches to prohibition. The first approach is a “zero-tolerance” approach, in which all conduct with sexual overtones is prohibited and punished, regardless of the context (including the absence of any real complaint) and regardless of whether the conduct would amount to sex harassment under Title VII. The second approach, which I call the “cultural sensitivity” approach, requires employees to be ever-vigilant in monitoring their own speech and conduct so as to avoid any offense to another employee's sensibilities. The zero-tolerance approach represents an individual-bad-actor model of harassment, in which harassment is seen as a form of sexual predation that individual men perpetrate on women. The cultural sensitivity approach represents a gender-difference perspective, in which harassment is seen as a form of sexual crudeness that men-who-are-from-Mars impose on women-who-are-from-Venus. Despite these differences, the two approaches overlap more than they diverge. By focusing on individual bad behavior or broader “cultural” norms men allegedly bring with them to the workplace, both approaches miss the context-specific nature of sex harassment and its link to larger gender inequalities in the workplaces in which it occurs.

1. *The Zero-Tolerance Approach*

The “zero-tolerance” stance is illustrated in an interview with Laurie Jones, a senior consultant with InterActive Training Solutions (ITS), a Fort Worth, Texas, consulting firm that advises employers on sexual harassment.¹¹³ Jones said she defines sexual harassment as “unwelcome

112. *Id.*

113. Between July and September 1998, nine human resource specialists who are involved in developing sexual harassment programs for their employers or clients were interviewed under my supervision by Mr. Matthew Heimer, a journalist who received legal training under Yale Law School's graduate program for journalists. I developed the questions, and Mr. Heimer conducted the interviews. Telephone Interview by Matthew Heimer with Holly Culhane, Owner/Senior HR Specialist, PAS Associates (Aug. 28, 1998) [hereinafter Culhane Interview]; Telephone Interview by Matthew Heimer with Beverly R. Davis, Principal, Davis HR Consulting (July 22, 1998) [hereinafter Davis Interview]; Telephone Interview by Matthew Heimer with Diane S. Gold, J.D., President, EEO Management Solutions (Aug. 25, 1998) [hereinafter Gold Interview]; Telephone Interview by Matthew Heimer with Michelle Fantt Harris, Director, Human Resources, Association of American Medical Colleges (Sept. 1, 1998); Telephone Interview by Matthew Heimer with Laurie R. Jones, J.D., Senior Consultant, InterActive Training Solutions (ITS) (July 24, 1998) [hereinafter Jones Interview]; Telephone Interview by Matthew Heimer with Mel

sexual conduct; it's that easy."¹¹⁴ When asked if there are specific kinds of conduct that she advises companies to discourage or even prohibit, she said verbal harassment is the one she discusses most frequently: "dirty jokes, derogatory name-calling, [and] anatomy."¹¹⁵ She said her most frequent problems involve "older men trying to clown around, or even to be amorous, but failing to understand that mores have changed."¹¹⁶ When asked how she addresses "gray areas where activity with sexual content might have no harassing intent," she replied, "If you hire ITS, what I'm gonna tell you about is zero tolerance. It's my job to keep you out of trouble. You will not use bad language, or discuss your private life—or ideally, date your coworkers."¹¹⁷ Indeed, when asked how she advises clients to deal with consensual romantic relationships, Jones replied bluntly, "You don't date. There's a million other people out there who don't work for your company."¹¹⁸

This demonstrates that it is not only HR experts who are promoting this view. Jones, an attorney with a J.D. from the University of Virginia and several years of experience as a management-side labor lawyer, also reduces the definition of harassment to conduct with sexual content, and sees no need to inquire into whether such conduct conformed to the legal definition under Title VII. In fact, when asked how her understanding of the law's demands shapes her recommendations, Jones stated that her understanding of sex harassment is "not really theory driven."¹¹⁹ In reality, it seems that Jones does have a theory of harassment: She subscribes to an individual-bad-actor model of harassment, commenting that harassers are "just jerks; they try to intimidate me and everybody they work with."¹²⁰

Given this acontextual view of harassment as something individual bad men bring with them into the workplace, it is not surprising that Jones said she gives the same recommendations for how to deal with harassment regardless of the gender composition of the job or firm. In fact, although her firm does advise companies on discrimination and diversity issues as well as harassment, Jones does not see sex harassment as related to larger

Lyons, Manager, Recruiting, EEO & Affirmative Action, American Management Association (Aug. 18, 1998); Telephone Interview by Matthew Heimer with Carol Merchasin, Director of Training and Development, Day, Berry & Howard Human Resources Advisors (Aug. 26, 1998); Telephone Interview by Matthew Heimer with Amy Oppenheimer, Administrative Law Judge and HR Consultant (Aug. 12, 1998) [hereinafter Oppenheimer Interview]; Telephone Interview by Matthew Heimer with Craig Pratt, Owner, Craig Pratt & Associates (Sept. 2, 1998) [hereinafter Pratt Interview]. Note that the interviews were conducted after the Supreme Court's three 1998 sexual harassment decisions had been handed down.

114. Jones Interview, *supra* note 113.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

issues of sex discrimination. When asked if there can be harassment that is not sexual in nature, she acknowledged that it exists but insisted that it is “different.” “[T]hat’s not sexual harassment; it doesn’t fall under the same rules, and companies aren’t as worried about it, don’t face the same risks.”¹²¹ To Jones (and to most other experts), it is only *sexual* conduct that must be addressed in a sex harassment policy—backed up by the threat of “immediate disciplinary action” for violations, and reinforced through the use of what Jones herself called “scare tactics” during training sessions.¹²²

Although we lack precise estimates of how many companies are following such a zero-tolerance approach, it is being pushed heavily by HR managers. Many experts advise companies “to go one step beyond the law” and “be extra-prudent,” to be “more conservative than the law [demands],” to “be a little strict, since you never know when something may be taken the wrong way”—as another one of the consultants in my interview base, the American University Law School-trained Diane Gold, of EEO Management Solutions of Arlington, Virginia, put it.¹²³

Holly Culhane, another interviewee and owner of PAS Associates, a consulting firm in Bakersfield, California, agreed that “the best approach is to be conservative: don’t allow it,” with respect to sexual innuendo and jokes.¹²⁴ Culhane said even profanity was “dangerous,” especially if it had “sexual overtones.”¹²⁵ She concurred with Jones that clients should also regulate employee “fraternization” because “any type of dating relationship is a potential sexual harassment situation.”¹²⁶ She said she recommends a ban on all supervisor-subordinate relationships, as well as heavy monitoring of coworker relationships for clients who don’t wish to adopt an across-the-board no-dating policy.¹²⁷ The result is a chilling caution when it comes to employee sexuality, especially in the gray areas of sexual jokes and banter, flirtation, and even dating.

2. *The Cultural Sensitivity Approach*

The major alternative to the draconian zero-tolerance stance, an approach I call the “cultural sensitivity” approach, differs only in degree—not in kind (nor often in result). In this approach, managers and employees must constantly monitor their own sexual conduct and stop it the minute they detect that someone else may be offended. Although this approach may reflect a theoretical respect for Title VII’s severity and pervasiveness

121. *Id.*

122. *Id.*

123. Gold Interview, *supra* note 113.

124. Culhane Interview, *supra* note 113.

125. *Id.*

126. *Id.*

127. *Id.*

requirement, in practice HR professionals tend to forgo any attempt at objective inquiry in favor of focusing on the subjective reaction of the "victim." Throughout the literature, I encountered the idea that harassment depends on "impact, not intent,"¹²⁸ meaning: It doesn't matter whether anyone intended to discriminate, as it's all a question of whether someone was offended. Tellingly, one commentator reports that in a training session she attended, the trainer projected "a picture of a giant eye, to illustrate the idea that sexual harassment is 'in the eye of the beholder.'"¹²⁹ Of course, the eye also projects a piercing image of surveillance: a corporate Big Brother who is watching you as you watch whether others are watching you as a means of watching yourself.

Due to a desire to ensure that even fully consensual interactions not directed at the complainant do not offend a third party, many adherents of the sensitivity approach end up using the same broad bans on sexual conduct as zero-tolerance advocates. Because "it is the [harassee's] definition that determines whether the unwelcome behavior is sexual harassment," warns an article by Rebecca Thacker in *Business Horizons*, supervisors should intervene "[i]f they see social-sexual behavior of any sort."¹³⁰ Similarly, in a BNA course book aptly entitled *Intent vs. Impact*, Stephen Anderson counsels that simply because a coworker has tolerated the conduct does not mean she welcomes it.¹³¹ Indeed, Anderson suggests that a woman who says that she does not object to her male coworker's sexual joking may still be the victim of sexual harassment because she may have "learned while growing up that she must expect and tolerate that type of behavior from men, or that she doesn't have a right to *not* be treated that way."¹³² Anderson goes so far as to cite as an example of possible sexual harassment the behavior of a female warehouse worker who likes to hug her colleagues, suggesting that the only way to be sure of a hug's welcomeness is through "equal initiation."¹³³

Most of the consultants we interviewed tilted in favor of this cultural sensitivity approach. For example, Amy Oppenheimer, an administrative law judge and HR consultant, disavowed zero tolerance because "it overemphasizes things that are trivial," but she stressed that "something doesn't have to be illegal to violate [a sexual harassment] policy" and said she encourages clients to discourage harassing behavior that falls short of

128. For examples, see STEPHEN F. ANDERSON, *INTENT VS. IMPACT: HOW TO EFFECTIVELY MANAGE SEXUAL HARASSMENT INVESTIGATIONS* 37-38 (1989).

129. YOUNG, *supra* note 7, at 166-67.

130. Rebecca A. Thacker, *Innovative Steps To Take in Sexual Harassment Prevention*, *BUS. HORIZONS*, Jan.-Feb. 1994, at 29-31.

131. ANDERSON, *supra* note 128, at 37.

132. *Id.* at 43.

133. *Id.* at 42.

illegality.¹³⁴ The key, she said, is “impact, not intent,” stressing that employees need to learn how to read even *nonverbal* cues that a coworker objects to their behavior or talk. In a similar vein, Craig Pratt, the owner of a consulting company in Alameda, California, counseled evaluating bystander objections by “using an approach that . . . relies on sensitivity of the employee to welcomeness.”¹³⁵ When asked for a hypothetical, Pratt offered a scenario in which a visiting mailman frequently flirts with a receptionist, and they exchange sexual jokes and cartoons, offending a bookkeeper in an adjacent desk. “Most [people] think this [type of behavior] is inappropriate,” Pratt remarked, concluding on the basis of this assumption that the behavior should be stopped.¹³⁶

Like Jones and Culhane, Pratt also disapproves of consensual employee relationships (though he concedes that at a recent training session, most participants disagreed with him).¹³⁷ Although Pratt doesn’t go so far as to recommend an outright ban, his model employee handbook strongly discourages supervisor-subordinate relationships, calling them “always inadvisable and, possibly, inappropriate.”¹³⁸ The handbook further warns employees that “personal or romantic relationships with co-workers, competitors, or suppliers may lead to *perceived or actual* conflicts of interest,” and requires them to disclose any such relationship to a supervisor.¹³⁹ Thus, the allegedly softer cultural sensitivity approach converges with the more severe zero-tolerance stance as the insistence on avoiding offense to other employees’ sexual sensibilities demands that employees police their own sexual behavior closely.

D. *Punishing Sexual Transgressors*

Just as many sexual harassment policies have been crafted in an overzealous spirit, many are being enforced in a similar spirit. When sexual harassment is defined in terms of conduct of a sexual nature with no understanding of how harassment is linked to larger forms of inequality such as job segregation by sex, there is no incentive for companies to engage in structural reforms that might reduce the incidence of harassment, such as integrating their workforces. Instead, current law sets up incentives for employers to punish individual employees for engaging in any sexual conduct that might be seen as contributing to a hostile work environment—

134. Oppenheimer Interview, *supra* note 113.

135. Pratt Interview, *supra* note 113.

136. *Id.*

137. *Id.*

138. CHELA FIN. RES., INC., EMPLOYEE HANDBOOK 15 (1998).

139. *Id.* at 14 (emphasis added).

incentives that mesh well with many employers' preexisting inclinations to view sexual conduct as disruptive and out of place in the workplace.

As we saw earlier, Title VII allows employers to escape liability by taking prompt and effective action to prevent and correct harassment. According to legal scholar Estelle Franklin, "Discharge, demotion or removal of supervisory authority is usually enough to shield the employer from liability even in cases of outrageous conduct."¹⁴⁰ More troublingly, employers also have an incentive to impose such stiff discipline even on employees who engage in more ambiguous forms of sexual conduct:

[E]mployers seeking to avoid liability for sexual harassment are under pressure to take severe disciplinary action against a suspected harasser within days of learning of *even questionable misconduct*. . . . Further, because a quick investigation with a finding of no harassment may lead to the imposition of liability on the basis that the investigation was a sham, the employer may have an incentive to conduct a quick investigation and take some action, *even if the investigation is inconclusive*. . . .

Finally, the employer may be pressured to mete out stiff discipline in lieu of other corrective actions. Although the determination of the action's appropriateness turns on whether it is reasonably calculated to end the harassment, courts evaluated this requirement from a backward-looking point of view, evaluating the actual effect of the action, not its reasonably foreseeable effect. Moreover, while courts have held that discharge of the harasser is not required, the employer that fails to do so risks liability for further harassment because it is then on notice as to the employee's propensity.¹⁴¹

In line with these incentives, there is evidence that, in the name of eliminating sexual harassment, many employees are being disciplined, and even discharged, for engaging in sexual conduct. According to a large national survey published in 1999 by the SHRM, fully 60% of all sexual harassment complaints resulted in some form of disciplinary action against the alleged harasser.¹⁴² That the majority of accused harassers are subjected to such discipline or training seems troubling, when we recall that in almost half of complaints, sexual remarks, teasing, and joking are the primary

140. Franklin, *supra* note 66, at 1556.

141. *Id.* at 1557 (emphasis added).

142. See SOC'Y FOR HUMAN RES. MGMT., *supra* note 96, at 6 tbl.3 (reporting that 29% of alleged harassers were given a warning, 6% were put on probation, 4% were suspended, 9% were sent to training or counseling, and 12% were fired).

types of harassment alleged.¹⁴³ Furthermore, the vast majority of all harassment complaints are filed against coworkers, not supervisors.¹⁴⁴

This systematic evidence of punishment finds confirmation in a wealth of anecdotal accounts. In the wake of the Clinton scandals, the press has reported countless stories of employees who have paid a high price for what look like harmless interactions.¹⁴⁵ In one story, a male social worker was fired for imitating David Letterman and approaching a new female coworker with the comment, "I'm gonna flirt with ya."¹⁴⁶ In another, a lesbian psychology professor's guest lecture on female masturbation prompted a sexual harassment lawsuit by a married, male Christian student, who claimed that he felt "raped and trapped" by the lecture.¹⁴⁷ In another case, a male religion professor was reprimanded for "'engag[ing] in verbal conduct of a sexual nature' that had the effect of 'creating an intimidating, hostile or offensive' environment" when he recited a story from the Talmud, the writings that make up Jewish law.¹⁴⁸ The story involved a man who fell off a roof, accidentally landed on a woman, and had intercourse with her. The professor related that in the Talmud, the man is deemed innocent of sin because his act was unintentional. A female student in the class was offended by the story, and her sexual harassment complaint led the university to reprimand the professor and to record all his lectures to ensure that he did not say anything offensive in the future.¹⁴⁹

The critics of sex harassment law have amassed many more reports of sexual policing. In her book, *Ceasefire!*, for example, commentator Cathy Young recounts several stories, including the following:

In Seattle in 1996, county ombudsman David Krull asked soon-to-be-wed assistant ombudsman Amy Calderwood if she wanted to see a funny item from the Internet, warning that she might find it offensive. He got a green light. But after reading the mildly off-

143. *Id.* at 5-6 (reporting that these were the primary types of harassment alleged in 48% of all complaints); U.S. MERIT SYS. PROT. BD., *supra* note 96, at 14 (reporting similar results). Note, however, that the SHRM survey did not correlate the type of harassment with the likelihood of disciplinary action.

144. In the SHRM survey, 51% of all sexual harassment complaints involved employees accusing coworkers, and 29% involved employees accusing supervisors or executive/senior management. SOC'Y FOR HUMAN RES. MGMT., *supra* note 96, at 6 tbl.2. Similarly, in the 1994 MSPB survey, 77% of women and 79% of men who reported being harassed said they were harassed by a coworker or other employee, while only 28% of women and 14% of men reported being harassed by supervisors. U.S. MERIT SYS. PROT. BD., *supra* note 96, at 19 tbl.5.

145. See Schultz, *supra* note 5, at 1793 (citing some examples).

146. Kirstin Downey Grimsley, *In Combating Sexual Harassment, Companies Sometimes Overreact*, WASH. POST, Dec. 23, 1996, at A1.

147. Asra Q. Nomani, *Was Prof's Lecture Academic Freedom or Sex Harassment?*, WALL ST. J., Mar. 7, 1995, at A1.

148. Dirk Johnson, *A Sexual Harassment Case To Test Academic Freedom*, N.Y. TIMES, May 11, 1994, at D23 (quoting a formal reprimand issued by the Chicago Theological Seminary).

149. *Id.*

color piece, "Instruction and Advice for the Young Bride"—which purports to be a Victorian text on how to avoid sex—Calderwood made a complaint. Later she revealed another shocking detail: in the nine months she had worked for Krull, he had made several comments about her "great hair days." Krull's apology was not enough: the county council voted ten to three to fire him.¹⁵⁰

In another incident, in which women, rather than men, were deemed the sexual offenders, Young reports:

In 1994, several female tellers and managers at United Jersey Bank shared some laughs over cutouts of male nudes from *Playgirl* (half an hour before closing, with no customers in the bank). A male teller took offense and complained. The women were ordered to apologize to him and were suspended without pay for as long as two weeks; some were demoted.¹⁵¹

If the connection with gender equality seems slim in these examples, in other cases it is nonexistent. As Young suggests, "Sometimes action is taken even when the 'victim' doesn't complain."¹⁵² In one widely publicized case:

[A] corporate manager was reported for hugging a secretary in her cubicle. As it turned out, he was comforting her after she had learned of her mother's death, and the complainant had a grudge against the boss for denying her a promotion. Nevertheless, the review concluded that the manager may have violated company policy prohibiting "sexual touching," and he was placed on probation for a year.¹⁵³

From a review of the available underlying press accounts, Young does not appear to be exaggerating.¹⁵⁴ Nor are these examples isolated. In addition to the stories cited above, law professor Eugene Volokh and author Walter Olson have catalogued scores of cases depicting incidents that they regard as illustrations of how sex harassment law has operated to suppress

150. YOUNG, *supra* note 7, at 180.

151. *Id.* at 180-81.

152. *Id.* at 181.

153. *Id.*

154. See Alex Michelini, *Male Teller Can't Bare Nudie Pix*, DAILY NEWS (New York), Jan. 16, 1995, at <http://www.niom.com/html/teller.html> (reporting the suspension and demotion of bank tellers after a prank with *Playgirl* magazine); Margot Slade, *Sexual Harassment: Stories from the Field*, N.Y. TIMES, Mar. 27, 1994, § 4 (Week in Review), at 1 (recounting an incident of a manager disciplined for hugging his secretary after her mother died); *Primetime Live* (ABC television broadcast, July 21, 1994) (examining the same incident); Duff Wilson, *Aide Goes Public in Ombudsman Beef—Woman Says She Was Surprised, Offended by E-mail Try at Humor*, SEATTLE TIMES, Sept. 10, 1996, at B1 (describing the background to the firing of County Ombudsman Krull).

free speech and encourage “overlawyering” that breeds a “fear of flirting.”¹⁵⁵ Even if the press and critics do tend to focus too heavily on incidents in which companies go overboard in punishing sexual conduct, as some analysts suspect,¹⁵⁶ the sheer volume of the reported incidents may nonetheless tend to corroborate what the more systematic research suggests: that many employees are being punished for sexual conduct that would not amount to harassment under the law.

Libertarian commentators portray these incidents of sexual overreaching as a manifestation of political correctness,¹⁵⁷ and such an attitude may account for some of what is happening. Some HR professionals and managers do appear to have bought into the conventional feminist line that workplace sexuality is inherently sexist, and have sought to stamp out sexual expression with an intensity that bespeaks an ideological commitment. Yet, for all their perceptiveness, the libertarian critics have missed something crucial. They focus their wrath on *the government* (mostly courts and government enforcement agencies) for creating law that treads on self-expression, but it is *management* that is firing employees for sexual transgressions. In many of the cases, it is difficult to sort out PC-like purposes from more conventional managerial motives.

My review of the literature and the decisional law suggests that companies often rely on sexual harassment policies to justify punishing men who have violated the norm of asexuality, regardless of whether sex discrimination is involved. Sometimes management appears to seize on a sexual harassment complaint as a subterfuge for less benign motives for getting rid of an employee. Regardless of whether this is occurring, sexual harassment often provides a progressive justification for firing employees who have devoted their lives to the company. Managers weren't acting cold heartedly, they can claim. To the contrary, they were acting heroically to rid the workplace of outdated cretins who stood in the way of women's progress.

In some cases, management has relied on this line of reasoning explicitly to discipline older men who appear to have done nothing more than telling sexual jokes or making sexual conversation. In *Pierce v. Commonwealth Life Insurance Co.*, a male manager, Tom Pierce, was accused of sexual harassment after participating in an exchange of sexually

155. See *supra* note 73.

156. See Deborah Zalesne, *Sexual Harassment Law: Has It Gone Too Far, or Has the Media?*, 8 TEMP. POL. & CIV. RTS. L. REV. 351, 356-68 (1999).

157. See Olson, *supra* note 7, at 54 (referring to the “speech police” who advocate zero-tolerance policies); Cathy Young, *Groping Toward Sanity: Why the Clinton Sex Scandals Are Changing How We Talk About Sexual Harassment*, REASON, Aug.-Sept., 1998, at 24, 31 (arguing “for critics of ‘sexual correctness’ to . . . push for legislative change” in the realm of sexual harassment law), available at <http://reason.com/9808/fe.young.shtml>.

explicit cards with a female office administrator, Debbie Kennedy. One of the cards Pierce sent read, "Sex is a misdemeanor. De more I miss, de meanor I get."¹⁵⁸ According to Pierce and other employees, Kennedy had also sent Pierce cards with sexually explicit messages and had engaged in off-color behavior around Pierce and others in the office.¹⁵⁹ Yet, when Kennedy charged Pierce with sexual harassment, he was summarily demoted, with a significant reduction in pay, and transferred to another office. After spending thirty years with the company, Pierce was bid farewell by having his personal belongings dumped off at a roadside Hardee's.¹⁶⁰

The company claimed that Pierce had already been counseled about two sexual harassment complaints in the past ten years—a record that Pierce denied. Perhaps, if Pierce had such a history, management felt compelled to punish him or else risk a costly harassment suit. Still, the reasoning the company actually gave for disciplining Pierce is unsound—and dangerous. The company relied on the sexually oriented character of the cards alone, without even bothering to examine whether Pierce harbored any sexist motivation in sending them. Indeed, in an amazing bit of reasoning that conflates all forms of sexual interaction—from rape to racy talk—one of Pierce's superiors allegedly told him that he might as well have been a "murderer, rapist, or child molester, that it wouldn't be any worse."¹⁶¹

In a similar case, the Miller Brewing Company was assessed \$26.6 million in damages when it fired an executive, Jerold Mackenzie, whom a female employee, Patricia Best, had accused of sexual harassment.¹⁶² Mackenzie, who had worked for Miller for nineteen years, had commented to Best about an episode of *Seinfeld* that aired the night before. In the show, Seinfeld cannot recall the name of the woman he's dating. He knows that her name rhymes with a part of the female anatomy, however, and inaptly guesses such names as "Mulva" and "Gipple." At the end of the show, as the woman breaks up with him, Seinfeld remembers her name and calls out, "Delores?" Mackenzie recounted this episode to Best, and when she did not get the joke, he photocopied a dictionary page defining "clitoris" and handed it to her. It is possible that the facts of this case bear more than one interpretation. Perhaps Mackenzie was resorting to sexual joking as a way

158. *Pierce v. Commonwealth Life Ins. Co.*, 825 F. Supp. 783, 784 (E.D. Ky. 1993), *aff'd*, 40 F.3d 796 (6th Cir. 1994).

159. *Pierce*, 40 F.3d at 799 & n.2.

160. *Id.* at 800.

161. *Id.* at 799.

162. See James L. Graff, *It Was a Joke! An Alleged Sexual Harasser Is Deemed the Real Victim*, TIME, July 28, 1997, at 62; see also Gretchen Schuldt, *Former Miller Executive "Shocked"* by Seinfeld, MILWAUKEE J. SENTINEL, June 27, 1997, at 3 (discussing the firing of Mackenzie).

to “get to” a woman he despised due to sexist motives. But after hearing both sides of the story, a twelve-person jury that included ten women decided that Mackenzie’s conduct did not comport with their understanding of sex harassment and that his firing was unfair.¹⁶³ Indeed, some of the press accounts suggest that Miller may not have fired Mackenzie out of a genuine concern that his conduct left them vulnerable to liability for harassment, but instead may have used the accusation of sex harassment as a subterfuge for firing Mackenzie, when they really wanted to get rid of him for other reasons.¹⁶⁴

Some readers may have little sympathy for executives or supervisors who engage in sexually oriented conduct, even when it is as apparently benign as telling sexual jokes. These readers may worry that employees under their supervision will experience subtle pressure to participate or at least acquiesce in such behavior—whether they like it or not—when it’s coming from the boss. Yet, it isn’t simply bosses who have been disciplined for sexual behaviors; many employees have been disciplined as well. Indeed, surveys indicate that lower-level employees are more likely than supervisors and higher-level employees to be disciplined.¹⁶⁵ In a number of the reported decisions, relatively low-ranking male workers were fired or suspended for sexual jokes or remarks that seem relatively innocuous.

In one 2001 dispute involving the Cook County Sheriff’s department, a correctional officer of thirteen years was temporarily suspended without pay for telling a joke he had heard on the radio that morning to an administrative assistant in the jail whom he had known for several years.¹⁶⁶ According to the officer, the joke mentioned that the American Dental Association was at the Taste of Chicago and had as a punch line, “if you want a tongue massage, come down to the Taste of Chicago and get your toothbrush.”¹⁶⁷ The officer claimed that he approached the complaining woman by explaining that the joke “sounds dirty, but it’s not,” and after recounting the joke, suggested that she go home and give her boyfriend or

163. See Dave Daley, *Women Jurors Seen as Key to Mackenzie’s Court Victory*, MILWAUKEE J. SENTINEL, July 17, 1997, at 10; *Fired Executive Awarded \$26.6 Million over Seinfeld Rhyme*, LEGAL INTELLIGENCER, July 17, 1997, at 4.

164. See, e.g., Erik Brooks, “*Lighten Up*” or “*Shut Up*”?; *Racy “Seinfeld” Chat Not Harassment, Jury Rules; Women’s Groups Angered*, CHATTANOOGA TIMES, July 17, 1997, LEXIS, Nexis Library, Chattanooga Times/Chattanooga Free Press File; Dave Daley, *\$26 Million Awarded in Seinfeld Case; Miller Firing Improper, Jury Decides*, MILWAUKEE J. SENTINEL, July 16, 1997, LEXIS, Nexis Library, Milwaukee Journal Sentinel File.

165. See, e.g., U.S. MERIT SYS. PROT. BD., *supra* note 96, at 38 (reporting that respondents complained that higher-level employees were least likely to receive appropriate punishment for harassment, particularly if they were managers or supervisors).

166. *In re County of Cook/Sheriff of Cook County*, 115 Lab. Arb. Rep. (BNA) 1346 (2001) (Wolff, Arb.).

167. *Id.* at 1348.

husband a tongue massage—while brandishing a toothbrush in his hands.¹⁶⁸ The woman screamed at him to “get the fuck away from [her],” and filed a sexual harassment complaint.¹⁶⁹

The county’s sexual harassment policy included as examples of “Unwanted Sexual Advances, Propositions, or Other Sexual Comments” such things as “sexually-oriented gestures, noises, remarks, jokes, or comments about a person’s sexuality or sexual experience.”¹⁷⁰ In arguing that the officer violated the policy, the County Attorney stressed the allegedly sexual content of this somewhat unintelligible joke:

Now, we have this officer telling a dirty joke, which he . . . admits to have sexual overtones

. . . This joke that he was telling had one purpose and one purpose only, . . . to bring forth the sexual overtones underlying the joke.

His intent is irrelevant. . . . Whether he intended to offend or not, it’s the effect it had on those that he told it to, and [Complainant] recognized it as being offensive.¹⁷¹

To counter the union’s argument that the county should have followed the usual procedure of imposing progressive discipline (a warning, before suspension), the county emphasized the severity of the offense:

When you look at the collective bargaining agreement, you will see in certain cases that discipline doesn’t have to be progressive when the offense is more serious.

. . . [I]n our workplace, one of the most serious offenses somebody can commit is sexual harassment. It is something that is pervasive in our society . . . and it’s something that we as people want to stop¹⁷²

168. *Id.* According to the arbitrator, the complainant’s version of the facts was slightly different.

Asked if grievant was carrying a toothbrush in his hand, [Complainant] replied, “Not that I’m aware of” and she repeated that grievant had put his arm around her shoulder.

She denied that grievant had told her that he had heard a joke on the radio that morning and that while it “sounded dirty,” it wasn’t, and that she could tell her husband.

Id. at 1347. Regardless of whose facts are accepted, my point still stands: The County Attorney argued that the sexual undertones of the joke were what made it sexual harassment and provided the basis for punishing the grievant in question.

169. *Id.*

170. *Id.* at 1349.

171. *Id.* at 1350.

172. *Id.*

Although the arbitrator overturned the suspension for violating the principle of progressive discipline, his reasoning in no way disavowed, but actually affirmed, the county's argument that a sexual joke would be punishable as sexual harassment. The arbitrator went out of his way to find that the joke was not "reasonably susceptible of 'sexual overtones,'" and thus was not covered by the policy.¹⁷³ In addition, the arbitrator stressed, this officer had no history of making sexual remarks. The arbitrator's decision portrayed the grievant as someone who ordinarily conducted himself as an officer and a gentleman, and who had slipped up on this one occasion by telling a sophomoric joke. By contrast, the decision suggests, the county would have been well within its rights to punish a sexual harasser who had told a truly "dirty" joke, especially if he were a repeat offender.¹⁷⁴

Similar reasoning emerges from a decision involving a challenge by a night crew shelf-stocker at Safeway who was fired for creating a hostile work environment.¹⁷⁵ The grievant had a long history of making crude sexual comments on the job, which sometimes upset some of his female coworkers.¹⁷⁶ On the occasion of his firing, the grievant overheard one of the women on his crew saying to a male coworker, "Richard, I'm going to smack you," and "[a]llegedly with a leer in his voice, Grievant . . . said, 'Oooh, you're going to smack him.'"¹⁷⁷ When his female colleague responded, "I'm going to smack you first," the grievant responded, "Oooh, you're going to smack me, I'm going to go to my truck and get my handcuffs."¹⁷⁸

The point here is not that the grievant was a sympathetic figure; he probably was not. The point is that the arbitrator simply accepted, without questioning, the idea that sexual remarks amount to sexual harassment. Although the arbitrator held that the grievant should be given another chance before being fired, the arbitrator admonished:

There is no question that the comments . . . constituted sexual harassment . . . His comments regarding the handcuffs must be viewed in light of his overall behavior in the workplace, which is one of a leering, crude, ungentlemanly person, who unfortunately, thinking that he is being "cute" or "colorful," harms, embarrasses, and humiliates female employees. . . . The Grievant does not appear to be a mean or a physically intimidating individual, but his

173. *Id.* at 1351.

174. *Id.*

175. *In re Safeway, Inc.*, 109 Lab. Arb. Rep. (BNA) 768 (1997) (DiFalco, Arb.).

176. *Id.* at 769.

177. *Id.* at 770.

178. *Id.*

behavior is wrong, and cannot be tolerated in the modern work environment.

The Grievant must understand that he is a dinosaur in the modern workplace, and like a dinosaur (i.e., sexual harasser), he will either change or be extinct in the near future The Grievant needs to be punished severely, he needs to receive a strong message, and he should receive "sensitivity" training, but he is entitled to one final chance.¹⁷⁹

Like the reasoning in the Cook County decision, this arbitrator's rhetoric reflects a mindset that equates sexual offense with harassment, regardless of context, and marks male employees who offend female sensibilities as pariahs who must be reprogrammed (through sensitivity training) or perish.

In another case, American Mail-Well Envelope suspended a leadman when he failed to stop some men under his supervision from viewing a sexually explicit magazine.¹⁸⁰ When Tonya Harding, a local celebrity whose escapades workers had been discussing for weeks, appeared in *Penthouse* magazine, one of the men brought the magazine in and many of his coworkers viewed it unobtrusively at the beginning of their shift. Afterward, the owner of the magazine placed it, cover down, at his work station. Someone told a woman coworker about it, and she told someone in management about it.¹⁸¹ Despite the fact that there were no allegations that the magazine had prompted lewd remarks or bad behavior, no concern that it had reduced efficiency, and no claim that it had been wielded as a weapon against any of the women, the company said the grievant's failure to stop others from looking at it or to report its presence to management placed him in violation of the firm's sexual harassment policy.¹⁸²

The company's policy gave supervisors and leadmen a responsibility to help create "a work environment that is free from racial and sexual discrimination," and required them to be "sensitive to situations which are, or might be interpreted to be, racial or *sexual* in content."¹⁸³ The leadman reasonably might have interpreted "sexual discrimination" to refer to situations involving gender-biased or gender-based conduct, but the arbitrator rejected this interpretation out of hand. The arbitrator also rejected the union's attempt to raise free speech concerns as "polemics . . . [that are not] directly related to the factual situation at hand."¹⁸⁴ In the eyes of the arbitrator, the magazine was "beyond any

179. *Id.* at 773-74 (emphasis added).

180. *In re* Am. Mail-Well Envelope, 105 Lab. Arb. Rep. (BNA) 1209 (1995) (Paull, Arb.).

181. *Id.* at 1211.

182. *Id.*

183. *Id.* at 1211-12 (emphasis added).

184. *Id.* at 1213.

shadow of a doubt, sexual in content”¹⁸⁵—and anything with sexual content was, by definition, a form of sexual harassment. Thus, the arbitrator upheld management’s right to discipline the leadman, who earned a mere twenty-five cents an hour more than the workers he supervised,¹⁸⁶ for failing to turn in his buddies for taking a nondisruptive peek at a dirty magazine.

Disturbingly, the specter of pretextual motives haunts many decisions in which employees are fired for sex harassment. In some of the cases, the accused’s offense seems so small, its connection to any sexist motivation or pattern so slight, and the managerial response so overblown, that it is hard to resist the conclusion that management is using sexual harassment as a justification for punishing an employee they want to punish for other reasons. Many of the cases involve older men. Although it is possible that older men are simply slower to adjust to “modern” workplace norms, it is also possible that companies are seizing on their sexual misconduct to railroad aging men out of their jobs (and out of their pensions or accrued bonuses). There are a number of cases in which employees have alleged age-related and other improper motivations explicitly.¹⁸⁷ In *Pilkington v. CGU Insurance Co.*, for example, a manager was accused of sexually harassing a female data analyst with whom he had been involved.¹⁸⁸ When she went on short-term disability leave, he called or e-mailed her once or twice a week, saying, during one phone conversation, “I love ya” and “I am looking forward to you coming back.”¹⁸⁹ When he was fired for sexual harassment, with no meaningful investigation, he claimed the company had “knowingly used an unfounded charge of sexual harassment to discharge him and evade its obligation to pay him . . . bonus money”¹⁹⁰ he had accrued under a program that promised contractual bonus payments to employees for the express purpose of encouraging them to stay with the company.

Gay men have also alleged that companies have used sexual harassment charges as a subterfuge for firing them because they are homosexual.¹⁹¹ For

185. *Id.*

186. *Id.* at 1210.

187. *See, e.g., Galambos v. Fairbanks Scales*, 144 F. Supp. 2d 1112 (E.D. Mo. 2000) (holding that an employee of thirty years met the burden of proof for a claim of discriminatory discharge on the basis of age and disability as a result of a recent heart attack, where the employee met and surpassed most performance goals, and established as pretext the employer’s claim of sexual harassment arising just after the employee’s return from medical leave); *Ex parte Usrey*, 777 So. 2d 66 (Ala. 2000) (holding that an employee established a prima facie case of pretextual and retaliatory discharge, based on an accusation of relatively mild sexual harassment, after the employee sought workers’ compensation for an injury incurred during employment).

188. 143 Lab. Cas. (CCH) ¶ 59,244 (E.D. Pa. 2001).

189. *Id.* at 92,907.

190. *Id.* at 92,911. The court denied the company’s motion to dismiss, in a passage that suggests that these facts, if proven, would amount to breach of contract under Pennsylvania law.

191. Though rarer, there have been claims that employees have used sexual harassment charges to attempt to have someone fired, when the real motive was bias on the grounds of sexual

example, Michael White, a dispatcher at B&W Cartage Company, a Michigan trucking firm, alleged that his employer used a sexual harassment claim as a pretext to fire him because he is gay and was believed by his employer to be HIV-positive.¹⁹² White, who had come out about being gay only a few months before his termination, had been described by one coworker as “queer as a three-dollar bill.”¹⁹³ “We feel the alleged sexual harassment was a pretext for discharging Mr. White and most likely it was a way of harassing him,” asserted his attorney, Lissa Cinat. “[A]ll of a sudden, out of the blue, comes this alleged harassment and three weeks later he is fired. No one at the company talked to him. They didn’t counsel him. The woman never indicated to him that his behavior was improper. She never said anything to him.”¹⁹⁴

In another case, Kenneth Kendrick, an Astra USA heating and air-conditioning specialist, claimed that his company used “several pretexts” to suspend him from his job because he is gay.¹⁹⁵ “I was charged with sexual harassment because I made a remark of sexual nature to an employee who worked in a different unit,” read his Massachusetts Commission Against Discrimination complaint. “This employee had previously accused a heterosexual of a more grave instance of sexual harassment, which did not result in any reprimand to the individual. However, because I am a homosexual, the remark I made resulted in suspension.”¹⁹⁶ After Kendrick hired a lawyer, Astra’s associate counsel for human resources offered him a severance package, later stating that “[f]urther information confirmed some, but not all, of Mr. Kendrick’s allegations.”¹⁹⁷ The media has reported numerous other complaints that managers have used sexual harassment claims as a pretext for firing gay employees because of their sexual orientation, without bothering to conduct a proper sexual harassment investigation.¹⁹⁸ Some employees have won these claims.¹⁹⁹

orientation. See, e.g., *Three Say Lesbian Boss Harassed Them*, SUN-SENTINEL (Fort Lauderdale), Feb. 25, 1994, at 9A.

192. See Cheryl Zupan, *Gay Michigan Man Sues Employer*, GFN.COM: THE GAY FINANCIAL NETWORK, Aug. 10, 1998, at <http://www.gfn.com/archives/story.phtml?sid=201>.

193. *Id.*

194. *Id.*

195. See George B. Griffin, *Worker Alleges Gay Bias*, WORCESTER TELEGRAM & GAZETTE, July 16, 1997, at E1.

196. *Id.*

197. *Id.*

198. For example, in Manchester, England, a gay man named Vincent Monks was fired from his job as a cleaning-firm site manager after he made a lighthearted comment to a female security guard in a staff bar. See John Mahoney, *I Never Harassed Girl . . . Coz I'm Gay*, DAILY STAR (London), Mar. 27, 2002, at 25. Over coffee, he said to her jokingly, “Ooh, I could take you home and make passionate love to you!” *Id.* According to him, she responded with a joke about his being gay, and “[i]t all seemed fun. That was the end of it.” *Id.* Two weeks later, Monks was called before the chiefs of the company, who told him about the complaint and fired him on the spot. *Id.* Monks claimed that he couldn’t have harassed a woman because he is gay and has no sexual interest in women, while the company responded that “Mr. Monks admitted making

There are other cases in which juries and arbitrators have explicitly found that companies used accusations of sexual harassment to cover up other suspect motivations for firing their employees. In union or civil service settings, in which employees are protected from firings that lack cause, arbitrators sometimes overturn such management decisions. In a case involving the City of Hollywood, Florida, for example, a man who had been employed as a police officer for ten years was terminated for wearing an “inappropriate” T-shirt to a sexual harassment training session that all the officers had been ordered to attend when the department lost a sex harassment suit.²⁰⁰ The grievant claimed that he did not know the purpose of the meeting beforehand, and wore a T-shirt bearing the words “Booby trap” in the front, and a picture of a bikini-clad woman on the back. During the training session, the instructor encouraged the participants to speak freely about what could be done to improve the department. The officer made negative comments about the Chief. The next day, he was fired.²⁰¹

The arbitrator overturned the discharge, finding that the reasons given were pretextual.²⁰² The rule requiring appropriate attire applied only when officers were on-duty: Officers had always been allowed to wear T-shirts, shorts, and zori to in-service training sessions without complaint. Nor did the T-shirt violate a rule requiring officers to show civility and respect to others, or deliberately flaunt the judges’ order in the harassment suit. No one had complained about the T-shirt, and no one was offended; the woman who conducted the training session hadn’t even noticed it. Instead, the Chief had seized upon the T-shirt incident as an excuse to fire the grievant for his outspoken criticisms of the Chief himself. “The result was an Internal Affairs report sustaining violations only to justify the Chief’s preordained decision to discipline,” concluded the arbitrator.²⁰³

comments of a very blunt sexual nature. It is quite possible for an openly gay man to sexually harass a woman.” *Id.* While Monks’s defense that he is gay is not dispositive—clearly, gay men can also have sexist motivations and can act on them to harass women—it is hard to believe that the coworker would feel sufficiently threatened by such a comment to justify the company’s swift and harsh reaction. *See also* Bill Roundy, *Man Alleges Firing for Orientation*, GFN.COM: THE GAY FINANCIAL NETWORK, May 3, 1999, at <http://www.gfn.com/archives/story.phtml?sid=1177> (reporting the allegations of a Fairfax, Virginia, man who claimed that he was fired after his company discovered his sexual orientation while conducting an investigation for sexual harassment, and who believed that the company took into account the fact that he was gay and terminated his contract without ever determining whether the harassment claims were true).

199. For an example of a successful pretext claim related to sexual orientation, see *MA \$1.2M Discrimination Award*, PLANETOUT.COM, Jan. 6, 1997, at <http://www.planetout.com/pno/news/article.html?1997/01/06/3> (reporting that a jury awarded \$1.2 million to a hospital housekeeping manager after finding that a sexual harassment claim was used as a pretext to terminate him because he was perceived to be gay).

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

201. *Id.* at 89-90.

202. *Id.* at 92.

203. *Id.* at 93.

In another case involving the Monterey, California, Office of Education, an arbitrator overturned the discharge of a man who had worked for the school district for twenty-three years, and was transferred to the district's Head Start program to work as a financial secretary late in his career.²⁰⁴ The man's troubles began when the program hired a new director, Ricardo Tellez, who treated him shoddily. Although he was supposed to give every employee a performance evaluation once a year, for example, Tellez never did this for the grievant. Eventually, Tellez fired him, saying that he had violated the sexual harassment policy. On one occasion, the grievant had brought cookies to a female kitchen employee, Anita Colinga, blown kisses at her, and said, "Hi Sweetie."²⁰⁵ Although the lead cook had complained, Colinga said the grievant's behavior was not a problem. On another occasion, the grievant held up a copy of *Maxim* magazine to display the cover photo of a popular actress to a different female coworker. When she told him she felt uncomfortable with it, he put the magazine away, and, according to her own account, he never did anything like that again.²⁰⁶

In defense of firing the man, Tellez testified that his main "concerns were with the behavior of [the grievant] toward female employees and the frequent complaints of female employees. . . . [H]e [simply] could not allow female employees to be subjected to that kind of behavior."²⁰⁷ But the arbitrator found that, to the contrary, "there was nothing in the evidence record showing that *any* female employee filed a personal complaint regarding any inappropriate personal or verbal conduct towards them."²⁰⁸ In this case, aided by the testimony of two former Head Start coordinators who testified that the grievant was extremely competent and efficient at his job, and spoke of their "empath[y] with [Grievant] regarding the frustrations he was subjected to by Mr. Tellez in the performance of his duties,"²⁰⁹ the arbitrator saw through Tellez's false concern for the grievant having allegedly made female employees feel uncomfortable and rejected the sexual harassment allegation as pretextual.

Just as some companies use accusations of sexual harassment to cover up darker motives for firing employees, other firms seem to find that a charge of sexual harassment provides a more publicly acceptable explanation for firing an employee than allegations of poor performance. In *Moore v. Arthur Andersen*,²¹⁰ for example, a Texas appellate court affirmed

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

205. *Id.* at 914.

206. *Id.*

207. *Id.*

208. *Id.* (emphasis added).

209. *Id.* at 915.

210. *Moore v. Arthur Andersen*, L.L.P., No. 13-00-389-CV, 2001 Tex. App. LEXIS 5834 (Aug. 23, 2001).

a grant of summary judgment against an accountant, David (Barry) Moore, who was fired. His project manager, Laura Mawhinney, had written a memorandum to the file complaining that Moore flirted too much at work. "Throughout the week," she wrote, "I observed Barry engaged in multiple conversations with multiple female employees, sometimes lasting 20-30 minutes at a time."²¹¹ She admonished Moore for spending "too much time 'chatting' with multiple female client personnel at the client site," and "emphasized the importance of [his] maintaining professional relationships with client personnel."²¹² Shortly thereafter, Moore complained to Human Services that Mawhinney was directing antagonistic behavior toward him and alleged that she was creating a hostile work environment. Yet, no one investigated his complaint, or even read his detailed rebuttal of the charges in Mawhinney's memo. Instead, the Director of Human Resources, Scott Wilson, called Moore in to his office, said it "appears you are a flirt," and fired him for sexual harassment.²¹³

Although the accounting firm told the Texas Workforce Commission that Moore had been fired for sexual harassment, according to the court, Human Resource Director Wilson later said that Moore should have been fired for "unprofessional conduct."²¹⁴ As for substance, the firm's investigation into Moore's misconduct turned up only vague allegations that some of the women at the client site felt "uncomfortable" when Moore asked if they were dating anyone.²¹⁵

It is difficult to discern Arthur Andersen's true reasons for firing Moore. Perhaps the "sexual harassment" reason was real: The firm may have worried that the client company would dislike his behavior, or perhaps Mawhinney herself was offended by it. Yet, the company had already backed off from the sexual harassment explanation before trial. The record also suggests that Mawhinney may have been angry that Moore's extracurricular activities were taking time away from his work; she complained that he spent so much time flirting that she suspected him of working only six hours in an eight-hour day.²¹⁶ But if a concern for his productivity were the reason, why fire him for sex harassment (or even inappropriate conduct)? After all, in an employment-at-will state like Texas, Andersen could have fired Moore for not working hard enough, or, indeed, fired him for no reason at all. So, even if Mawhinney simply

211. *Id.* at *6.

212. *Id.* at *5.

213. *Id.* at *7.

214. *Id.*

215. *Id.* at *8.

216. *Id.* at *6.

wanted him fired because she didn't like him, why resort to his sexual conduct as a justification?²¹⁷

A clue to the company's motivation in stating that it fired Moore for sex harassment may be found in the court's easy acceptance of that rationale. Despite the fact that Moore's actions did not come close to constituting sexual harassment under Title VII, and that Andersen had distanced itself from the sexual harassment explanation before trial, the court had no trouble relying on it as a justification for Moore's firing: "Although Andersen chose to characterize the reason for Moore's termination as unprofessional conduct rather than sexual harassment, the nature of conduct for which it terminated Moore would, if sufficiently severe, constitute sexual harassment."²¹⁸ After all, said the court, Moore never denied that he had engaged in flirtatious conduct—conduct that "made women uncomfortable" and "w[as] inappropriate in a business setting."²¹⁹ Perhaps, even in employment-at-will settings, employers feel they have a need to protect their reputational capital: Better to be known as a firm that doesn't fire people unfairly. If so, it is one of the dubious triumphs of sexual harassment law that companies feel righteous about telling the world they have fired an employee for inappropriate sexual behavior, instead of relying on more business-like concerns about the employee's productivity.²²⁰

Whether management is using sexual harassment to cover up less benign motives, or is simply defining harassment so broadly that it provides justification for punishing almost any form of conduct with sexual content, the results are similar. In the name of protecting women, companies are firing or punishing employees for sexual transgressions even when no sex discrimination is involved. Although in some of the cases discussed above arbitrators overturned management's punishment, there is evidence that this

217. The evidence does not preclude a darker motivation. Mawhinney had put her criticisms of Moore in a memo to the file, and it was not clear that Andersen was going to do anything more than give Moore a warning until he went to human resources to complain about *her*. On this theory, Andersen may have used the accusation of sexual harassment to cover up a less benign, retaliatory motive for firing Moore. Whatever the real motive, it is clear that firms consider sexual harassment to be a more publicly acceptable justification for firing their employees.

218. *Moore*, 2001 Tex. App. LEXIS 5834, at *18.

219. *Id.* at *15.

220. In the HR literature, I came across articles warning companies not to overuse sexual harassment, which suggests that the HR experts fear that some employers may be tempted to do so (or are doing so already). "Make the punishment fit the crime," warned one article, which continued:

If your evidence shows that the alleged harasser was having an affair with his accuser, deal with him (and her) under the company anti-nepotism policy, but not under the sexual harassment policy. If your evidence shows him guilty of horseplay (nonsexual, of course) but not sexual harassment, discipline him for horseplay but not sexual harassment. In other words, don't use an atomic bomb to kill a gnat. If you do, the sheer injustice of it may make the employee want to sue you.

Rolnick, *supra* note 68, at 95.

is not the norm. In Franklin's systematic study of reported arbitration decisions concerning employees who were disciplined for sexual harassment, arbitrators reversed management's decisions only 13% of the time.²²¹ In 52% of the cases, arbitrators upheld the precise form of discipline management imposed, and in another 34% of the cases, some sort of penalty was imposed.²²² Furthermore, Franklin found that arbitrators have become increasingly likely to uphold the employer's choice of discipline in recent years.²²³ Although the type of harassment that was alleged mattered, arbitrators nonetheless upheld management's imposed discipline in 50% of the cases alleging only verbal harassment, and in 45% of the cases alleging such low-level conduct as gawking or staring.²²⁴ Indeed, she found that when arbitrators did reverse or reduce the punishment management imposed, they tended to do so by invoking traditional principles of progressive discipline or fairness; in only a handful (14 out of 225, or 6%) of cases did arbitrators rule that the alleged conduct did not amount to sexual harassment.²²⁵ It is striking that in the absence of managerial abuses, even arbitrators seem to accept the notion that companies may impose broad bans on sexual conduct that exceed Title VII's mandates.

Furthermore, most employees who are accused of sexual harassment do not have the benefit of arbitration. Although many union and government employees are covered by collective bargaining agreements or civil service provisions that protect them from arbitrary forms of discipline, most people have no such protection. When employees who are protected by just-cause provisions are being disciplined in such troubling circumstances, there is cause for even more concern about what is happening to the majority of American workers. Over time, it seems, sexual harassment law has taken on a life of its own, uprooted from the larger project of achieving gender equality that animates Title VII.

E. *Policing Sexual Relationships*

Sexual harassment law has also provided new momentum for policing consensual intimate relationships between employees. In the name of preventing harassment, employers are not simply prohibiting employees' sexual misconduct on the job: They are also policing employees' sexual relationships off the job. Not only has workplace flirting become suspect, so too has falling in love (and lust).

221. See Franklin, *supra* note 66, at 1565.

222. *Id.* at 1565 & n.225.

223. *Id.* at 1568.

224. *Id.*

225. *Id.* at 1567, 1569.

Although there are a number of reasons why companies might have concerns about workplace romance,²²⁶ a growing literature pinpoints fear of sexual harassment liability as the reason companies must take action. Recall the interview stances of consultants Laurie Jones (who advocated telling employees, “You don’t date! There’s a million other people out there!”),²²⁷ Holly Culhane (who argued that “any type of dating relationship is a potential sexual harassment situation”),²²⁸ and Craig Pratt (whose model handbook strongly discourages even fully consensual employee relationships).²²⁹ The “how-to-avoid-liability” literature generally confirms the view that employee relationships are dangerous—even explosive—because they can land companies in trouble for sexual harassment. “[O]ffice romances . . . [may] lead to sexual harassment, which is illegal and for which employers can be held liable to the tune of millions of dollars in legal fees, settlements, and penalties—enough to cripple or bankrupt most companies,”²³⁰ warned one business journal. Another HR specialist agreed:

[A] company without definitive strategies for intracompany romances is one waiting to support an army of lawyers.

There is a temptation to think that consensual relationships are not harmful, that the only situations to be wary of are those of the chauvinistic, loathsome, stalking harassment kind.

. . . But the former, those workplace romantic liaisons, are by far more frequent and can turn just as nasty.²³¹

Even some scholars have joined the bandwagon. Charles Pierce and Herman Aguinis, two organizational psychologists who have written widely on the subject, encourage researchers to stop treating sexual harassment and workplace romance as unrelated issues.²³² In this new view, workplace romance—defined as a “mutually desired romantic relationships between two people at work in which some element of sexuality or physical

226. Organizational psychologists have discussed the potential effects on job productivity, worker morale, worker motivation, job satisfaction, job involvement, and management decisionmaking, for example. See, e.g., Charles A. Pierce et al., *Attraction in Organizations: A Model of Workplace Romance*, 17 J. ORG. BEHAV. 5, 18-26 (1996). There is no consensus that workplace romance or other forms of workplace sexual interaction have more negative than positive effects. See *infra* notes 476-482 and accompanying text.

227. *Supra* note 118 and accompanying text.

228. *Supra* note 126 and accompanying text.

229. *Supra* note 138 and accompanying text.

230. Piantek, *supra* note 78.

231. John Farr, *Dangerous Liaisons*, CHAIN STORE AGE, Feb. 1998, at 35, 36.

232. Charles A. Pierce & Herman Aguinis, *Bridging the Gap Between Romantic Relationships and Sexual Harassment in Organizations*, 18 J. ORG. BEHAV. 197 (1997).

intimacy exists”²³³—must be carefully managed in order to stave off costly harassment suits.

In the eyes of most HR experts, relationships between supervisors and subordinates—or other employees who occupy “power-differentiated” work roles²³⁴—place employers most at risk for harassment claims. “A supervisor risks more than quid pro quo sexual harassment allegations when dating (or attempting to date) a subordinate,” experts advise.²³⁵ “The supervisor also runs the risk of discrimination and harassment complaints from other employees who are aware of or affected by the relationship. The other employees may allege that the subordinate who is dating the boss receives favored treatment, promotions, or other work-related perks.”²³⁶ “The overriding, No. 1 problem is the perception of other employees of favoritism,” which can lead to charges of hostile work environment, according to a California-based employee-relations consultant.²³⁷ Even if no favoritism is present, other employees may perceive a boss-employee relationship as a subtle form or indication of sexual harassment that makes them uncomfortable.²³⁸ “Sexual relationships with subordinates can be career suicide for supervisors,” agrees Paul Siegel of the national labor and employment law firm of Jackson Lewis LLP. “Both the object of the supervisor’s affections and disgruntled coworkers may have claims.”²³⁹

If the relationship “goes south,” the experts warn, even more problems can arise. According to organizational psychologists, dissolved hierarchical relationships often lead to sexual harassment claims because the negative feelings that people who break up often have for each other are intensified when they are forced into frequent contact with each other. “I can’t tell you how many cases we get daily that [stem from soured supervisor-subordinate romances],” said a senior partner at Littler Mendelson, P.C., the nation’s largest labor- and employment-law defense firm.²⁴⁰ In the wake of such

233. Sharon Foley & Gary N. Powell, *Not All Is Fair in Love and Work: Coworkers’ Preferences for and Responses to Managerial Interventions Regarding Workplace Romances*, 20 J. ORG. BEHAV. 1043, 1043 (1999); see also Robert J. Paul & James B. Townsend, *Managing the Workplace Romance: Protecting Employee and Employer Rights*, 19 REV. BUS. 25, 25 (1998) (defining workplace romance as “relationships between people working together which are characterized by sexual attraction”); Pierce & Aguinis, *supra* note 232, at 197 (adopting a similar definition); Robert E. Quinn, *Coping with Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations*, in *SEXUALITY IN ORGANIZATIONS* 38, 38 (D.A. Neugarten & J.M. Shafritz eds., 1980) (defining organizational romance as “a relationship between two members of the same organization that is perceived by a third party to be characterized by sexual attraction”).

234. See Kramer, *supra* note 78, at 79.

235. Piantek, *supra* note 78.

236. *Id.*

237. Judy Greenwald, *Office Romances May Court Trouble*, BUS. INS., Feb. 14, 2000, at 3, 4.

238. See Kramer, *supra* note 78, at 82.

239. Piantek, *supra* note 78.

240. James Lardner et al., *Cupid’s Cubicles: Office Romance Is Alive and Well. Despite a Barrage of Corporate Countermeasures*, U.S. NEWS & WORLD REP., Dec. 14, 1998, at 44, 47.

breakups, supervisors may be accused of quid pro quo sexual harassment—and more—as the following passage warns:

First, out of revenge, a subordinate might accuse his or her supervisor of sexual harassment if the supervisor terminates the romance, especially if the subordinate entered the romance because of a job-related motive such as seeking lighter workloads, a promotion or pay raise, an increase in power, or more vacation time. Second, if a subordinate terminates the romance against the supervisor's wishes, the supervisor may be bitter and attempt to rekindle the romance. The supervisor's coercive attempts to reunite the dyad may be undesired and, hence, considered sexually harassing. Third, a supervisor might try to manage the romantic dissolution by relocating or terminating the subordinate in order to avoid negative feelings from the disengagement. . . . [A] male supervisor's relocation or termination decision rendered in response to his romantic dissolution could be considered discrimination based on his female subordinate's gender, and such discrimination might be construed as harassment.²⁴¹

As a result of these fears, there is now widespread agreement among HR managers and management-side labor lawyers that supervisor-subordinate relationships should be prohibited or at least strongly discouraged. The experts cite feminist arguments about the power dynamics inherent in the male supervisor/female subordinate relationships,²⁴² and point to evidence that many employees disapprove of such unions.²⁴³ As two HR experts put it, "Nearly all employees and employers agree on one aspect of the organizational romance issue. They fervently disapprove of the dicey supervisor-subordinate romantic relationship."²⁴⁴

Many experts advise outright bans, called "no-fraternization policies," on romantic liaisons between employees in supervisor-subordinate relationships, even when they are fully consensual. A growing number of companies seem to be following their advice. Staples made headlines in 1997 when its policy prohibiting managers from having intimate relationships with subordinates led to the resignation of its president, Martin Hanaka, and the termination of his secretary, Cheryl Gordon. In 1991, Arthur Andersen reportedly declared in its Personnel Reference

241. Pierce & Aguinis, *supra* note 232, at 199. For confirmation that legal scholars perceive these same risks, see Kramer, *supra* note 78, at 86-97 (warning of sexual harassment complaints by "the jilted lover," "unwelcome (previously welcome) sexual advances by a supervisor," "third-party discrimination claims," and "other retaliation complaints").

242. See, e.g., 1 ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE* 12-13 (3d ed. 2000).

243. See Pierce & Aguinis, *supra* note 232, at 198; see also Kramer, *supra* note 78, at 82-83; Pierce et al., *supra* note 226, at 20.

244. Schaefer & Tudor, *supra* note 78, at 6.

Binder that "it is inappropriate . . . for someone with supervisory responsibility to 'date' an employee who is subject to that supervision," and stated that "appropriate disciplinary action [for] poor judgment in personal relationships" can include discharge.²⁴⁵ Intel also explicitly forbids managers from dating any employee they supervise and warns violators that they may face termination.²⁴⁶ IBM's sexual harassment policy states, "A manager may not date or have a romantic relationship with an employee who reports through his or her management chain, even when the relationship is voluntary and welcome."²⁴⁷ Wal-Mart's "Improper Work Place Conduct" policy forbids "[a] supervisor or salaried associate [from] becom[ing] romantically involved with someone s/he supervises, or someone whose terms and conditions of employment s/he may have the ability to influence."²⁴⁸ Even Apple Computer, located in the notoriously "loose" Silicon Valley, forbids direct-reporting or contractual relationships between employees "who have a significant personal relationship."²⁴⁹

The stricter no-fraternization policies require one or both employees to be terminated, while the "softer" ones require only that one participant be reassigned when they become involved.²⁵⁰ This softer approach to no-fraternization coincides with what some experts call a "date-and-tell" strategy, in which the firm doesn't explicitly prohibit, but still strongly discourages and regulates, supervisor-subordinate relationships. Under this approach, employees who become involved with each other must disclose their relationship to management, who can then monitor the situation and transfer or discipline the lovers as necessary.

To ward off Title VII liability, experts advise companies to incorporate language discouraging fraternization directly into the company's sexual harassment policy:

Since sexual harassment litigation risk management primarily justifies an employer's fraternization policy, the policy should be directly incorporated as a component of any existing sexual harassment policy. . . . *A statement discouraging supervisor-subordinate romances, explained in terms of potential claims of unwelcome conduct when the relationship ends, will clearly articulate the employer's concerns and explicitly encourage employees to utilize the reporting mechanism, thus heading off claims before they arise. . . . [A]n employer that specifically*

245. Mark Muro, *Corporate Mergers*, BOSTON GLOBE, Sept. 24, 1991, at 69.

246. William C. Symonds et al., *The Lewinsky Effect: Business Takes a Closer Look at Executive Affairs*, BUS. WK., Feb. 16, 1998, at 30, 31.

247. Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 63-64 n.105 (1997).

248. *Id.*

249. Ellen Rapp, *Dangerous Liaisons*, WORKING WOMAN, Feb. 1992, at 56, 61.

250. Schaefer & Tudor, *supra* note 78, at 6.

*discusses and discourages power-differentiated relationships in its sexual harassment policy will be more successful in its argument that it adequately discharged its duty to prevent [harassment].*²⁵¹

Even though most experts believe supervisor-subordinate relationships present the greatest risk, others warn against even romances between peers. According to Jim Kuns, a consultant with a Los Angeles-based HR organization, "There's a presumption that sexual harassment will arise out of these [peer] relationships if permitted by the employer, and that's not an unfounded presumption When relationships go sour, people's emotions take over and they start to do things."²⁵² Another consultant, Ethan Winning, cited an incident involving one of his clients in which a woman began to stalk her ex-boyfriend and coworker, lingering outside his apartment in the early morning hours. The ex-boyfriend obtained a restraining order against the woman, but when the employer was unwilling to fire her, he sued the company and eventually walked away with a \$500,000 settlement.²⁵³

In the face of these perceived threats, and the knowledge that workplace romance is very common,²⁵⁴ some HR consultants and lawyers

251. Kramer, *supra* note 78, at 121-22 (emphasis added); *see also* Farr, *supra* note 231, at 36 (advising corporations to discourage supervisor/subordinate relationships).

252. Greenwald, *supra* note 237, at 4.

253. *Id.*

254. Most studies suggest that between 24% and 37% of all employees have participated in an office romance at some time. *See, e.g.,* SOC'Y FOR HUMAN RES. MGMT., WORKPLACE ROMANCE SURVEY 12 (2001) (finding that 37% of 645 respondents reported that they have been involved in a workplace romance); Claire J. Anderson & Caroline Fisher, *Male-Female Relationships in the Workplace: Perceived Motivations in Office Romance*, 25 SEX ROLES 163, 171 (1991) (indicating that 30% of 168 employees admitted to involvement in an "intimate affair" at some time with someone at the same firm); Am. Mgmt. Ass'n, Office Romance: Summary of Findings (1994) (on file with author) (finding that 24% of 485 respondents had a "romantic relationship with an office colleague"). One study places the figure much higher. In a 1998 Internet survey of nearly 7000 subscribers of America Online, called "Love@Work," 71% of the respondents said they had dated someone at work, and 50% of the managers said they had dated a subordinate. *See* Charlene Marmer Solomon, *The Secret's out*, WORKFORCE, July 1998, at 42, 44. Perhaps not surprisingly, survey results suggest that office romances occur more frequently among younger employees. In an American Management Association study, 38% of those under 35 reported at least one romance with a peer or a subordinate, compared to only 22% of those 35 or older. *See* Carol Hymowitz & Ellen Joan Pollock, *Corporate Affairs: The One Clear Line in Interoffice Romance Has Become Blurred*, WALL ST. J., Feb. 4, 1998, at A1. Of course, even many employees who have not actually participated in a workplace romance have observed them. Studies report that as many as 80% of American employees have observed some type of romantic relationship at their workplace. *See* Schaefer & Tudor, *supra* note 78, at 4; Carolyn I. Anderson & Phillip L. Hunsaker, *Why There's Romancing at the Office and Why It's Everybody's Problem*, PERSONNEL, Feb. 1985, at 57, 59 (reporting that among a small sample of white-collar employees with a mean age of 30, 86% had been exposed to one or more organizational romances); *see also* J.P. Dillard & K.I. Miller, *Intimate Relationships in Task Environments*, in HANDBOOK OF PERSONAL RELATIONSHIPS 449, 453 (S.W. Duck ed., 1988) (reporting that 71% of respondents in combined samples of five prior studies had observed at least one romantic relationship at work, and 31% of respondents in combined samples of three prior studies had themselves been involved in such a relationship).

now advise companies to take steps to manage *all* their employees' relationships, including ones between coworkers who do not have decisionmaking power over each other. Because the threat of incurring sexual harassment liability is perceived to be weaker and the risk of incurring countervailing liability to the employee if they're punished is perceived to be stronger in the context of these coworker relationships,²⁵⁵ and because traditional feminist arguments about male/female sexual power dynamics do not resonate as strongly,²⁵⁶ most HR managers lean against imposing on coworkers the express bans on "fraternization" that they recommend for supervisors and subordinates.²⁵⁷

For these horizontal relationships, most experts advise the softer date-and-tell approach, which, while not as stringent as an outright ban, still invites management to involve itself heavy-handedly in the affairs of company employees:

"If I hear rumors of a romance, I'll call up a line manager who's involved in the romance and ask him if it's true, and if it is, I'll take him, his manager and the employee and talk to them," says C. Anthony Ladt, the vice president for human resources of a large leasing company based in Louisiana. "I'll tell them we want to make sure that all parties understand it's consensual. . . . And I'll say we frown on it."²⁵⁸

Behind even this velvet-glove approach lies a powerful punch. Although some employers have devised innovative penalties for employees who fail

255. See Kramer, *supra* note 78, at 97 (arguing that "a narrowly-tailored employer policy, addressing only the problem of supervisor-subordinate romances, will normally withstand judicial scrutiny under almost every common-law, statutory, and constitutional attack"); Douglas Massengill & Donald J. Petersen, *Legal Challenges to No Fraternization Rules*, 46 LAB. L.J. 429, 435 (1995) (concluding that "employers have essentially free rein to impose prohibitions against fraternization between employees even when those employees are away from the workplace"). For a different analysis, which argues that courts are more likely to reject employees' claims for protection when their intimate relationships are "seen as a reflection of the moral degradation of the fiber of society," as opposed to those who are "living a conventional, or 'family values' lifestyle," see Dworkin, *supra* note 247, at 48-49.

256. See, e.g., Kathleen M. Hallinan, *Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability*, 26 COLUM. J.L. & SOC. PROBS. 435, 463 (1993). Although Hallinan cites Susan Estrich's work to argue in favor of banning sexual relationships between supervisors and subordinates, she rejects such an approach to coworker relationships, arguing that employees' privacy interests in dating outweigh employers' interest in preventing workplace inequality.

257. For example, see the conclusion of a Los Angeles attorney, based upon her review of legal pressures favoring and cutting against no-fraternization rules. Nicole C. Rivas, *Love Contracts*, NAT'L L.J., Feb. 7, 2000, at B6 ("Generally, policies that prohibit intra-office dating entirely are unrealistic and difficult to enforce. More practical is to prohibit dating between management and non-management personnel and to discourage, but not completely prohibit, romantic relationships between coworkers.").

258. Philip Weiss, *Don't Even Think About It. (The Cupid Cops Are Watching.)*, N.Y. TIMES, May 3, 1998, § 6 (Magazine), at 43, 45.

to register their relationships,²⁵⁹ many firms resort to discipline to provide the proper incentive. For example, one large Texas energy firm fired two employees for engaging in undisclosed relationships—prompting a dozen more supervisor-subordinate couples to come forward with word of their sex lives to avoid being discharged.²⁶⁰

In addition to policies that prohibit or discourage dating, many lawyers now recommend the use of a “love contract”—a legal form invented when the general counsel for a major company contacted the Littler Mendelson firm to say that the company president was planning to have an affair with one of his employees, but before he did so, he wanted a written agreement stating that the affair was voluntary to reduce the likelihood that the woman would file a sexual harassment suit if the couple later broke up.²⁶¹ Companies around the country now ask or require top managers to send letters to their lovers with language like the following:

I very much value our relationship and I certainly view it as voluntary, consensual, and welcome. And I have always felt that you feel the same. However, I know that sometimes an individual may feel compelled to engage in or continue a relationship against their will out of concern that it may affect the job or working relationships.

It is very important to me that our relationship be on an equal footing and that you be fully comfortable that our relationship is at all times voluntary and welcome. I want to assure you that under no circumstances will I allow our relationship or, should it happen, the end of our relationship, to impact on your job or our working relationship.²⁶²

The letter is intended to be accompanied by a copy of the firm’s sexual harassment policy, and ends with a signature block for the recipient, under a paragraph that reads:

I have read this letter and the accompanying sexual harassment policy and I understand and agree with what is stated in both this letter and the sexual harassment policy. My relationship with (name) has been (and is) voluntary, consensual and welcome. I also

259. Kramer, *supra* note 78, at 135-36 (reporting that some companies threaten that they will not pay for the defense of any sexual harassment claim arising out of unreported relationships).

260. Lardner et al., *supra* note 240, at 47.

261. Symonds et al., *supra* note 246, at 30.

262. Kramer, *supra* note 78, at 140.

understand that I am free to end this relationship at any time and, in doing so, it will not adversely impact on my job.²⁶³

Love contracts aren't written only for executives and their underlings: They can be written for coworker couples, too. "To prevent harassment, some employers prohibit employees from dating, or entering into consensual social relationships with employees," reads one policy recommended by a management-side, labor-and-employment law firm in southern California, which then continues:

The XYZ Company does not feel that such extreme measures are necessary, so long as other parties mutually and voluntarily consent to the social relationship, and the social relationship does not affect the performance of their duties or negatively impact the Company's business.

To ensure that social relationships do not violate the sexual harassment policy, employees who enter into such relationships must comply with the following:

- Notify the Human Resource Director of the Relationship;
- Review the Company's Policy prohibiting Sexual Harassment;
- Sign the Company's Consensual Relationship Contract;
- Agree to possible reassignment if the social relationship involves a subordinate employee;
- Avoid indiscreet behavior while at the workplace; and
- Notify the Human Resource [Director] should the social relationship terminate.²⁶⁴

263. *Id.* Kramer notes that this letter is "obviously somewhat informal," and suggests that companies consider "some additional important ingredients," such as:

(a) a statement that the subordinate is in no way obligated to accept the agreement, i.e., signature is not required, but signifies the absence of any coercion, duress, fraud, or improper inducement; (b) an expression advising and indicating an opportunity to consult with counsel before signing; (c) provisions for express revocation of the agreement, including a requirement for immediate notification of management and other procedures; (d) the superior's *permanent* relinquishment of any decision-making authority over the subordinate . . . ; (e) an agreement to refrain from engaging in any sexual or amorous conduct in the workplace or other places when on official business; and (f) the subordinate's waiver of rights to pursue a claim of sexual harassment or other legal action against the employer based on any and all events up to the date of the agreement, but not waiving any prospective rights or claims.

Id. at 140-41 (citations omitted).

264. HRZone, Office Romance . . . Is the Company Helpless? Three Tools That Will Help (1998), at http://www.hrzone.com/articles/office_romance.html (quoting a policy provided by Gutierrez, Preciado & House, LLP).

For those who question the validity of love contracts²⁶⁵ or see them as “overkill,”²⁶⁶ HR professionals have devised another, “perhaps less restrictive” approach of monitoring all their employees’ personal communications.²⁶⁷ Under this strategy,

companies . . . introduce e-mail and voice mail policies under which all employees sign waivers that clearly say employers are entitled to access these communications This way, employers may be able to catch any problems that develop in their beginning stages “and nip that type of harassment in the bud” as well as limit damages stemming from potential sexual harassment claims²⁶⁸

Whether corporations require employees to curtail their sexual relationships altogether, to reveal them to management and subject themselves to invasive forms of managerial intervention, or to risk having their personal behavior and communications monitored on an ongoing basis, these are far-reaching strategies that will profoundly affect the individual behaviors and personalities—and the collective psyche—of American workers. Indeed, that is precisely the effect they are intended to have. In addition to monitoring one’s e-mail and other personal communications for any hint of sexual content or romantic intent, employees are now being advised to take the following precautions:

1. Watch what you say. Sexual or suggestive comments should be avoided.
2. Remember that women and men interpret remarks differently.
3. Watch your body language. Be aware of the signals you send and how they may be interpreted. Terminate sexual vibes immediately.
4. Keep intensity in check. Workers who cooperate in team activities share an intimacy, and people may get different types of intimacy confused.

265. Some lawyers are skeptical of the legal validity of love contracts, questioning whether courts will uphold a waiver of liability for future claims of sexual harassment. *See, e.g., Terms of Engagement: Love Contracts*, TRAINING, Aug. 1999, at 19; Let’s Do the Love Contract? (2000), at <http://www.hrhero.com/topics/harassment/romance-harassment.shtml>.

266. Greenwald, *supra* note 237, at 4 (quoting Joseph Gibbons, Senior Consultant, Towers Perrin, New York, NY). Some experts doubt the practical wisdom of such contracts, seeing them as a form of legal overregulation that risks destroying employee morale. *See, e.g.,* Stuart Silverstein, *Employers Use Consent Form To Regulate Office Romances: Date-and-Tell Rules May Limit Liability if an Office Fling Triggers Lawsuit*, MINNEAPOLIS STAR TRIB., Sept. 28, 1998, at D6. Others disagree, urging cheerfully that “employees who wish to continue their romantic relationship and retain their current position might be delighted to sign this document. The employer has offered a solution to their dilemma, so job satisfaction and morale increase.” Schaefer & Tudor, *supra* note 78, at 7.

267. Greenwald, *supra* note 237, at 4.

268. *Id.* (quoting Peter Foster, Senior Vice-President, Marsh, Inc., Boston, Mass.).

5. Know the risks involved. An office romance can ruin a career, cost a job and wreck a marriage.
6. Do not cross the line. The standard the courts use is whether a reasonable person would consider the behavior abusive or hostile.²⁶⁹

Although there has been too little research examining the extent to which companies have actually adopted policies to regulate employee dating, there is evidence that the phenomenon is fairly widespread. The available research suggests that between 22% and 39% of companies have written or verbal policies or clear organizational norms on workplace romance, and that the overwhelming majority of these companies prohibit or discourage such romance.²⁷⁰ The data also suggest that employees are sensing a company disapproval of workplace relationships that goes beyond what is expressed in organizational policies. In the 2001 SHRM survey, 21% of employees said their organizations ban workplace romance, while only 8% of HR professionals report that their employers do so.²⁷¹ Similarly, almost half of all employees (49%) said workplace romance “should be hidden by the parties involved,” while only a third (35%) of HR professionals said so.²⁷² The data also show that the consequences for engaging in workplace romance can be severe: Among HR professionals who were asked what would happen to employees who disregarded workplace romance policies, 35% said they would be terminated, 13% cited suspension, 7% cited demotion, 32% cited formal reprimand, 55% cited an internal transfer, and 30% said the employees would be sent to counseling. It is telling that only 22% said there would be no consequences whatsoever.²⁷³

269. Paul & Townsend, *supra* note 233, at 7.

270. The most widely cited estimates come from the Society for Human Resource Management’s 2001 survey. Among the 558 human resource managers who responded, 22% said their organizations had policies on workplace romance (15% had a written policy, 5% had a verbal policy, and 2% were in the process of drafting them). SOC’Y FOR HUMAN RES. MGMT., *supra* note 254, at 2, 4 chart 1. These professionals reported that, among companies with policies, 64% discouraged workplace romances and another 8% prohibited them altogether. *Id.* at 4. These figures are similar to the results of the Society’s 1998 survey, in which, of the 617 human resource professionals surveyed, 27% said their organizations had policies on workplace romance (13% had a written policy, while 14% had clear unwritten understandings). SOC’Y FOR HUMAN RES. MGMT., WORKPLACE ROMANCE SURVEY 3 (1998). In the 1998 survey, the share of company policies that HR professionals said discouraged or prohibited romance was lower: 55% discouraged workplace romances while another 7% prohibited them, for a total of 62%, *id.*, compared to the 72% figure the professionals reported in the 2001 survey. In another widely cited study of 175 white-collar employees, employees reported that 39% of their organizations had policies or understandings about employee relationships—with the overwhelming majority (82%) of those 39% banning or discouraging them. Anderson & Hunsaker, *supra* note 254, at 59, 61.

271. SOC’Y FOR HUMAN RES. MGMT., *supra* note 254, at 4.

272. *Id.* at 3 tbl.1.

273. *Id.* at 7.

Anecdotal evidence suggests, and the available quantitative data seem to confirm, that the number of companies with formal written policies has risen in the last decade.²⁷⁴ In addition, the SHRM surveys show that, between 1998 and 2001, training for HR professionals on how to manage workplace romance increased by ten percent.²⁷⁵ HR professionals believe that the numbers remain too low, arguing that “[a]ll too frequently, organizations have tried to ignore the office romance, despite evidence of a potentially substantial negative impact.”²⁷⁶ They strongly advocate that companies adopt express written policies to manage workplace romance. As one legal commentator put it:

[I]n the last several years, a growing number of organizations, including large corporations, public employers, and even law firms, have adopted express written policies concerning office romance, especially between supervisors and those employees whom they supervise. *An emerging consensus among business academics, labor and employment law attorneys, human resource management specialists, training consultants, and other personnel professionals encourages and recommends these policies.*²⁷⁷

Moreover, the potential for claims of sexual harassment is the primary reason that HR professionals cite for banning or discouraging workplace romance.²⁷⁸

Although it may still be a minority of companies that ban workplace romance, it is clear that the momentum lies in this direction. In today’s legal and cultural climate, “[m]odern lovers have to be documented. Modern lovers have to have their job assignments separated. Modern lovers have to visit what one human resource manager referred to, with only a

274. Both a 1987 study, see Andrea Warfield et al., *Co-Worker Romances: Impact on the Work Group and on Career-Oriented Women*, PERSONNEL, May 1987, at 22, 28, and a 1994 study, see Am. Mgmt. Ass’n, *supra* note 254, indicated that only 6% of companies surveyed had formal written policies on employee dating. More recent surveys put the number higher, see SOC’Y FOR HUMAN RES. MGMT., *supra* note 270, at 3 (finding that 13% of workplaces surveyed in 1998 had formal written policies on employee dating), and suggest that it may be rising, see SOC’Y FOR HUMAN RES. MGMT., *supra* note 254, at 4 (finding that 15% of workplaces surveyed in 2001 had formal written policies on employee dating).

275. SOC’Y FOR HUMAN RES. MGMT., *supra* note 254, at 9 (reporting that, in 2001, 22% of HR professionals reported that their organizations conducted training, while in 1998, only 12% did so).

276. Anderson & Hunsaker, *supra* note 254, at 63; see also Kramer, *supra* note 78, at 78; Brett Chase, *Risk Management: Dating Subordinates Is Widely Prohibited*, AM. BANKER, June 17, 1997, at 5.

277. Kramer, *supra* note 78, at 78 (emphasis added).

278. In the 2001 SHRM survey, 95% of HR professionals cited a “[p]otential for claims of sexual harassment” as a reason to ban or discourage workplace romances. In comparison, the second most widely cited rationale, “concerns about lowered productivity by those involved in the romance,” was cited by only 46% of HR professionals. SOC’Y FOR HUMAN RES. MGMT., *supra* note 254, at 5.

little irony, as the Cupid Cops.²⁷⁹ Many companies are coming down especially hard on what are called “power-differentiated” relationships, just at the time when in many workplaces, hierarchies have become flatter and more fluid, “where today’s boss may be next month’s co-worker, or vice versa.”²⁸⁰

Years ago, as we have seen, feminists called for such regulatory measures, arguing that the only way to allow women “to work on an equal basis with men”²⁸¹ was to cleanse the workplace of sexual interactions. In the name of eliminating sexual harassment, “frightened corporate boards have teamed up with feminists dedicated to sexual equality and human resource managers dedicated to harmonious office life to regulate these affairs. As never before, your business is their business, for 40, 50, 60 or more hours a week.”²⁸² As one business commentator put it: “While the purpose of . . . Title VII is to level the playing field and make sure that women have equal access to a chance for success, the effect [of sexual harassment law] has been to control significantly the visual, conversational, and associational behaviors of employees.”²⁸³

F. *Disregarding Discrimination*

Underneath this avalanche of no-dating policies and love contracts, zero-tolerance policies, self-policing, and discipline for conduct with sexual overtones, the most fundamental goal of employment discrimination law has been lost. Title VII should not be used to police sexuality; it was meant to guarantee women and men equal work roles. The drive to eliminate sexuality from the workplace has detracted from this important goal—and may even encourage organizations to act in ways that undermine genuine workplace equality.

At the level of the individual complaint, companies do not attempt to determine whether the alleged sexual harassment was linked to sex discrimination. They simply *assume* that any sexual conduct covered by their policies is discriminatory or harmful. Yet, in many of the cases in which men have been fired or disciplined for violating sexual harassment policies, the women who were the alleged targets of the harassment did not even object (or voiced only vague objections) to the conduct for which the offenders were punished. In the Monterey County arbitration, for instance, the female kitchen helper to whom the suspended financial officer brought cookies and blew kisses testified emphatically that his behavior was “not a

279. Weiss, *supra* note 258, at 45.

280. *Id.*

281. Mead, *supra* note 43, at 31.

282. Weiss, *supra* note 258, at 45.

283. Dworkin, *supra* note 247, at 63.

problem"; it was others who were allegedly offended by his actions.²⁸⁴ In the case involving Arthur Andersen, it was the woman who supervised the flirtatious accountant—rather than the women he attempted to woo—who seemed most uncomfortable with his conduct.²⁸⁵ Similarly, in *American Mail-Well Envelope*, the leadman was suspended because he failed to discipline some men for viewing a sexually explicit magazine, despite the fact that no women were even exposed to it.²⁸⁶ In these and other cases, companies simply equated sexual content with sex discrimination—without bothering even to inquire into whether the offending conduct was intended or used to exclude women or otherwise interfere with their work opportunities on the basis of their sex.

At the organizational level, sexual harassment policies have taken on a life of their own, divorced from the larger goal of dismantling sex discrimination.²⁸⁷ As I have emphasized above and discuss more fully below,²⁸⁸ sex harassment is integrally linked to such sex segregation in employment. Sex segregation structures work environments in which harassment flourishes because numerical dominance encourages male job incumbents to associate their work with masculinity and to police their jobs by treating women and gender-nonconforming men as "different" and out of place. By the same token, sex harassment preserves segregation by driving away or denigrating the newcomers who would integrate the job.²⁸⁹ As a tool of segregation, sex harassment assumes many forms—not all of which can be easily or even best characterized as "sexual" in content or design.²⁹⁰

Despite this linkage between sex harassment and sex segregation, few companies are taking steps to incorporate their sex harassment policies into more comprehensive plans to integrate women equally into all levels of the organization. Indeed, most experts do not even see harassment as a problem that might be alleviated by taking steps to achieve gender integration. Among consultants, the typical approach is represented by Beverly R. Davis, a consultant in San Diego, who regards sex harassment as unrelated to the larger structural forms of discrimination that result in segregation. When asked if she advises clients about how to prevent such forms of discrimination (in hiring, promotion, assignment, training, evaluation, pay, and the like), she replied, "Every company should have an EEOC policy. Just a short one-pager."²⁹¹ In response to a follow-up question about

284. See *supra* note 204 and accompanying text.

285. See *supra* note 210 and accompanying text.

286. See *supra* note 180 and accompanying text.

287. See *supra* note 20.

288. See *infra* notes 317-329 and accompanying text.

289. See Schultz, *supra* note 5, at 1755-68.

290. See *id.* at 1762-74.

291. Davis Interview, *supra* note 113.

whether she advises companies about how to implement valid affirmative action programs or otherwise achieve diversity in their workplaces, she stated, "I haven't gotten into that."²⁹² Not surprisingly, her recommendations for how to prevent harassment do not include recommendations for how to prevent other forms of sex discrimination (such as discrimination in hiring, promotion, training, and evaluation). Indeed, when asked if she believes sex harassment is linked to any of these other structural forms of discrimination, she said, "No."²⁹³

Instead, like a number of other consultants interviewed, Davis saw harassment as a "power issue" that afflicts individual men. "It's usually a coworker, male against female thing. . . . [I]t's a way to pick on that employee," a way of saying, "I'm better than you, I have power over you."²⁹⁴ Davis did believe harassment was more prevalent in the manufacturing sector, even when the jobs were "woman-dominated," but she attributed this to the education level and "locker-room" mentality of the men who work there, rather than to the sex composition or sexist structure of manufacturing job settings.²⁹⁵ Indeed, when asked explicitly whether she thought the degree of sex segregation in the job or work setting makes any difference to the prevalence of harassment or the type of harassment that occurs, she said, "No."²⁹⁶ And, when asked whether her recommendations for how to prevent harassment ever vary with the sex composition of the job or work setting, she said, "No," they are "the same, always."²⁹⁷

Once harassment is attributed to the psychosexual proclivities of individual male workers or the external cultural insensitivities of the men as a group, rather than linked to larger organizational structures, it makes sense to deal with it through stand-alone policies that regulate sexual conduct through the threat (and reality) of employer discipline. Throughout America, as we have seen, companies seek to prevent harassment by prohibiting various forms of sexual conduct, conducting training sessions to "sensitize" supervisors and workers, and warning employees of the disciplinary consequences applied to those who fail to comply.²⁹⁸

292. *Id.*

293. *Id.*

294. *Id.*

295. This attribution of harassment in the manufacturing sector to the education level or mentality of the men who worked there may reflect an unconscious class bias. See, e.g., Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1201-04, 1209 (1990) (arguing that judicial decisions reflect an implicit assumption that working-class men are less civilized and more sexist); see also Christine L. Williams & Dana M. Britton, *Sexuality and Work*, in INTRODUCTION TO SOCIAL PROBLEMS 1, 13 (Craig Calhoun & George Ritzer eds., 1995) (discussing the role of sexual banter in the work cultures of working-class men).

296. Davis Interview, *supra* note 113.

297. *Id.*

298. See, e.g., Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE

Companies seek to remedy harassment by setting up machinery to process individual complaints and by undertaking investigations to identify and punish the harassers, one by one.

Thus, regardless of whether one adopts an individual-bad-actor, sexualized understanding of harassment or a group-based cultural difference approach, there is no need to inquire whether the harassment serves or is served by larger patterns of sex discrimination: The presence of sex in the workplace is simply deemed discriminatory. Indeed, to the extent that segregation comes into the picture at all, it is not seen as a potential *cause* of the harassment, but instead as a potential *solution*. If the presence of sex is the problem, then one way to deal with it is to separate “the sexes.” In the wake of sexual harassment at the army-training facility at Aberdeen, for example, an advisory committee appointed by the Secretary of Defense and headed by former senator Nancy Kassebaum Baker responded with a recommendation to sex-segregate basic training in the services.²⁹⁹ Ironically, the committee recommended this strategy as a substitute for another simplistic segregationist measure—the “no talk, no touch rule”—that Army trainers had seized upon in an effort to eliminate sexual misconduct among male-female recruits.³⁰⁰ At a more individual level, sociologists have shown that men sometimes use the fear of women falsely accusing them of sexual harassment as an excuse for excluding women altogether.³⁰¹

Although Title VII forbids employers subject to its command from using such segregationist strategies formally, there are signs that some employers may resort to them informally in an effort to stave off sexual harassment liability. In New Haven, Connecticut, for example, one construction company reportedly instructs its (all-male) employees to adhere to a “five-second rule,” which prohibits the men from even looking at a woman for more than the allotted time.³⁰² According to other sources,

ROCK L. REV. 147, 161-62 (2001) [hereinafter Bisom-Rapp, *Fixing Watches*] (observing that “sexual harassment training is more ubiquitous than ever,” and showing how the courts rely on it in assessing employer liability and as a strategy for remedying proven harassment); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3 nn.6-7 (2001) (citing a survey that shows that 55% of organizations provide employee training to help avoid litigation, and that consultants’ revenue from sexual harassment training is about \$10 billion a year); Dobbin & Kelly, *supra* note 58, at 2 (reporting that in a sample of 389 employers contacted in 1997, 95% had grievance procedures, and 70% had training programs).

299. REPORT OF THE FEDERAL ADVISORY COMMITTEE ON GENDER-INTEGRATED TRAINING AND RELATED ISSUES TO THE SECRETARY OF DEFENSE 5 (1997), at <http://www.defenselink.mil/pubs/git/report.html>.

300. *Id.* at 14.

301. See Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1177-78 (2000) (citing examples).

302. Conversation with Amy Cuneo, in Woodbridge, Conn. (Jan. 1998) (reporting on a policy of a construction firm at which her relative worked).

companies who send delegates to business conventions are now advised to place their male and female employees in rooms on different floors and to not allow staff meetings to take place in employees' hotel rooms.³⁰³ In addition, the human resources literature counsels supervisors that, in order to prevent accusations or even the appearance of sexual harassment, they should avoid meeting with their subordinates of a different sex alone behind closed doors.³⁰⁴ This last piece of advice is now so ubiquitous that it has become known as the "open door policy"—in an ironic twist on the old meaning of the term, which referred to a policy of allowing employees complete access to higher-ups.³⁰⁵

In the name of preventing sexual harassment, these segregationist policies turn Title VII on its head. If male supervisors cannot meet with their female subordinates in private settings, how will women ever gain access to the training and mentoring needed to succeed? If female workers cannot travel and do business with their male coworkers as equals, how will women ever become valued organizational players? If women can't be trained and treated equally for jobs requiring close proximity and trust, who will want to hire or promote them for those positions?

In a world in which companies fear the large damage awards and adverse publicity they associate with sexual harassment more than they fear liability for more traditional forms of discrimination, and in which managers have traditionally associated sexuality with disruption even in the absence of legal liability, it is not surprising that corporate America is

303. See, e.g., Walter Olson, *Who'd Be a Boss in the USA?*, INDEP. BUS. WKLY. (Auckland), Dec. 2, 1998, 1998 WL 28591743.

304. For example, the University of Illinois informs its instructors they can "help eliminate sexual harassment or an appearance of sexual harassment in several ways":

Strictly avoid personal relationships with any of your students. . . .

During student conferences, it is a good idea to leave the door open. Keep your office area free from pictures, cartoons and other artifacts with predominately sexual themes. Respect a student's personal space. Do not put your arm around a student or otherwise touch a student in a manner that might be considered even slightly offensive.

OFF. OF INSTRUCTIONAL RES., HANDBOOK FOR TEACHING ASSISTANTS AT THE UNIVERSITY OF ILLINOIS 13-14, at http://www.oir.uiuc.edu/Did/docs/pdf_files/handbook.pdf (last visited Mar. 20, 2003); see also Univ. Ombudsman, Sexual Harassment at Binghamton University: Definition, Policy, Response and Prevention: A Guide for Students, Faculty, and Staff at Binghamton University, at <http://ombudsman.binghamton.edu/sexualharassment.htm> (last visited Mar. 20, 2003). There are even signs that, in foreign settings, sexual harassment has been boiled down to this open-door policy. See, e.g., *Taken for a Ride*, AUTOMOTIVE NEWS INT'L, Aug. 1, 2000, LEXIS, Nexis Library, Magazine Stories, Combined File (reporting that, as part of the process of merging Daimler-Benz and Chrysler, "[t]he Germans took a course on the meaning of sexual harassment in the U.S. work environment," namely, "[a] German male should always keep the door open when meeting with an American female").

305. As a British female journalist complained in connection with the sex-segregated character of Washington officialdom, "Try inviting a married man for lunch or a drink, and as often as not he brings an 'alibi' in the shape of his secretary or his wife. What you may have heard about office doors being kept open during one-on-one male-female meetings is true." Mary Dejevsky, *In Foreign Parts: Man's Town, USA, Stirs the Bra-Burner in Me*, INDEPENDENT (London), July 28, 2001, at 16.

dealing with sexual harassment in ways that do not take into account (and may sometimes even intensify) larger patterns of sex discrimination and segregation on the job.³⁰⁶ But divorcing sexuality from the larger organizational context—including the gender context—is a mistake, as the next Part demonstrates.

IV. THE TROUBLE WITH THE TRADITIONAL VIEW

A. *Essentializing Sexuality*

In the current approach to sex harassment, as we have seen, companies adopt policies that describe and prohibit certain forms of sexual conduct, and threaten to punish those who fail to comply. Throughout the country, these policies look remarkably similar, regardless of the history, structure, or culture of the firm. Within each company, managers are encouraged to treat incidents of sexual conduct with disapproval, without regard to the context in which it occurs; only the subjective offense of the victim is to be taken into account. This approach to sexual harassment assumes that there is a stable body of “sexual” conduct that can be identified and proscribed in advance, regardless of the context, and that its presence in the workplace creates organizational disorder and gender disadvantage regardless of the larger structure and culture of the organization.³⁰⁷ Those assumptions are linked to a larger theoretical perspective about sexuality that many organizational theorists, mainstream feminists, and modern managers have all taken for granted—a perspective that recent theoretical and empirical research calls into question.

In classical organizational theory, sexuality is seen as an irrational force that disrupts the smooth functioning of the organization. In radical feminist thought, sexuality is defined as an eroticized desire to dominate women that subverts the achievement of gender equality. In modern organizational theory and practice, sexuality is depicted as an erotic attraction that can disrupt productivity, corrupt the professionalism of the workplace, and

306. Cf. Edelman et al., *supra* note 74 (documenting the parallel transition from a justice-oriented demand for affirmative action to a productivity-oriented emphasis on functional diversity within organizations).

307. It is not only legal feminists and managers who have taken this acontextual, individual-bad-actor, sexualized view of harassment: Many social scientists have also. Much of the empirical research on sexual harassment has been conducted from this perspective. See Schultz, *supra* note 5, at 1688 n.13 (listing sources); Christine L. Williams, *Sexual Harassment in Organizations: A Critique of Current Research and Policy*, 1 *SEXUALITY & CULTURE* 19 (1997). This is not surprising, since most of the research has been conducted by psychologists, who see individuals rather than organizations as the primary unit of analysis. From within sociology and organizational theory, a new literature is emerging that challenges this view. See generally Schultz, *supra* note 5 (urging attention to the larger organizational context in evaluating sexual conduct); Williams, *supra*, at 27-32 (same).

create costly liability. Yet, regardless of whether sexuality is perceived as leading to organizational disorder, gender disadvantage, or the disruption of productivity, all three theories assume that there is something called “the sexual” that preexists and can be separated from the organizations from which it is to be banished. It is this reified understanding of sexuality that enables feminists and managers to believe that sexual harassment—or even “sexual” conduct—can be pinned down and prohibited in advance, in a uniform way, across all organizational contexts. It is this essentialist understanding of sexuality as a preexisting “property” of individuals that allows managers to believe they can purge the workplace of sexuality by disciplining—or ultimately ejecting—the individual men or clusters of men who carry it with them in their hearts (and loins).

Even the libertarian critics of sexual harassment law subscribe to this essentialist view of sexuality. The difference is that they believe that we must carve out and protect a “private” realm in which individuals can be free to express their own individual sexuality. In this body of work, sexuality is treated as a private property of individuals that commands respect in the law. In the work of law professor Kingsley Browne, for example, the First Amendment stands as a shield for private sexual expression, even when it is expressed in the quintessentially public realm of the workplace.³⁰⁸ Similarly, law professor Mark Hager argues that antidiscrimination law should not be allowed to place blanket constraints on male employees’ sexuality; instead, abuses of individual women’s sexuality should be dealt with through private tort law.³⁰⁹ This perspective perhaps finds its most thoughtful expression in the work of legal scholar and commentator Jeffrey Rosen, who argues explicitly that sexuality is a private matter that individuals deserve to have shielded from public scrutiny;³¹⁰ from this perspective, he proposes privacy protections for both harassers and harassees whose sexual selves are exposed to the glaring scrutiny of what he calls the unwanted gaze.³¹¹

Today, among sophisticated theorists of sexuality, this essentialist view is largely discredited. Most adopt a Foucauldian view of sexuality, treating

308. See Browne, *supra* note 7, at 491-96; see also YOUNG, *supra* note 7, at 174 (“Life isn’t fair, but must the law be unfair as well, allowing the women who reject [an undesirable man] to make his attempts at courtship illegal?”).

309. Hager, *supra* note 66, at 376-77.

310. See ROSEN, *supra* note 7, at 11, 24.

311. See, e.g., *id.* at 115 (“In my view, . . . the indignity of hostile environment harassment can often be defined more precisely, as an invasion of privacy.”). Rosen also notes:

It is unfortunate, in a liberal society, that sexual expression without tangible employment consequences . . . must be monitored by employers and punished by the state. . . . [T]he courts could help to rebuild enclaves of privacy in public spaces for people to relax, to reveal different sides of themselves in different contexts, to misjudge each other—in short, to be human.

Id. at 127.

it as a socially constructed force that circulates complexly across and within human psyches and institutions, and operates as a resource that people simultaneously wield, and yield to, as a form of discipline.³¹² Building on such Foucauldian views, organizational sociologists have added a nuanced understanding of work and workplaces to develop a new understanding of *organizational sexuality*.³¹³ Scholarship in this new tradition insists that sexuality is not a static “something” that individuals bring with them into the workplace, but instead is better understood as a complexly created, constantly renegotiated process or “achievement” of organizational life.³¹⁴ At the simplest level, theorists caution, sexuality is not a biological essence that resides in an individual’s body, but is instead a relational phenomenon that is created within social networks. Since work is not simply a means of production, but also an intensely social activity, it is difficult to separate sexuality from work. Put simply, work can be sexy. Yet, at a more complex level, sexuality cannot even be understood to be embodied in a specific activity or set of practices, but is instead a “diverse and diffuse process” that managers and employees actively construct within the larger constraints of organizational structure.³¹⁵ To quote two leading organizational theorists, Gibson Burrell and Jeff Hearn, sexuality is “an ordinary and frequent public process rather than an extraordinary feature of private life.”³¹⁶

From this perspective it becomes clear that, contrary to the approach taken in most policies, sexual harassment cannot be understood as a list of specific “sexual” behaviors that can be defined and forbidden in advance, regardless of the circumstances. The meanings most employees attach to sexual behaviors in the workplace—indeed, even whether those behaviors are viewed as “sexual”—vary in systematic ways depending on the organizational context. Sexuality assumes form and meaning only in particular work cultures—cultures that help determine such things as

312. For the master source, see 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 103-07 (Robert Hurley trans., Vintage Books 1978) (1976). For others in this tradition, see, for example, MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 178-79 (1999); JEFFREY WEEKS, *SEXUALITY* 25 (1986); and Janet Halley, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catharine A. MacKinnon & Reva Siegel eds., forthcoming 2004).

313. For examples of work in this tradition, see SILVIA GHERARDI, *GENDER, SYMBOLISM AND ORGANIZATIONAL CULTURES* 57-66 (1995); JEFF HEARN & WENDY PARKIN, *SEX AT WORK: THE POWER AND PARADOX OF ORGANIZATION SEXUALITY* (1987); ROSEMARY PRINGLE, *SECRETARIES TALK* (1988); Burrell, *supra* note 17; Gibson Burrell & Jeff Hearn, *The Sexuality of Organization*, in *THE SEXUALITY OF ORGANIZATION* 1 (Jeff Hearn et al. eds., 1989); and Christine L. Williams et al., *Sexuality in the Workplace: Organizational Control, Sexual Harassment, and the Pursuit of Pleasure*, 25 *ANN. REV. SOC.* 73 (1999).

314. See, e.g., Linda Van Leuven, “I Need a Screw”: *Workplace Sexualization as an Interactional Achievement*, in *EVERYDAY INEQUALITIES: CRITICAL INQUIRIES* 73, 75 (Jodi O’Brien & Judith A. Howard eds., 1998).

315. See Burrell & Hearn, *supra* note 313, at 13.

316. *Id.*

whether people are outgoing or guarded with each other, or whether they relate to each other out of a spirit of competition or cooperation. Employees have some role in creating those cultures. Yet, work cultures are always shaped within the context of larger organizational structures—structures that determine such things as the way jobs are defined and organized, their pay and working conditions, the demographics of those who do the jobs, and the authority granted to those who supervise them. These structures are established largely by management. As a result, employees can help shape the existence and meaning of sexual conduct, but this process occurs in the context of larger structures not of their own choosing. In fact, employees often create sexualized work cultures to respond to some set of needs that are established by the nature of their work or the way it has been structured by management. Contrary to conventional understandings, then, the “sexual” does not always signify desire for an erotic liaison. Nor does the presence of sexuality necessarily signal sexism. Sometimes employees resort to sexuality to serve more banal (though equally important) purposes, such as creating solidarity, relieving stress, or enlivening a deadening job. To understand how sexuality operates in the workplace, we must bring larger work structures—including gender—back into view.

B. *Abstracting Sexuality from the Larger Organizational Context*

For purposes of understanding sex harassment, gender is a crucial component of the workplace structure that creates the cultures in which sexuality is formed and understood. It turns out that the very same sexual behaviors can be—and are—understood by employees very differently depending on whether they occur in a work setting in which women have significant responsibility and influence, or whether they occur in a less egalitarian setting. Thus, contrary to feminist orthodoxy and the new management line, sex in the workplace is not always experienced by women as discriminatory or disadvantageous. A lot depends on the extent to which women have been integrated into equal positions of responsibility and authority in the job and the firm.

By now, we know what is likely to happen when women have *not* been integrated into equal positions of responsibility and authority. Twenty-five years of social science research has documented the hostility and abuse that frequently await the first women to enter male-dominated domains.³¹⁷ In

317. A large body of research shows that women who work in male-dominated job settings are more likely than other women to report hostility and harassment at work. *See, e.g.*, U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT* 20 (1988); U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* 51-52 (1981); Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in*

these highly imbalanced settings, the dominant group closes ranks to protect its own resources and status by exaggerating its own commonality and stereotyping the newcomers as different and out of place.³¹⁸ Thus, in sex-segregated settings, it is foreseeable that some male workers will seek to shore up the masculine content and image of their jobs (and their own threatened sense of identity) by taking actions to drive women away or brand them as inferior.³¹⁹ In many (though not all) such job settings, the dominant men will resort to forms of harassment that are sexualized in content. They will create sexist work cultures in which they wield sexuality as a weapon to drive away or disenfranchise women and gender-nonconforming men.³²⁰

Organizations: A Test of an Integrated Model, 82 J. APPLIED PSYCHOL. 578, 584 (1997); Barbara A. Gutek & Bruce Morasch, *Sex Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOC. ISSUES 67-68 (1982); Susan Ehrlich Martin, *Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status*, in WOMEN: A FEMINIST PERSPECTIVE 22, 61 (Jo Freeman ed., 5th ed. 1995); Sandy Welsh, *Gender and Sexual Harassment*, 25 ANN. REV. SOC. 169, 178-80 (1999). Note that with the exception of Fitzgerald's, none of these studies attempts to capture nonsexual forms of sex-based harassment.

318. There is a voluminous social science literature showing the link between a group's numerical representation (or "token" status) in an occupation or job setting and the incidence of stereotyping, discrimination, and harassment that the group experiences from the dominant group. This research began with sociologist Rosabeth Moss Kanter's work theorizing the importance of skewed sex ratios in her classic book, *Men and Women of the Corporation*. See KANTER, *supra* note 13, at 206-42. Kanter hypothesized that, when a group is severely underrepresented in a job setting, "[t]he numerically dominant types also control the group and its culture in enough ways to be labeled 'dominants.' The few of another type in a skewed group can appropriately be called 'tokens,' for . . . they are often treated as representatives of their category, as symbols rather than individuals." *Id.* at 208.

Since Kanter's work, a large body of literature has confirmed the link between numerical scarcity and discriminatory treatment and explored its ramifications. For summaries of the literature, see Brief for Amicus Curiae American Psychological Association in Support of Respondent, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167) (summarizing psychological research and finding that women who work in settings in which they comprise less than fifteen percent of the population are more likely than others to experience sex discrimination, that the discrimination is more intense, and that such "women are likely to be penalized"); Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41, 43-48, 61-63 (2000) (reviewing literature testing Kanter's thesis and finding that it applies in elite law firms); Susan Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97, 103-10 (1995) (discussing how sex stereotyping operates in employment settings that are sex-segregated); and Welsh, *supra* note 317, at 179-80 (summarizing sociological literature). *But cf.* Janice D. Yoder, *Rethinking Tokenism: Looking Beyond Numbers*, 5 GENDER & SOC'Y 178, 180-83 (1991) (suggesting that this literature does not necessarily imply, in gender-neutral fashion, that men who occupy token status in female-dominated jobs will experience comparable levels of harassment and discrimination because asymmetrical incentives apply).

319. See Fiske & Glick, *supra* note 318, at 105 ("Successful performance by women in these jobs undermines . . . sources of male gender-related self-esteem. If a woman can do the job, the male sense of superiority is effectively punctured."); Schultz, *supra* note 5, at 1756-69 (providing a detailed analysis and numerous examples of this phenomenon).

320. See Quinn, *supra* note 301, at 1159 (finding that in a case study of how women respond to hostile work environment harassment, including sexual forms of humor, "the specific organizational context did not prove as salient to an understanding of the particular tactics analyzed as the gender composition of the workplace context"); Schultz, *supra* note 5, at 1766

Just as horizontal sex-segregation encourages the use of sexuality as a tool of hostility and exclusion in male-dominated settings, research suggests that vertical segregation—or the tendency of women to be concentrated in low-level positions that are supervised by men—may be especially salient in contributing to the use of sexuality against women in female-dominated jobs,³²¹ who also experience a great deal of harassment.³²² Whereas women in male-dominated jobs are viewed as being “out of place” in a man’s job, women in female-dominated jobs are viewed as having stepped out of their proper place as women if they refuse to comply with the stereotypically feminine behavior expected of those who hold their jobs.³²³ In such settings, male bosses sometimes subject women to demands for sexual favors³²⁴ and other non-job-related services (such as serving food and cleaning up), to demeaning and abusive comments linked to their womanhood, and to paternalistic forms of control and authority that

(discussing the use of sexual overtures, sexual taunting, and mockery as forms of harassment that are used to mark women as different and less competent); see also Nancy DiTomaso, *Sexuality in the Workplace: Discrimination and Harassment*, in *THE SEXUALITY OF ORGANIZATION*, *supra* note 313, at 71, 89 (speculating that many men may resort to nonconforming sexuality as a means of harassment because, for women, in our culture, sexuality is supposed to remain a private matter, so by calling attention to a woman’s sexuality or threatening to make it public, men can powerfully restrain women’s ability to fight back).

For a vivid example of how sexuality can be used to denigrate and drive away women who work in a male-dominated field, see *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); and *infra* text accompanying notes 372-377 (discussing *Robinson*). For another example, 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). Judge Sifton’s opinion describes in detail how the female plaintiffs, recently admitted to the Fire Department after a discrimination lawsuit, “were subjected . . . to extensive sexual abuse in the form of unimpeded hazing.” *Id.* Judge Sifton recognized that these acts of sexual assault and ridicule were part of a larger campaign of hostility and discrimination designed to negatively affect the women’s training and evaluation, stemming from the men’s desire to preserve firefighting as an all-male preserve. *Id.*

321. See, e.g., MACKINNON, *supra* note 39, at 9 (observing that “[v]ertical stratification means that women tend to be in low-ranking positions, dependent upon the approval and good will of male superordinates for hiring, retention and advancement” and that “[b]eing at the mercy of male supervisors adds direct economic clout to male sexual demands”); Peggy Crull, *Searching for the Causes of Sexual Harassment: An Examination of Two Prototypes*, in *HIDDEN ASPECTS OF WOMEN’S WORK* 225, 232-35 (Christine Bose et al. eds., 1987).

322. Some studies suggest that women in female-dominated jobs experience high levels of harassment, with some forms approximating those experienced by women in male-dominated jobs, at least where the women have frequent interaction with men in their larger work environments. See GUTEK, *supra* note 47, at 140-45, 141 tbl.1, 143 tbl.2; James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment*, 12 *GENDER & SOC’Y* 301, 311 (1998).

323. See Crull, *supra* note 321, at 235.

324. See Suzanne C. Carothers & Peggy Crull, *Contrasting Sexual Harassment in Female- and Male-Dominated Occupations*, in *MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME: EVERYDAY TRIALS AND TRIUMPHS OF WOMEN WORKERS* 219, 222 (Karen Brodtkin Sacks & Dorothy Remy eds., 1984) (observing that women in female-dominated occupations often experience “subtle compliments and hints for dates that turned into work sabotage and sometimes job loss when turned down”). For an example of such retaliation, see *Williams v. Saxbe*, 413 F. Supp. 654, 656, 662 (D.D.C. 1976) (involving a male boss who harassed, criticized, belittled, and finally terminated a female employee after she declined his sexual advances).

would not be imposed on men.³²⁵ In addition, employers often exploit women's sexuality by making it an instrument of managerial control or by building sexualized requirements directly into the job.³²⁶

In addition to these clear-cut male/female problems, sex-segregated structures can foster other, cross-cutting forms of sexual harassment. Evidence shows that, in traditionally male-dominated settings, men who do not conform to the job's idealized image of masculinity often threaten the self-image of dominant male workers, just as women do, and are subjected to virulent sex-based harassment in which their sexuality is often highlighted.³²⁷ Furthermore, research suggests that in these male-dominated

325. For examples of such phenomena, see *Cross v. Alabama*, 49 F.3d 1490, 1495 (11th Cir. 1995) (involving male supervisor at a medical facility who acted professionally with male workers, but would yell, throw objects, and insult the female employees, including telling them that "women belonged barefoot and pregnant" and that they "must prove to him that they were not incompetent"); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1507-08 (9th Cir. 1989) (involving hotel housekeepers who were subjected to demeaning treatment, including comments that the supervisor did not like "stupid women who have kids"); and *Cline v. Gen. Elec. Capital Auto Lease, Inc.*, 757 F. Supp. 923, 925-26 (N.D. Ill. 1991) (involving female collections agents whose boss belittled their dress and appearance, slapped and hit them, and confiscated their personal credit cards).

326. For an analysis and review of some of the relevant literature, see Williams & Britton, *supra* note 295, at 6-9. See also Peta Tancred-Sheriff, *Gender, Sexuality and the Labour Process*, in *THE SEXUALITY OF ORGANIZATION*, *supra* note 313, at 45, 54 (showing that "[t]he frequent gender contrast between those occupying managerial positions and those in adjunct control positions facilitates the use of sexuality in order to maintain control"). For some examples, see Meika Loe, *Working for Men—at the Intersection of Power, Gender, and Sexuality*, 66 SOC. INQUIRY 399 (1996) (analyzing a restaurant like Hooters, in which young women's sexuality is explicitly exploited in order to attract customers); and Leslie Salzinger, *Manufacturing Sexual Subjects: "Harassment," Desire and Discipline on a Macquildora Shopfloor*, 1 ETHNOGRAPHY 67 (2000) (analyzing a Mexican export-processing plant in which sexuality is mobilized as a means of controlling women workers).

327. See Schultz, *supra* note 5, at 1774-79. The evidence is more mixed about the experience of men who work in female-dominated jobs. Although some women may seek to protect the perceived femininity of their work from incursion by men, such a reaction is unlikely to be widespread—not because women are more virtuous than men, but because men's and women's structural incentives with respect to their work are not symmetrical. Whereas men in male-dominated jobs may worry that an influx of women will lead to a decrease in pay or status, women in female-dominated jobs have reason to believe that an influx of men will lead to an increase. Thus, it is not surprising that some studies have found that men who occupy token status in female-dominated work settings do not experience hostile work environment harassment comparable to that encountered by their female counterparts working in male-dominated settings. For examples of such work, see Yoder, *supra* note 318, and studies cited therein. See also PRINGLE, *supra* note 313, at 78-82 (discussing the experience of male secretaries working for female supervisors); CHRISTINE L. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS* 88-130 (1989) (discussing the experience of male nurses). Some exceptions no doubt exist. See, e.g., Jane Gross, *Now Look Who's Taunting. Now Look Who's Suing*, N.Y. TIMES, Feb. 16, 1995, § 4 (Week in Review), at 1 (describing a hostile work environment case brought by male employees of a Jenny Craig weight-loss center, who claimed that their female supervisor forced them to perform traditionally male activities, like changing tires, as part of a general campaign of gender harassment). There is ample evidence that men who work in certain traditionally female-dominated jobs are typically presumed to be gay or sexually predatory; they may be harassed on the basis of such presumptions about their sexuality. See CHRISTINE L. WILLIAMS, *STILL A MAN'S WORLD* 101 (1995) (showing that men who work in

settings, the dynamics of tokenism can cause women colleagues to disavow and undercut each other in an attempt to gain the approval of their male superiors.³²⁸ Even where women work in fairly well-integrated jobs, the existence of a male-dominated supervisory structure can lead women to see each other in more negative, sex-stereotyped terms and to behave seductively in order to curry favor with senior men.³²⁹ Other research has shown the importance of paying attention to race in sex-segregated settings.³³⁰ Racial stereotypes about women of color's sexual permissiveness, combined with their isolation and structural vulnerability in their jobs, may make them particularly likely to be subjected to sexualized forms of hostility and abuse.³³¹

As disheartening as this research is, it does have a hopeful implication: If highly segregated environments foster the use of sexuality as a weapon of gender-based intimidation and exclusion, it stands to reason that more integrated, egalitarian workplaces hold promise for creating less threatening—and perhaps even pleasurable—deployments of sexuality. In fact, this is a logical corollary to the theory of tokenism; thus, many major scholars who have contributed to the literature agree that one of the most effective ways to minimize sex harassment and abuse, including hostile uses of sexuality, and to create better climates for women is to integrate

nursing, librarianship, social work, and elementary school teaching are often subject to such biases).

328. See KANTER, *supra* note 13, at 228-29, 237-38 (explaining how, in male-dominated settings, gender dynamics work to defeat potential alliances among women).

329. Harvard Business School Professor Robin Ely studied law firms in which women were 40% of the associates. She compared peer relationships among women associates who worked in firms with highly male-dominated partnerships (those with less than 5% women) to peer relationships among those who worked in firms with somewhat more-integrated partnerships (15% women). She found that the women who worked in the more-segregated firms were more likely to see other women in negative, sex-stereotyped terms and to experience their relationships with each other as competitive in ways that inhibited their ability to work together. See Robin J. Ely, *The Effects of Organizational Demographics and Social Identity on Relationships Among Professional Women*, 39 ADMIN. SCI. Q. 203 (1994); see also C.L. Ridgeway, *Gender Differences in Task Groups: A Status and Legitimacy Account*, in STATUS GENERALIZATION: NEW THEORY AND RESEARCH 188 (Murray Webster & Martha Foschi eds., 1988). The women in more-integrated firms were less likely to hold rigid gender stereotypes about themselves and other women, and were more confident that expressing their individuality would contribute to their success. In addition, they felt less need to behave seductively in order to curry favor with senior men and less pressure to highlight their sexuality generally. See Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 ACAD. MGMT. J. 589, 617-18 (1995) [hereinafter Ely, *The Power of Demography*].

330. See Tanya Kateri Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183, 189-94 (2001) (reviewing the relevant data and literature showing that women of color report and may experience higher instances of sexual harassment than white women); see also James E. Gruber & Lars Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271, 284-85 (1982) (reporting in a study of women who work on the auto assembly line that Black women were more severely and more frequently harassed).

331. See, e.g., Hernández, *supra* note 330, at 194-96, 212-16 (discussing this phenomenon and analyzing relevant literature).

them fully and equally into all levels of the organization.³³² Where women are present in sufficient numbers, they should have the numbers, and therefore the power, to dispel stereotypes, resist harassment, and help shape their workplaces' cultures and norms about sexuality along more empowering lines.

There is some empirical evidence that supports this view.³³³ For example, Barbara Gutek's path-breaking book, *Sex and the Workplace*, reports that women who work in integrated occupations and jobs are less likely than other women to report harmful forms of sexual conduct (including insulting comments, looks or gestures, sexual touching, or required dating or sex in their jobs), even where the larger work group with whom they interacted was mostly men.³³⁴ Frequent sexual talk and joking occurs as often as it does in male-dominated occupations and jobs,³³⁵ but women do not experience it as harassment. In these sex-integrated occupations and jobs, sex harassment virtually ceases to be a problem.³³⁶ Similarly, research by organizational behavior scholar Robin Ely shows that, even where women already work in relatively integrated fields, increasing the numbers of women in supervisory positions leads to less sex stereotyping and leaves junior women feeling less pressured to cater to

332. See KANTER, *supra* note 13, at 242 (arguing that "there is also a strong case that can be made for number-balancing as a worthwhile goal in itself, because, inside the organization, relative numbers can play a large part in [organizational] outcomes"); Fiske & Glick, *supra* note 318, at 111 ("Clearly, the long-term remedy is to increase the numbers of the underrepresented sex."); see also GUTEK, *supra* note 47, at 171-72 (recommending "sexual integration of jobs at all levels [to] eventually reduce the amount of sex role spillover in sexually skewed work units and the amount of sexual harassment"). For a different explanation of why integration will reduce harassment, see John Markert, *It Ain't Going Away: The New Face of Sexual Harassment*, Paper Presented at the American Sociological Association Annual Meeting, Chicago, Ill., Aug. 2002, at 5-6 (unpublished manuscript, on file with author) (arguing from a communications perspective that sex-integrated work settings have fewer sex harassment problems because "the sexes in these environments have learned how to relate to one another," and therefore "the risk of misunderstanding or misinterpreting an off-hand sexual remark is greatly reduced").

333. It is worth noting that none of the systematic empirical studies I cite here involve perfectly sex-integrated work settings, probably because there are few, if any, such environments to study. Cf. Ely, *The Power of Demography*, *supra* note 329, at 597 (explaining that she could not increase the ratio of women among partners in law firms to more than 15%, because that figure "marked the upper portion of the distribution of firms on this dimension"). Instead, they compare women in highly sex-segregated work settings to those in relatively more integrated ones.

334. See GUTEK, *supra* note 47, at 141 tbl.1.

335. See *id.* at 143 tbl.2 (reporting that 28.4% of women in male-dominated occupations and jobs say their workplaces are characterized by "frequent sexual talk and joking," and a virtually identical 28.2% of women in integrated employment do also). Interestingly, Gutek also reports that women in integrated occupations and jobs were far more likely to report that their organizations accepted dating among employees. See *id.* (reporting a 67.9% level for integrated occupations and jobs, but only 51.2% for male-dominated ones and 52.2% for female-dominated ones).

336. *Id.* (reporting that 9.0% of the women in male-dominated occupations and jobs say sexual harassment is a major problem at work, and 5.1% of the women in female-dominated occupations and jobs whose larger work group was mostly male do, but 0% of those in integrated occupations and jobs do).

senior men's sexual needs and more free to express their sexuality as they see fit.³³⁷

In addition to the empirical studies, a growing body of qualitative research suggests that in more gender-integrated or egalitarian work settings, women have the capacity to help forge the shape and meaning of sexual interaction—perhaps because their numerical strength gives them the power to contribute to setting limits on what is considered acceptable behavior. As a result, they are often able to participate and take pleasure in sexual interactions.

Consider sociologists Kirsten Dellinger and Christine Williams's vivid account of sexual norms in the editorial departments of a pornographic magazine aimed at men, which the authors refer to as *Gentleman's Sophisticate* (*GS*), and a feminist magazine aimed at women, which they call *Womyn*.³³⁸ At *Womyn*, all of the eighteen members of the editorial staff, including top management, are women, and at *Gentleman's Sophisticate*, six of the twelve editors (although none of the top managers) are women.³³⁹ *Womyn* is a female-only magazine explicitly devoted to advancing a feminist agenda, while *Gentleman's Sophisticate* is a gender-integrated, though male-headed, publication devoted to mainstream masculine heterosexual pleasure.

In the "dorm room" culture of *Womyn*, management encourages the staff to feel they are doing more than "just a job"; they have joined a "sisterhood."³⁴⁰ Being an editor requires people to think and talk openly about sex, because editors are expected to draw on their own personal experiences to work on the magazine's wide range of sexual topics, "from date rape to sexual harassment to the nature of sexual pleasure and desire."³⁴¹ In addition, because of the widely shared commitment to the feminist philosophy, "the personal is political," sexual conversations and interactions are an integral part of the informal work culture as well.³⁴² At *Womyn*, the editors, "both straight and lesbians," spoke graphically about their own sex lives and what they did and did not like to do in bed, and they also talked seriously about their own sexual relationships and identities.³⁴³ The staff socialized together frequently in intimate, sometimes raucous settings. According to one editor, "[We were] always having parties just [us] together without our partners. And . . . always dancing together and

337. See *supra* note 329 (describing Ely's research).

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

339. *Id.* at 244.

340. *Id.* at 251.

341. *Id.*

342. *Id.*

343. *Id.*

having sleep overs and stuff.”³⁴⁴ One editor summed up the atmosphere as follows: “I think this is a very sexual place in a lot of ways.”³⁴⁵ The staff appreciated, even cherished, this aspect of the magazine’s culture. As Vera, a former editor, explained, “For the most part, conversations about our emotional and sexual lives are wonderful and liberating and one of the best parts of being at *Womyn*.”³⁴⁶ The staff overwhelmingly agreed, arguing that the all-female composition of the organization made the sexualized interactions “safe” and “non-threatening”—even though some of the women conceded that if the same conversations involved men, they might consider them sexual harassment.³⁴⁷

Yet, even in this highly sexualized culture, the staff drew lines between acceptable and unacceptable behavior—despite the absence of a sexual harassment policy. As the editor-in-chief explained, “We don’t have any formal policy here at *Womyn* except we clearly, as feminists, know where we stand on the issue.”³⁴⁸ A feminist commitment to nonhierarchical relations led *Womyn* to deny any status differences between the editors and interns; everyone was a part of the “sisterhood.” Yet, the same feminist ethos sensitized editors to the need to avoid exploiting unacknowledged power differentials. Thus, when a concern about sexual harassment emerged, it came from an editor who herself had been propositioned one night by a half-drunken intern. After a party at a coworker’s house, a few staffers and interns had decided to go dancing, and at the end of the night, the editor and intern went to a strip show at a lesbian bar. Rather than accusing the intern of reverse sexual harassment,³⁴⁹ the editor castigated herself for her own lack of judgment in accompanying the intern to a strip bar, lamenting, “I would never have done that in another workplace. NEVER!! After it happened, I was like, ‘How could you not see that this was completely inappropriate behavior?’”³⁵⁰

344. *Id.*

345. *Id.* at 252.

346. *Id.*

347. *Id.* at 251-52.

348. *Id.* at 251.

349. Unwelcome sexual overtures made by a person occupying the formally less powerful role toward a person occupying the formally more powerful role (i.e., subordinate to supervisor, student to teacher) are known in the sexual harassment literature as “contrapower harassment.” See Rachel Mead Zweighaft, *What’s the Harm? The Legal Accommodation of Hostile Environment Sexual Harassment*, 18 COMP. LAB. L.J. 434, 437 n.12 (1997) (citing Kathleen McKinney & Nick Maroules, *Sexual Harassment*, in *SEXUAL COERCION: A SOURCEBOOK ON ITS NATURE, CAUSES, AND PREVENTION* 29, 34 (Elizabeth Grauerholz & Mary A. Koralewski eds., 1991)). Similarly, Nicole Guéron has coined the term “bottom-up harassment” to refer to situations in which male workers who resent having a female boss resort to acts of work sabotage or other competence-undermining behavior in order to drive her away from the job or make her look bad. See Schultz, *supra* note 5, at 1767 n.444 (citing Nicole L. Guéron, Strengthening “The Weakest Case of All”: Expanding Title VII Sexual Harassment Doctrine To Include “Bottom-Up” Harassment (May 16, 1995) (unpublished manuscript, on file with author)).

350. Dellinger & Williams, *supra* note 338, at 253.

Almost certainly, the denial of any editor-intern hierarchy at *Womyn* gave the intern a sense of permission to make a pass at the editor. But the countervailing feminist taboo on sex between work-role unequals led the editor to hold herself accountable (and to decline the intern's offer). At *Womyn*, sex was supposed to stay "safe" and role-egalitarian.

At *GS*, different norms emerged. Here, too, the job itself was sexualized in content. Editors had to work on sexual advice columns, write and copyedit captions for the nude "pictorials" or "artwork," and edit and screen graphic reader mail for potential publication.³⁵¹ As a result, much of the everyday work conversation was sexually explicit. Just as at *Womyn*, the sexual content of the job spilled over into the informal atmosphere, which included a great deal of sexual banter and joking. At *GS*, a culture of "locker room" joking diffused the sexual tension.³⁵² "Most of the sexual joking . . . is about the content of the magazine itself. People joke about breast implants, ads for penis enlargements, and the impossibility of certain sexual acts that are described in letters from readers."³⁵³ The women editors actively participated in this sexual conversation, although some said they had to get used to it. Over time, they learned to see their work as funny. As one female editor put it, "[Y]ou really have to have a sense of humor, that's the one requirement to work here. . . . You gotta have a really open mind."³⁵⁴

In contrast to *Womyn*, however, where the staff's sex talk frequently linked the sexual themes in the magazine to their own sexual experiences and identities (and vice versa), at *GS*, both male and female employees insisted on a strict boundary between sex talk "in the abstract" versus sex talk about someone's personal life.³⁵⁵ Strikingly, some of the editors didn't even consider their "locker room" banter about the magazine to be talk about "sex," as the researchers' interview with one of the male editors, Bill, reveals:

When Bill is asked if he ever talks about sex at work, he doesn't think to mention sexual joking about the magazine. He says, "No, not at all. I just don't want to talk about sex . . . especially with women because everything could be misconstrued, especially in these times when people are so sensitive." But when asked if he talks about sex in regard to the magazine, he clarifies that "that" kind of joking happens "all the time."³⁵⁶

351. *Id.* at 246.

352. *Id.* at 247.

353. *Id.*

354. *Id.* at 246.

355. *Id.* at 247.

356. *Id.* (alteration in original).

To Bill, the line between work-related sex talk and personal sex talk is clear:

“Oh, yeah, we laugh a lot at that stuff. . . . We laugh at the pictorials. We laugh at the color. We laugh at the choice of girls. . . . But to me that’s in the abstract. . . . If I met you outside of this environment and I brought a *Gentleman’s Sophisticate* magazine with me . . . and started talking to you about it, that would be like approaching you, hitting on you. For us, it’s like an ‘in’ thing. . . . [W]e work here.”³⁵⁷

In another example, Margaret, the managing editor, described a situation in which a production worker held open an issue of a competing magazine and, exposing the centerfold, said to a female coworker, “Can you imagine what our relationship would be like if you looked like this?” To Margaret, this comment was “totally inappropriate.”³⁵⁸

Although, as this example reveals, some of the men did violate the norm against personalization, their behavior didn’t threaten the women, because the women had the numbers and power within the organization to marginalize these men. As one of the editors explained:

There’s very little sexual harassment that does go on. . . . I mean, that’s not to say, I don’t observe like “Troglodytes speaking coarsely with their women.” But the strange thing is that other men will speak up and say, “Hey, knock it off!” or “Gentlemen, stop this!” I mean, for the most part, people cool it. . . . There’s a couple of guys that roam around the office that are real sort of pigs, and classic male chauvinists, but because the company is so upwardly mobile, it’s just sort of like, “Ahh, he’s just a retrograde.”³⁵⁹

In the locker-room ethos of *GS*, it is okay to talk about sex in the abstract, but when the joking shades into personal innuendo directed at an individual, it is considered “sexual” and inappropriate. Those who violate the norms are not considered “gentlemen,” but are ostracized as “troglodytes” by male and female editors alike.³⁶⁰

Thus, despite the different organizational missions of *Womyn* and *GS*, women editors at each magazine had significant responsibility and influence. And, despite the different cultures of the two organizations, both of them were highly sexualized. Neither organization was a model of integration or equality: *GS* retained a male-dominated authority structure,

357. *Id.* at 247-48 (third and fourth alterations in original).

358. *Id.* at 248.

359. *Id.* at 250 (second alteration in original).

360. *Id.* at 248-50.

and *Womyn* involved an integrated occupation (editor) located in an all-female job and organizational setting that may have unfairly excluded men. Yet, at each magazine, because the women editors had the numbers to give them meaningful power and influence, they did not feel threatened by sexually charged interactions, but participated in them actively and willingly and helped generate norms about where to draw the line.

In both settings, it seems clear, the editors created sexualized work cultures in response to deep needs created by the structure or content of their work. At *Womyn*, sexual sharing was the fabric for weaving together the political solidarity and personal intimacy the magazine's leadership believed its feminist philosophy required. At *GS*, sexual bantering was the medium for relieving the sexual and social tension that arose from dealing with graphic (and potentially embarrassing and stimulating) material that was the stuff of the job, day in and day out. In both organizations, the editors' resort to the "sexual" was not always, or always only, about desire. In creating their day-to-day cultures, the editors put sex to some very basic—even banal—uses to work out human issues that arose out of the demands of their jobs. It was safe, even pleasurable, for the women to deploy the sexual, because the background structure of relative gender equality in the organization made it so.

Additional sociological studies show that even in less-than-perfectly-integrated occupations where women have achieved some measure of respect and influence, women as well as men often feel that they benefit from certain uses of sexuality in their workplaces. In sociologist Patti Giuffre's study of health-care professionals in a teaching hospital,³⁶¹ for example, women doctors inhabited a sexualized work culture that included a lot of flirting, sexual bantering, and even physical touching. But just as at *Womyn* and at *GS*, many of them did not consider such conduct to be sexual harassment. Indeed, it wasn't always even considered "sexual," if that term is used to refer to a desire for an actual sexual liaison. Instead, Giuffre's doctors used sexuality as a way to help them meet the demands of their jobs, which included a great deal of stress and anxiety due to the risk of losing or seriously harming a patient. As one male anesthesiologist explained:

You can go into a typical heart operation. We joke all the time about sex. It's a coping mechanism for people in an operating room for stressful situations. People come up to me and hug me, or massage my back, and that's all it's meant to be. Outsiders might

361. Patti A. Giuffre, *Labeling Sexual Harassment in Hospitals: A Case Study of Doctors and Nurses* (1997) (unpublished manuscript, on file with author).

think, "Gee, is she coming on to him?" But they don't know that you might have been doing that for six years. Everybody does it.³⁶²

In these situations, the women as well as the men appreciated the frequent sexual banter and touching that helped them cope with the stressful nature of their work. Indeed, as Williams, Giuffre, and Dellinger noted, "The pleasure that many [men and women] derive from sexual interactions leads some to be wary of efforts to rid their workplaces of sexual harassment."³⁶³ As a female urologist put it:

Sexual banter happens partly because of the high stress situations. In the operating room, it's even more stressful . . . you all go in and put on these scrubs . . . It removes social . . . and sexual boundaries. . . . [There's] [t]easing and joking and pinching and elbowing. It's fun. That's one reason people like being in that arena . . . That's part of the camaraderie . . . I think it's been limited somewhat by all of the sexual harassment cases. . . . [I]t's sad that if someone who I'm working with nudges up to me and elbows me, and I say, "I'm glad I wore my metal bra today to protect myself from your elbow," it's sad that you can't say that in peace anymore . . . It's a way that men and women interact. It's a form of flirtation.³⁶⁴

It is important to note that in this example, even though they remained in an occupation that wasn't yet integrated, women doctors were at the top of the authority structure in the hospital and in the larger health-care profession, and this positioning may have allowed them greater scope for participating in and enjoying sexual conduct with their peers in the hospital setting. In addition, simply because these health-care professionals enjoyed sexual interactions with each other on the job did not mean they believed "anything goes." Just as the editors at *Womyn* and *GS* had done, the physicians established their own norms about appropriate uses of sexuality. In Giuffre's study, both "doctors and nurses . . . were very circumspect about engaging in sexual interactions with their patients."³⁶⁵ Even in the midst of their highly sexualized work cultures, health-care professionals had been thoroughly socialized to "desexualize" their relations with patients, who lay outside the community of professionals who alleviated their anxiety by flirting in the face of death.

Participant observation work by sociologist Leslie Salzinger confirms that in more sex-integrated work settings, women have greater capacity to

362. Williams et al., *supra* note 313, at 86 (citing Giuffre).

363. *Id.*

364. Giuffre, *supra* note 361, at 6 (fifth, seventh, and ninth alterations added).

365. Williams et al., *supra* note 313, at 86.

shape the terms and meaning of sexuality along more empowering lines.³⁶⁶ Salzinger studied three Mexican export-processing factories owned by well-known transnational companies. She found that, in stark contrast to the firms that hired sex-segregated workforces and used highly sexualized or punitive modes of controlling workers, in the firm that hired equal numbers of male and female production workers, emphasized skill, and paid people based on productivity, life in the factory was not governed by any controlling set of gender stereotypes or prescribed sexualities. Instead, according to Salzinger's description:

Gendered rhetorics abound, but there are as many opinions about women, men, and work as there are managers, supervisors, and workers to have them, and there is no consistent correspondence between position in production and perspective on gender. As a result, unconnected to the fundamental axes of struggle over control in the factory, gendered categories do not disappear, but they subside into insignificance in daily interaction on the shop floor.³⁶⁷

In such a context, neither women's nor men's sexuality was prescribed by management nor by any dominant group of workers. But this does not mean that it was abolished or was not part of factory life. To the contrary, Salzinger reports:

Music blasts through the factory. At intervals, loud whoops emerge from the floor in response to a particularly favored selection. If the music is especially inspiring, the commotion may develop into an impromptu salsa—a couple of paired blue smocks dancing in the aisle—sometimes a woman and man, sometimes two women, sometimes two men. . . . Always these outbursts delight and enliven, contributing, for the casual observer, to the sense of disorganization and play at work.³⁶⁸

Salzinger's study shows that, although the larger organizational gender structure inevitably affects how sexuality is experienced and expressed, the achievement of greater gender balance will not necessarily result in work cultures that appear more, or less, sexualized to an outside observer. The relevant question is not whether the cultures are sexualized, but how sexuality is organized in them and who has had a role in shaping it. Taken together, the studies suggest that more integrated, egalitarian employment settings give both women and men more power to resist stereotypes and, in

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

367. *Id.* at 563-64.

368. *Id.* at 564.

so doing, to remake the culture of sexuality on their own terms. Whether the end result will be more or less open sexual expression, and what form the expression will take, we cannot predict in advance. In fact, what may seem like a less sexualized culture from the outside may well be one alive with sexual energy, but one in which diverse sexual identities and expressions proliferate rather than being established by management or by a dominant group of workers whose gender (along with their race and sexual orientation) gives them control.

C. *Sexualizing Workplace Harm*

Not only does the current approach to sexual harassment neglect the affirmative potential gender integration has to give women the power to experience workplace sexuality in positive (or at least equal) terms; it also creates a negative dynamic that encourages women (and sometimes men) to frame their complaints in terms of sexual offense, even when much more—or much less—may be at stake. The fact that employers recognize and punish sexual misconduct encourages workers to resort to the language and machinery of sexual harassment, while at the same time obscuring the larger structural features of the organization (such as gender, class, and race hierarchies) that create the cultural contexts that give the complained-of conduct meaning and punch.

First, consider the relationship between sexual harassment and larger forms of sex discrimination that give rise to segregation on the job. The fact that companies regard and treat sexual harassment as a more serious—and more threatening—claim than these other forms of discrimination encourages women to frame their complaints in sexualized terms. Women often complain about sexual offense, when it seems clear that their real problems concern more overarching forms of discrimination and hierarchy that cannot be articulated within the idiom of “sexual harassment.” Recall, for example, the *Pierce* case,³⁶⁹ in which Debbie Kennedy, a female office administrator, accused her boss, Tom Pierce, of sexual harassment, after the two of them engaged in an exchange of joking, sexually oriented cards. The truth is that Kennedy’s complaint against Pierce referred to much more than just the cards: She also protested her most recent job evaluation.³⁷⁰ Yet, the company apparently only investigated the allegation that Pierce had sent Kennedy the “sexual” cards, ignoring the more conventional (and more serious) charges Kennedy had made. Under the company’s reasoning, sending the cards alone pegged Pierce as a sex abuser—regardless of

369. *Pierce v. Commonwealth Life Ins. Co.*, 825 F. Supp. 783 (E.D. Ky. 1993), *aff’d*, 40 F.3d 796 (6th Cir. 1994); *see also* text accompanying notes 158-161.

370. *Pierce*, 825 F. Supp. at 784-85.

whether other signs of sexism or managerial abuse were present. Little wonder, then, that Kennedy complained about the cards. Whether she saw them as part of a larger pattern of sex discrimination in which Pierce failed to treat her as a competent professional, or whether she saw them as completely harmless but simply used them to get the company's attention, her strategy made sense. In a world in which companies can feel virtuous about firing employees for sexual harassment, it should not be surprising that women feel they can get more mileage out of characterizing old-fashioned sexist supervisors as newly stigmatized sexual harassers.

Consider also the myriad complaints about pornography. Contrary to the popular libertarian perception, these complaints are not always launched by prudish women who can't stand the sight of naked bodies, regardless of the context. Instead, in many of the published Title VII cases involving pornography, there is very real evidence that male employees are creating gender-based hostile work environments designed to drive women away from the job or denigrate their work competence.³⁷¹ In these cases, the women who are being harassed may focus their outrage on the pornography because they believe such protests will command attention; in the watchful eyes of human resource managers, feminist litigators, or conservative judges, the presence of pornography in the workplace stands out as a crude violation because of its sexual content. Yet, in the eyes of the women themselves, the pornography *itself* isn't the problem; it's merely a *symbol* of the real problem, which is a deliberate campaign of sex discrimination and harassment involving a host of *sexual and nonsexual* actions designed to put women back in their place. Over the years, I have received countless phone calls from women complaining about sex harassment, and, not infrequently, one of the first things they will mention is that there is pornography in their workplaces. Perhaps they expect me to jump in and castigate pornography—and those who use it—as inherently sexist. When instead I pause for a moment, and ask, “What else is going on at work?”, I inevitably hear detailed stories about much larger patterns of sex discrimination and mistreatment that are painful to confront.

In the *Robinson v. Jacksonville Shipyards* case, for example, the men hadn't simply posted pornography in their private workspaces or even in the common areas of the workplace. Instead, some had brandished personalized pornographic images of their female colleagues as instruments of intimidation,³⁷² in the same way that men have been known to brandish plumbing snakes, used tampons, fists, file cabinets, and accusations of incompetence. The male coworkers searched for pornographic pictures that

371. See, e.g., *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

372. *Robinson*, 760 F. Supp. at 1495-501.

looked like Robinson,³⁷³ put them on her toolbox, and laughed at her reaction.³⁷⁴ The pornography was only one among many tools used to exclude Robinson and communicate the message that she was unwelcome: Following one of her complaints, a “Men Only” sign was painted on the door of a trailer³⁷⁵ and abusive language was written across the walls.³⁷⁶ Robinson was also bullied by her coworkers, both in a sexual manner and with comments such as “women are only fit company for something that howls” and “there’s nothing worse than having to work around women.”³⁷⁷

Women’s complaints about sexual jokes may also be understood from this perspective, as a recent study by sociologist Beth Quinn shows.³⁷⁸ In traditionally male-dominated jobs, Quinn’s interviews with women revealed, men often use sexual and sexist jokes as a form of “insider humor” that serves to build masculine identities and solidarity by casting women as outsiders.³⁷⁹ The problem with the jokes is not their content, but the fact that they are used to exclude and isolate women. As Quinn puts it:

Most researchers and legal scholars have assumed that the harm of sexual harassment lies in its content, that jokes and pranks and talk of sexuality are inherently demeaning. In the case of insider humor, however, that the humor is sexist or overtly sexual [is] of secondary concern. The main harm lies in the continual reassertion of a woman’s outsider status.³⁸⁰

Quinn cites several examples, including the story of Judy, a construction worker, who “was not offended per se by the male employees’ crude remarks or the pornography in the construction trailer”; she was harmed, instead, because she “understood how these things functioned to separate her from the group.”³⁸¹ Such actions put the women in a double bind because if they object, they reveal their own weakness and risk being completely ostracized from their work group; but if they don’t object, they are participating in the creation of a work culture built on their own exclusion.³⁸² Most of the time, in Quinn’s study, the women “explained away men’s sexist comments and sexual banter simply as an effect of ‘the way guys are,’”³⁸³ and refused to take it personally—a strategy that allowed

373. *Id.* at 1496.

374. *Id.* at 1497.

375. *Id.* at 1498.

376. *Id.* at 1499.

377. *Id.*

378. Quinn, *supra* note 301.

379. *See id.* at 1175.

380. *Id.* at 1176-77.

381. *Id.* at 1177.

382. *Id.* at 1163.

383. *Id.* at 1169.

them to maintain some sort of relationship with the harassers by normalizing their own mistreatment. But when the harassment became particularly egregious or prolonged and the pretense of normality could no longer be maintained, some women began to attribute it to the pathologies of individual men in the same way that HR managers often describe sexual harassment under the individual-bad-actor model.³⁸⁴ By remaining silent in the face of their own exclusion or attributing sexual harassing behavior to “a power-hungry, aggressive personality rather than organizational location . . . or social structure,” however, the women undercut their own ability to demand organizational change, as Quinn points out.³⁸⁵ They reduce larger patterns of sexism to narratives about offensive jokes or domineering sexual harassers.

Thus, behind women’s angry complaints about pornography and sexual joking there are often anguished pleas for inclusion, and belonging, in a workworld dominated by men. But many of the same dynamics that have led companies to focus on driving out sexual misconduct, at the expense of dealing with more subtle forms of discriminatory exclusion, lead women to frame their complaints in terms of sexual offense. Every time this happens, the system misses an opportunity to glimpse the larger problem of gender and gets imprinted with one more story of sexualized harm.

As the arbitration cases reveal, it isn’t only sex discrimination that gets occluded when employees articulate their workplace grievances in terms of sexual harassment. Sexual harassment has become the category through which employees articulate—and may actually experience—a broad variety of complaints about managerial mistreatment. In one striking example, a teenager who worked in an Albertsons grocery store in Portland, Oregon, accused her supervisor of sexual harassment when he ordered her to stick out her tongue to see if she was wearing a tongue ring.³⁸⁶ The arbitrator held that the supervisor’s order did not constitute sexual harassment, even though the young woman said she felt “violated” and “embarrassed”³⁸⁷ by his attempt to look into the “private space” of her mouth.³⁸⁸ The arbitrator also held that the no-tongue-ring rule was reasonable because some customers would likely be offended if they saw tongue rings flashing in the mouths of supermarket employees.³⁸⁹ Nonetheless, the arbitrator sided with the teenager, concluding that the manager had no reasonable suspicion to

384. For example, one woman said, “I think a lot of sexual harassment . . . is part of a personality trait of chauvinism, of power, of aggression. You know, a lot of that comes from that, no matter what position a person’s in.” *Id.* at 1170. Other women described men as “creep[s],” “goof[s],” “ball-buster[s],” and “chauvinist[s].” *Id.*

385. *See id.* at 1170-71.

386. *In re Albertson’s, Inc.*, 115 Lab. Arb. Rep. (BNA) 886 (2000) (Gangle, Arb.).

387. *Id.* at 889.

388. *Id.* at 892.

389. *Id.* at 891.

believe she wasn't telling the truth when she said she had removed the tongue ring since neither the manager nor the director had seen anything metallic flashing in her mouth when she spoke. The arbitrator also found that the penalty for failing to comply with the order—firing—was exceedingly harsh and not clearly explained. For these reasons, he overturned the discharge.³⁹⁰

This case provides a fascinating example of the extent to which sexual harassment has become the master discourse through which workers protest managerial violation (even though the arbitrator wisely refused the label). A teenager feels that a manager who has no reason to doubt her word shouldn't be able to order her to stick her tongue out to prove she isn't lying. It is humiliating, as a worker, to have to comply with such a dictatorial directive. But in our employment-at-will culture, there is little or no language in which to complain about this kind of managerial overreaching, so she calls it sexual harassment—a move that her mother, who also works in the grocery store, urges her to make. Perhaps this isn't simply a strategic move; she may really feel the order to stick out her tongue was a form of sexual violation. In a culture in which there is no broad political/cultural discourse on general forms of managerial abuse—no matter how degrading—the language of sexual harassment has come to supply the medium through which complaints about managerial abuse are communicated and perhaps even experienced.

While many women and men articulate broader complaints about managerial abuses through sexual harassment complaints in good faith (meaning that they believe they have experienced a sexual violation), in other cases their motivation is murkier. Employees can manipulate charges of sexual harassment as a way to protect their jobs or to get back at bosses who they feel have treated them unfairly, just as the HR types, professionals, and lawyers warn. In *Jacobus v. Krambo Corp.*, the chief financial officer and treasurer of a six-person investment banking firm was personally sued for sexual harassment (along with his firm) when a secretary whose job performance he criticized, Rosie Vera-Aviles, decided she was offended by some earlier sexualized encounters.³⁹¹ From all appearances, Jacobus and Vera-Aviles had been friends. They socialized together outside work, having dinner together, playing softball, and shooting pool.³⁹² They also had a friendly relationship inside the office, one which the court found was marked by “frequent sexual bantering”: “They discussed their personal lives with each other, including their sexual encounters. Vera-Aviles also had frequent conversations with other workers

390. *Id.* at 893-94.

391. 93 Cal. Rptr. 2d 425 (Ct. App. 2000).

392. *Id.* at 428.

in the office involving sexual matters.”³⁹³ At one point, Jacobus had some erotic stories written by his sister-in-law in the office, and when Vera-Aviles asked to see them, he showed them to her. He also composed a sexually explicit story at his computer, which he shared with her upon her request.

Their relationship ended one day when Jacobus, who was not her supervisor, conveyed to the firm’s vice president a coworker’s complaint that Vera-Aviles spent too much time on the telephone. When the vice president and Jacobus met with her to discuss the issue, she got upset that her job performance was being criticized. Later that same day, she met with the vice president and asserted, for the first time, that Jacobus had been sexually harassing her and claimed that the complaint about her spending time on the telephone was a continuation of the harassment. Jacobus was encouraged to “accelerate his already-formed plan to leave the firm,” and he resigned that day.³⁹⁴ Four days later, Vera-Aviles quit her job and filed her sexual harassment suit. A jury exonerated Jacobus of sexual harassment, finding that Vera-Aviles had participated willingly in the encounters of which she later complained.

In a subsequent lawsuit, a California court held that the firm was responsible for Jacobus’s legal expenses because his interactions with Vera-Aviles had occurred within the scope of his employment. Although acknowledging that “sexual misconduct falls outside the scope of employment” and is usually deemed to be “motivated [by] strictly personal reasons,” the court rejected the argument that “the interactions between Jacobus and Vera-Aviles were motivated by Jacobus’s own [personal] desire for sexual gratification.”³⁹⁵ Instead, in an opinion that is remarkable for its realism and sexual openness, the judge recognized that “social interactions among employees, including the sharing of private or personal information, are broadly incidental to the enterprise of an employer. . . . We conclude that Jacobus’s consensual sharing of sexual materials with Vera-Aviles was no more unusual or startling than other forms of everyday conversation among coworkers.”³⁹⁶ If anyone was trying to take advantage here, said the court, it was Vera-Aviles: “The facts suggest that Vera-Aviles developed her sexual harassment claim to gain advantage in her employment.”³⁹⁷ Rather than villainizing her, however, the court acknowledged the ordinariness of her attempt to exploit the sexual

393. *Id.*

394. *Id.*

395. *Id.* at 430.

396. *Id.* at 431.

397. *Id.*

harassment claim in a world in which workers must constantly struggle to survive on the job.³⁹⁸

It is possible, of course, that Vera-Aviles's motivations were more complex than the court recognized. Perhaps, as she reflected back on her experiences with Jacobus, she came to believe that he had been exploiting her sexually, rather than relating to her out of the kind of true friendship in which he would try to protect her from an adverse performance review rather than participating in it. But even if that is true, it would not undermine the larger observation about the way sexual harassment discourse is functioning. Whether employees seek to strategically exploit sexual harassment claims in order to protest other perceived workplace harms, or whether they learn to subjectively understand ambiguous sexual interactions as instances of sexual harassment (or both), the point remains that the widespread legal and cultural recognition of sexual harassment as a legitimate form of injury makes it a preferred idiom in which to frame perceived workplace harms. The comparative lack of recognition for many forms of workplace abuse—particularly managerial overreaching—encourages employees to conceptualize and characterize their experiences in terms of sexual misconduct. In this way, sexual harassment becomes a band-aid that may mask a larger malady of gender segregation or managerial abuse. At the same time, the availability of the band-aid may make minor scratches seem like deeper wounds.

D. *Legitimizing Bias*

Not only does the priority given to sexual harassment claims encourage employees to frame perceived harms in sexual terms, it also legitimates expressions of sexual offense and bigotry that can arise when workers from stigmatized groups engage in conduct that others regard as overly "sexual" or familiar.

In earlier work, I expressed concern that sex harassment law's focus on sexual misconduct would permit or even encourage companies to punish employees who are regarded as sexually deviant.³⁹⁹ Recent research adds fuel to these fears and suggests that, for many employees, the determination of whether certain sexual behaviors are offensive (or perhaps even "sexual") turns on *who* is engaging in it. Such findings are not surprising, for they confirm the general insight that workplace sexuality is given meaning within organizational context. As a result, the same sexual conduct

398. *Id.* ("In our view, the risk that one worker may accuse another of sexual harassment to deflect an adverse performance review is a risk inherent in employment, analogous to the risk . . . that one worker may assault another in a job-related dispute.")

399. See Schultz, *supra* note 5, at 1729, 1784-85, 1789 n.540; see also Schultz, *supra* note 71, at 428.

that would be tolerated—or even welcomed—from coworkers of a similar status may well be labeled sexual harassment if it is engaged in by coworkers of a different status, particularly if they are perceived as part of a social group culturally marked as “sexual.”

In a recent study of waiters in restaurants that employ equal numbers of men and women, for example, the researchers found that, as in many restaurants, their subjects worked in cultures that were highly sexualized.⁴⁰⁰ In the restaurants where they worked:

[S]exual joking, touching, and fondling were common, everyday occurrences For example, when asked if he and other waitpeople ever joke about sex, one waiter replied, “about 90% percent of [the jokes] are about sex.” According to a waitress, “at work . . . [we’re] used to patting and touching and hugging.” Another waiter said, “I do not go through a shift without someone . . . pinching my nipples or poking me in the butt or grabbing my crotch. . . . It’s just what we do at work.”⁴⁰¹

True to our earlier observations, in these gender-integrated workplaces, the women as well as the men said they enjoyed the sexualized interactions; they actively participated in the ritualized displays of heterosexuality with their male coworkers, and did not consider their sexual advances improper. Yet, when some of the Mexican men, who were concentrated in positions as kitchen cooks and busing staff, made identical sexual overtures, the white waitresses were quick to take offense and to label the conduct sexual harassment. When asked if she had ever experienced sexual harassment, for example, one of the waitresses, Beth, said:

Yes, but it was not with the people . . . that I work with in the front of the house. It was with the kitchen. . . . In the kitchen, the lines are quite different. Plus, it’s a Mexican staff. It’s a very different attitude. . . .

. . . One guy, like, patted me on the butt and . . . I went off on him. I said, “No. Bad. Wrong. I can’t speak Spanish to you, but, you know, this is it.”⁴⁰²

Other white waitresses had similar reactions. Ann conceded that the Mexican men in the kitchen “would see the waiters hugging on us, kissing us and pinching our rears and stuff,” but that she considered their attempt to

400. Patti A. Giuffre & Christine L. Williams, *Boundary Lines: Labeling Sexual Harassment in Restaurants*, 8 GENDER & SOC’Y 378, 380-87 (1994).

401. *Id.* at 382.

402. *Id.* at 388.

take the same liberties a form of sexual harassment.⁴⁰³ Brenda complained that “[t]he kitchen can be kind of sexist. . . . They’re not as bad as they used to be because they got warned. They’re mostly Mexican, not even Mexican-American.”⁴⁰⁴ She criticized relatively harmless interactions that fell far short of sexual touching; for instance, “sometimes, they will take a relleno in their hands like it’s a penis”—an action she berated as “Sick!”⁴⁰⁵ Several of the white waitresses admitted that they felt comfortable engaging in sexual banter and touching with the other waitpeople (who were predominantly white), but not with the Mexican workers. In the racial and occupational hierarchy of the restaurant culture, the white women closed ranks against the Mexican men as sexual harassers, whom they perceived as too beneath them to be assuming sexual familiarities.⁴⁰⁶

In addition to these racial/status differences, the researchers found that sexual orientation mattered to how sexual conduct was perceived. Male waiters who saw themselves as heterosexual characterized sexual horseplay and conversation as “sexual harassment” when it came from openly gay men, even though the waiters welcomed similar interactions with other straight men. One of the straight men objected to a gay coworker touching him on the rear end, for example, and another expressed discomfort about a gay baker talking about his sexual experiences and desires. Yet, these same men conceded that similar sexual conversation and horseplay from straight men didn’t bother them, and bragged that they themselves initiated such interactions.⁴⁰⁷ In the eyes of many of the straight men, the gay men were marked as potential sexual harassers from the beginning. Thus, any expression of sexuality by gay men became a self-fulfilling prophecy—a confirmation of the misplaced sexual desire they were expected to embody and enact.

As James Woods and Jay Lucas point out, gay men and lesbians are often reduced by others to nothing more than the walking embodiments of their sexuality:

403. *Id.* at 389.

404. *Id.*

405. *Id.*

406. Although in this example the white women’s reactions to the advances by the kitchen staff may confound racial difference and lower occupational status, a second study by Patti Giuffre provides examples of situations in which white nurses reacted negatively to the race or ethnicity of men of color who were doctors and occupied a higher occupational status. See Giuffre, *supra* note 361, at 13. One of the nurses stopped the touching by “walk[ing] off,” but the other began to find the doctor’s touches (back rubbing) less offensive, over time, when she got to know the doctor and realized that he “really likes the nurses and believes in the nurses.” *Id.*

407. Giuffre & Williams, *supra* note 400, at 393; *cf.* Giuffre, *supra* note 361, at 15 (reporting an interview with a heterosexual male nurse who said he had felt threatened when a gay male nurse asked him out, but who felt flattered when female nurses blew kisses at him and came on to him, even though he didn’t want to go out with them).

Gay men . . . attract a particular kind of attention. Because it is sexuality that distinguishes a gay man from his heterosexual peers, it is his sexuality that attracts their notice.

. . . Prevailing stereotypes about gay men (that they are hypersexual, promiscuous, indiscriminate) further emphasize the sexual aspects of their lives. The result is a tendency to hypersexualize gay men, to allow their sexuality to eclipse all else about them, even to see sexual motives or intentions where there are none.⁴⁰⁸

To illustrate this phenomenon, in *Gay Cops*, Stephen Leinen quotes a police officer who describes how another lesbian officer was treated by her female peers: "Some thought because she was a lesbian she would automatically proposition all other women."⁴⁰⁹ Yet, even when heterosexuals do not feel personally propositioned, gays may be accused of sexual harassment for merely revealing their sexual identity because, as Woods and Lucas observe, "[s]tatements about a [gay] man's sexual orientation, about who he *is*, are misread as statements about what he *does* during actual sexual encounters."⁴¹⁰ For example, one lawyer interviewed by Woods and Lucas feared that if he came out to his coworkers directly, he would be accused of "talking about sex."⁴¹¹ A publishing vice president whose homosexuality was known to his colleagues similarly refrained from alluding to his sexuality "unnecessarily" at work because he felt that it would make his heterosexual colleagues uncomfortable, despite their openness in discussing their own personal lives.⁴¹² Such fears on the part of gay people are not unfounded; heterosexuals have accused gay men and lesbians of sexual harassment for merely talking about homosexuality.⁴¹³ In one lawsuit, a jury agreed with a woman's claims that her coworker, a gay California Department of Corrections artist trainer, had sexually harassed her by simply "telling her details of his homosexual lifestyle and, on one occasion, drawing a sexually explicit picture of her."⁴¹⁴ Indeed, with a fear of such consequences, it is not surprising that studies suggest that the vast

408. WOODS & LUCAS, *supra* note 16, at 65.

409. STEPHEN LEINEN, *GAY COPS* 116 (1993).

410. WOODS & LUCAS, *supra* note 16, at 66; *see also* Karen Nugent, *School Chairman Rejects Gay-Notice Complaint*, WORCESTER TELEGRAM & GAZETTE, Mar. 20, 1998, at B1 (discussing a Massachusetts school investigation of a complaint by a male chemistry teacher who alleged that the reading of notices about the school's Gay-Straight Alliance, and the very word "gay," amounted to sexual harassment).

411. WOODS & LUCAS, *supra* note 16, at 66-67.

412. *Id.* at 63.

413. *See, e.g.*, *Fair v. Guiding Eyes for the Blind, Inc.*, 742 F. Supp. 151 (S.D.N.Y. 1990).

414. *See Homosexual Liable for Harassing Heterosexual*, NAT'L L.J., Mar. 25, 2002, at B2 (reporting on *Brown v. California Department of Corrections*, No. BC 217 520 (Cal. Super. Ct. 2001)).

majority of gay men and women remain closeted at work, believing that their employers and coworkers do not know or suspect that they are gay.⁴¹⁵

These results are disheartening, but they are not surprising. As Woods and Lucas point out, "The situation is familiar to anyone whose gender, race, or background has placed them in the minority; the 'few' will always stand out against the background of the 'many.'"⁴¹⁶ Within many sectors of American society, members of stigmatized minority groups are stereotyped as overly—even pathologically—"sexual." African-American men have learned not to participate in the sexual banter and horseplay of predominantly white organizations, or else risk threatening organizational power relations.⁴¹⁷ Black women, too, must downplay their sexuality—and even their sexual attractiveness—or else risk bringing unwanted attention to themselves. Gay men and lesbians often feel pressure to suppress information about their personal lives in the workplace to protect themselves from stigma,⁴¹⁸ and other sexual minorities occupy an even lower place on the hierarchy of sexual propriety.⁴¹⁹ Working-class men of all races are seen as crude and vulgar, especially when they engage in sexual displays toward their female "betters." Even white working-class women are often considered bad girls whose bawdy sexuality places them outside the bounds of respectability and protection.⁴²⁰

These observations raise the uncomfortable specter that sexual harassment policies will not be enforced evenhandedly, but instead will be used to mete out excessive discipline and punishment to people who are regarded as overly sexual. Indeed, the possibility of evenhanded enforcement seems remote, for, as we have seen, sexuality has no inherent meaning apart from organizational contexts. Because stereotypes about low-status groups' sexuality are so often incorporated into the formal structures and informal status hierarchies of work organizations, these forms of bias become embedded into the very fabric of organizational life through which sexuality is expressed and understood. In the end, no

415. See WOODS & LUCAS, *supra* note 16, at 8 (stating that 76% of gay men and 81% of lesbians remain closeted at work (citing Larry Gross & Steven K. Aurand, *Discrimination and Violence Among Lesbian Women and Gay Men in Philadelphia and the Commonwealth of Pennsylvania: A Study by the Philadelphia Lesbian and Gay Task Force* (1992))).

416. *Id.* at 62.

417. See David A. Thomas, *Mentoring and Irrationality: The Role of Racial Taboos*, 28 HUMAN RESOURCE MGMT. 279, 283 (1989).

418. See generally LEINEN, *supra* note 409, at 32-71 (discussing dominant police reaction to gay police officers and the gay community, and how gay police officers often feel forced to remain closeted about their sexuality); WOODS & LUCAS, *supra* note 16 (exploring the variety of ways in which gay men hide and manage their sexual identities in the workplace).

419. See generally Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY, *supra* note 48, at 267 (showing how sexual minorities occupy a hierarchy of social acceptability with lesbians who are involved in "vanilla sex" occupying the highest status).

420. See Schultz, *supra* note 5, at 1729-32.

workplace is ever really desexualized: Rules or norms that aim to suppress sexuality just end up privileging the forms of sexuality and sexual expression that are taken for granted by the dominant group. In a workplace committed to an ethic of asexuality, we can count on prejudice against those who are viewed as the embodiments of sex.

We should ask ourselves: Is this really the world we want to inhabit? Has feminism really nothing better to offer than an impoverished vision of a workplace sanitized of all sexuality and passion, in the name of protecting women? Can't employment discrimination law be read to embody other goals and values, ones that will help *enrich* people's experiences in the workplace, rather than reducing them to a desexualized—and ultimately dehumanized—conception of what a worker is supposed to be?

V. TOWARD A NEW VISION

To find alternative visions, we don't have to look that far. Early in the twentieth century, a group of feminists and freethinkers who congregated in Greenwich Village championed women's right to participate equally in work, sexuality, and talk. They believed that women's ability to stand alongside men in the same paid work, to control their own sexuality, and to engage in free expression—including frank talk about sexuality—were the pillars upon which a good and egalitarian society rested.⁴²¹ In the intervening decades, of course, it has become clear that these aspirations must be framed more broadly and that inequalities other than gender must be addressed. But the project of achieving a world in which all people have the capacity to participate meaningfully in work (both paid and unpaid), to pursue sexuality and intimacy on their own terms (both within and outside traditional family settings), and to practice free expression (both in politics and in more private realms) remains as powerful and as relevant as ever.

Unfortunately, the direction in which we are moving neglects the first goal (work equality) and threatens the second and third (sexual autonomy and free expression). We are not doing enough to promote gender equality in work roles, and what we are doing in the name of preventing sexual harassment threatens people's right to talk about—and even to participate in—many forms of sexual conduct that do not subordinate women. Although legal reform is an important part of what is needed, law alone is not enough. To change things for the better, we will have to alter our aspirations, as well as revise our legal and organizational approaches to workplace sexuality.

421. See generally NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* (1987); CHRISTINE STANSELL, *AMERICAN MODERNS: BOHEMIAN NEW YORK AND THE CREATION OF A NEW CENTURY* 73-144, 225-46 (2000).

A. *Aspiring to New Ideals*

As we have seen, social movement politics has played a role in bringing about the sanitization process, and a new set of politics and ideals is needed to disrupt that process. It is time to reject the sanitizing impulse and strive, instead, for a world in which people are able to be *more* fully human while they are at work. This means countering the trend toward universal, across-the-board strictures on sexual interaction and creating ways for organizations to offer more sexually open, and more gender-egalitarian, environments. There are many good reasons for taking such a stance.

Today, work's passions pull at women and men alike. We work because we must, but also because most of us can't choose not to. Work isn't just a way to make a living; it's a way to create something of value, to struggle with our capacities and limits, to make friends and form intimate relationships, to contribute to our communities, to leave our imprint on the world, and to know ourselves and others in the way that humans can only be known through struggle and (sometimes) success.⁴²² It isn't just that work is a stage where we as individuals can try to realize our dreams (and confront our demons); it's also one of the few arenas in which diverse groups of people can come together to find sustenance, solidarity, and shared meaning. Thanks to the partial success of forty years of social movements and legal reforms, our society has come to hold as an ideal the image—though not yet the reality—of the workplace as an arena of potential citizenship, a place where more and more groups have some claim to be included on equal terms.⁴²³ In the wake of this transformation, as sociologist Arlie Hochschild has chronicled, the workplace has become a central locus for many people's dreams and desires.⁴²⁴ Even for those who aren't fortunate enough to hold jobs that can foster self-realization, work remains vitally important to how they understand life. Like it or not, most people's lives are shaped profoundly—for better or worse—by their experiences in relation to the world of work.

In a world in which many relationships have become transitory and superficial, work can offer deep and meaningful connections. As sociologists are beginning to recognize, the workplace is a sphere characterized by extraordinarily intimate relations.⁴²⁵ For many people,

422. Schultz, *supra* note 10, at 1888-92, 1928.

423. *See id.* at 1930-37; *see also* Estlund, *supra* note 9, at 73.

424. *See* ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME, AND HOME BECOMES WORK* (1998).

425. *See* David R. Eyler & Andrea P. Baridon, *Far More than Friendship: The New Rules for Reckoning with Sexual Attraction in the Workplace*, *PSYCHOL. TODAY*, May-June 1992, at 58, 59 ("Work is becoming a major source of intimate attraction between [people] as they daily share the physical proximity of working side by side, the stimulation of professional challenge, and the powerful passions of accomplishment and failure."); Gary Alan Fine, *Friendships in the Work*

work fosters exciting, erotically charged relationships. There is an electricity and a sense of connection that comes from working together closely, day in and day out, to achieve common goals.⁴²⁶ For other people, work offers close, not necessarily erotic, friendships that occur primarily at work but extend beyond workplace issues. Scores of people are involved in what researchers have called “non-sexual love relationships” with their coworkers, bosses, or subordinates.⁴²⁷ Whether they are sexual or nonsexual, the ties that emerge at work may be as intense as those that exist at home because, in both realms, the constant contact, coupled with the mutual recognition that can arise out of working on common projects, fosters close, self-disclosing relationships.⁴²⁸ As one important researcher put it, “With individuals increasingly oriented to their work as an extension of their core selves . . . we *are* where we work. To use a worn metaphor, those who labor beside us become our kith and kin.”⁴²⁹

Of course, as this account suggests, intimacy is not synonymous with sexuality. Not all close ties create sexual energy, and not everyone in a sexually charged relationship consummates it physically. As a result, some readers may ask: Why should we care about whether employers prohibit *sexual* conduct? What would be wrong with preserving only workplace intimacy of the nonsexual variety?

One answer is that we may have to allow people to engage in sexual liaisons at work in order to find potential mates. In today’s economy, many people work extremely long hours and have little time for social lives

Place, in FRIENDSHIP & SOCIAL INTERACTION 185, 202-03 (Valerian J. Derlega & Barbara A. Winstead eds., 1986); Stephen R. Marks, *Intimacy in the Public Realm: The Case of Co-Workers*, 72 SOC. FORCES 843, 853 (1994) (concluding, on the basis of both theory and empirical surveys, that “[a]t workplaces, intimacy appears to be a rather pervasive phenomenon”).

426. As a special report by the Bureau of National Affairs put it:

A number of experts noted that when men and women work well together on interesting projects, spend large amounts of time together at the office, and travel together on business, it is easy to become sexually attracted to one another. [One] management consultant who has written extensively on the subject noted: “The most powerful aphrodisiac is common interests.”

BUREAU OF NAT’L AFFAIRS, *supra* note 1, at 1.

427. See Sharon A. Lobel et al., *Love Without Sex: The Impact of Psychological Intimacy Between Men and Women at Work*, ORGANIZATIONAL DYNAMICS, Summer 1994, at 5, 6-9 (reporting that in a large random sample of people who had attended an executive education program at a Midwestern business school, 37% had such intimate relationships with their peers, 37% had them with subordinates, and 20% had them with supervisors); see also Eyler & Baridon, *supra* note 425, at 59-60 (making a similar point).

428. Marks, *supra* note 425, at 846. In one large contemporary study, for example, fully 60% of the people surveyed said they talk to coworkers about personal matters or get together with them socially. Among the married people who said they discuss important matters with at least one other person, 34% said they do so with both their spouse and coworkers—a figure not that far below the 41% who said they do with their spouses and not with their coworkers—and 10% said they did so with coworkers but not with their spouses. *Id.* at 849-50, 853.

429. Fine, *supra* note 425, at 203; see also Marks, *supra* note 425, at 853; cf. Lobel et al., *supra* note 427, at 9.

outside work.⁴³⁰ As a practical matter, these people may have to find potential partners through their employment. If prohibitions against workplace dating become universal, many people may find it difficult if not impossible to find marriage partners or to secure other long-term or short-term sexual relationships.⁴³¹

Yet, the problem isn't simply that rules against sexual conduct might pose a barrier to people forming traditional sexual relationships that would extend *outside* the workplace. The bigger problem is that such rules may pose barriers to people forming erotic and other close connections that would occur primarily *inside* the workplace. For, although intimacy and sexuality may be possible to separate as a theoretical matter, they are not so easy to disentangle at the level of experience or policy. For many people, the line between a platonic relationship and a sexual one is often porous, and friends may cross it once or even on occasion without becoming full-time partners or lovers. Furthermore, simply because intimacy doesn't require sexual relations does not mean it can thrive in the presence of the prohibitory sexual harassment measures many companies are adopting. Many employers' policies extend beyond prohibiting sexual relations to limit a broader set of personal interactions, such as sexual remarks and joking, and even looks and gestures, that can be interpreted as "sexual" (such as hugs). When people have to fear that they can be accused of sexual harassment on the basis of something minor they may say or do, no matter how harmless (or even affectionate) their intentions, working relationships can become mistrustful rather than intimate—just as some survey research suggests may be occurring.⁴³² The sense of connection that work inspires can wither under the threat of sexual accusation.

Even if we could somehow separate out nonsexual intimacy from the more sexual variety, we should still be deeply concerned about across-the-board prohibitions on specifically sexual conduct. Workplace sexuality isn't solely a source of danger and disruption—it's also a source of vitality, creativity, and power. For many people, the sexual energy that work generates will be one of the most valued aspects of their work lives—one we should not sacrifice lightly. If sexuality were valued as it should be, we would celebrate, rather than seeking to snuff out, the erotic charge that

430. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN* (1992).

431. Recall earlier figures showing that between 24% and 37% of all employees have engaged in some sort of workplace romance, and that these figures may be much higher among younger people. See *supra* note 254.

432. U.S. MERIT SYS. PROT. BD., *supra* note 96, at 9. In the 1994 Merit Systems Protection Board survey of federal employees, 63% of the men and half of the women respondents stated that some people are too quick to take offense when someone expresses a personal interest in them through looks or remarks. Fully one-third of the respondents said they believe that normal attraction between people is, to a moderate or great extent, misinterpreted as sexual harassment. *Id.*

often accompanies working. Sexuality is, to a large extent, what makes us alive. So, in the move to suppress workplace sexuality, what is at stake is the very idea of whether work can be a sphere of human energy, vitality, and connection. The very existence of work as a humanist enterprise is on the line, as is the value of sexuality to human experience.

Just as we are coming to realize the importance of workplace intimacy in people's lives, we are also beginning to recognize—however reluctantly and painfully—how desperately our society needs to embrace a new ethics of sexuality. As a new generation of queer theorists and feminists has eloquently shown, our society all too often induces sexual shame and creates moral panics about sexuality.⁴³³ Not only does the politics of shame harm some groups at the expense of others; it also induces social stigma and enforces sexual conformity in a way that impoverishes life for everyone. Viewed in this light, the contemporary campaign to drive sex out of the workplace becomes visible as a larger politics of sexuality. It is a politics that, in the name of protecting women from sexual discrimination and danger, privileges some people's notion of acceptable sexuality over others'; in the name of protecting firms from disorder and legal demise, gives management the power to punish sexual transgressors upon pain of losing their jobs; and in the name of progress, enforces standardized, often stifling codes of appropriate sexual conduct that deprive employees of the capacity to create workplace cultures that reflect their own sexual norms.

This last realization raises an important point. Not only is the drive toward sexual sanitization part of a larger politics of sexuality; it is also part of a larger practice of managerial control. Firms are adopting sexual harassment policies in response to advice from lawyers and HR professionals, but without significant input from their own employees. In most cases, employees have little or no role in defining sex-based harassment, identifying its causes, or devising appropriate solutions.⁴³⁴ Managers sometimes even use accusations of sexual harassment as a pretext for firing workers whom they want to get rid of for other reasons. But even when no ulterior motives are present, sexual harassment law has given firms a newly progressive justification for punishing and even firing

433. See, e.g., WARNER, *supra* note 312, at 1-33 (discussing the powerful role of sexual shame in American society); Rubin, *supra* note 419, at 267-75.

434. For a look at the positive impact of employee participation in designing internal processes for legal compliance, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 508-09 (2001) (examining three companies that solicited employee feedback and participation in gender-related policymaking, and finding that where a company created a new "open door" policy that actively solicited and analyzed feedback from each employee and manager about its fairness and effectiveness, reported usage and satisfaction increased, and EEOC sexual harassment and discrimination complaints and lawsuits became disproportionately low).

employees whose conduct can be said to interfere with productivity and order.

From a workers' rights perspective, there is cause for concern. These draconian practices put workers, as individuals, at risk of losing their jobs, their livelihoods, and a significant source of meaning and connection to others. But more is at stake, for such policies also put employees, as a group, at risk of losing the ability to forge their own workplace cultures and sexual norms—cultures and norms that may be mobilized, at least at times, as a source of solidarity, pleasure, and even resistance to managerial abuse of authority on the job.⁴³⁵

Wittingly or unwittingly, over the past two decades, many feminists and sympathetic reformers have become complicit in this neo-Taylorist project. Many have bought into a logic that says, "Sex has no place in the workplace, because when people are at work, they should be working." But this logic has no stopping point. In the name of productivity and order, it grants organizations the power to control not only sexuality, but all the other emotional drives and dramas of human life that managers believe interfere with the smooth functioning of the workplace: reproduction and care, birth and death, accident and aging, disease and disability, sex and solidarity, and, yes, even love and marriage.⁴³⁶ Yet, these are the things that make us human. In a world in which work has become such a critical component of our lives, we should not cede to management such massive censorial power over our lives. Just as feminism and other social movements have demanded workplace recognition of other important life interests (such as the current movement to get employers to accommodate parenting and other caring responsibilities⁴³⁷), so too should we insist on the recognition that people who work are fundamentally sexual beings. Rather than trying to drive out sexuality, we should strive to create workplaces in which women as well as men, sexual minorities as well as sexual conformists—people of all races and classes and from all walks of life—can be perceived as competent workers and sexual subjects at the same time.

At a minimum, we should question the idea that workplace sexual conduct always constitutes harassment, and become more open-minded

435. See generally Burrell, *supra* note 17, at 107-10.

436. See, e.g., Timothy D. Chandler et al., *Spouses Need Not Apply: The Legality of Antinepotism and No-Spouse Rules*, 39 SAN DIEGO L. REV. 31 (2002) (chronicling the continued popularity of no-spouse rules, which earlier reformers sought to eliminate because of their disparate impact on women).

437. See, e.g., Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1437-39 (2001) (arguing that "[w]orkplaces must be restructured so that the burdens for dependency can also be redistributed in a more just manner as between family and market—so that caretakers have a meaningful 'right to work'"); JOAN WILLIAMS, *UNBENDING GENDER* 54-113 (2000) (arguing for workplace accommodation of parenting responsibilities).

about the presence and uses of sexuality at work. As I have argued above, and as a number of feminists across the generations have begun to recognize, sexuality is not always dangerous or disadvantageous to women, even in the workplace.⁴³⁸ Younger women are particularly likely to take such a position, finding a disconnect between themselves and the older generation of feminists who considered sexuality the primary axis of gender oppression.⁴³⁹ Instead, many younger feminists have adopted a spirited stance that seeks to put women fully in charge of their own sexuality—both its pleasures and risks.⁴⁴⁰ Many of these younger women have been turned off by the sexual conformism—and lack of realism—that they believe permeates the orthodox campaign to eliminate sexual harassment.⁴⁴¹ “Feminists concerned with sexual harassment reproduce their own version of [a utopia] based on the absence of messy sexual desire,” writes Katie Roiphe; she continues, “Although it takes some imaginative leaps to get

438. See, e.g., NAOMI WOLF, *FIRE WITH FIRE* 191 (1994) (arguing that “we must be wary of new definitions of harassment that leave no mental space to imagine girls and women as sexual explorers and renegades”); Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 *STAN. L. REV.* 691, 746 (1997) (arguing that “[s]hutting down all sexual behavior seems like an overreaction to the problem of sexual harassment, and requires some very disturbing assumptions about the possibility of female sexual agency”); Amelia Richards & Jennifer Baumgardner, *In Defense of Monica*, *NATION*, Dec. 21, 1998, at 6, 7 (arguing that “[f]eminists should support Monica Lewinsky not as a victim of a rapacious man but as a young woman with a libido of her own”).

439. See, e.g., RENE DENFIELD, *THE NEW VICTORIANS: A YOUNG WOMAN’S CHALLENGE TO THE OLD FEMINIST ORDER* 260 (1995) (“If there is a single attitude that would describe how many young people feel about sex, it’s this: It’s nobody’s business but our own. Young women do not like anyone, whether archconservatives or feminists, telling them what to do in the bedroom—which, unfortunately, is exactly what many current feminists are doing.”); Melissa Klein, *Duality and Redefinition: Young Feminism and the Alternative Music Community*, in *THIRD WAVE AGENDA* 207, 221 (Leslie Haywood & Jennifer Drake eds., 1997) (stating that “[u]nlike older, Dworkin-MacKinnon feminists, young punk feminists tended to be very pro-sex, more likely, for example, to celebrate female-centered pornography than to censor male-centered porn”).

440. For some additional examples, see PAULA KAMEN, *HER WAY: YOUNG WOMEN REMAKE THE SEXUAL REVOLUTION* 189 (2000) (recounting how a group of young feminists at the University of Illinois launched a protest advocating that “women have a right to control their sexuality no matter what, no matter how they dress or how promiscuous they are”); and Richards & Baumgardner, *supra* note 438, at 6 (insisting that “[w]e want the right to be sexually active without the presumption that we were used or duped. We want the right to determine our own choices based on our own morality.”). The editors of *Bust Magazine*, a popular Third Wave feminist publication, devoted three full issues to sex and sexuality and introduced the first “sex issue” by stating, “What seems to be the common thread to these stories, if there’s one to be found, is the pursuit of pleasure, the acceptance of pleasure, and the allowance of pleasure, in whatever form it takes.” Debbie Stoller & Marcelle Karp, *Editors’ Letter*, *BUST MAG.*, Summer-Fall 1994, at <http://www.bust.com/stories/editor.html>.

441. Consider Heather Corinna’s trenchant criticism of Harvard’s campaign to oust the Dean of the Divinity School when it was discovered that his private computer contained pornographic images. Heather Corinna, *What Unbecomes a Dean Most*, at <http://www.maximag.com/current/harvard/index.html> (last visited Mar. 23, 2003). Corinna contends that the Dean was asked to resign not for viewing pornography, but because his conduct held “the threat to make public that even academics and Deans are sexual people with diverse carnal desires often attributed to the uneducated masses . . . and because in our culture, the mainstream notion is that divinity, high-visibility public position and sex are opposing forces.” *Id.*

there, their version . . . is a land without dirty jokes, leers, and other instances of 'unwanted sexual attention.' Whether or not visions of [such a universe] are practical, the question becomes whether they're even desirable."⁴⁴²

Instead of suppressing sexual desire, these younger feminists seek ways to empower women—along with other employees—to participate in it on more equal terms. For feminist sociologist Christine Williams, who has written widely on this topic, for example, the solution is not to eliminate sexuality, but to ensure that women (and other disempowered employees) have more power to shape how it is experienced.⁴⁴³ As Australian feminist Rosemary Pringle has eloquently expressed the new goal: "Sexuality cannot be 'banished' from the workplace. . . . It is only by insisting on its presence, making it visible, asserting women's rights to be *subjects* rather than *objects* of sexual discourses, that bureaucracy can be challenged."⁴⁴⁴

Many scholars who write about issues pertaining to gay men, lesbians, and other sexual minorities have taken a similar position.⁴⁴⁵ Rather than seeing sexuality as the problem, these writers see the drive to deny and discipline it as a source of disproportionate harm to sexual minorities and, along with them, everyone else. As Michael Warner has eloquently argued, the impulse to "put sex in its place" creates "damaging hierarchies of shame and elaborate mechanisms to enforce those hierarchies" throughout social life.⁴⁴⁶ In sexual harassment cases in the courts, as we have seen, the fixation on sexual advances has led to a two-tiered system of justice in which people perceived to be homosexuals are frequently penalized as

442. KATIE ROIPHE, *THE MORNING AFTER* 111 (1993).

443. See, e.g., Williams, *supra* note 307, at 40 (arguing that it is neither realistic nor desirable to seek to eliminate workplace sexuality "since the problem with sexual harassment is not that it is sexual; the problem is that [it] is a form of workplace discrimination"); Williams et al., *supra* note 313, at 75 (arguing that employees "can and do make distinctions between sexual harassment and assault on the one hand, and pleasurable, mutually desired sexual interactions and relationships on the other," and that sociologists should seek to understand and distinguish between the organizational contexts that elicit such different responses); Christine L. Williams, *Sexual Harassment and Sodomasochism*, 17 *HYPATIA* 99, 105-06, 112-13 (2002) (arguing that some organizations encourage sodomasochistic dynamics around sexuality, and urging that sexual harassment policies must be part of larger efforts to reduce hierarchy and empower disadvantaged workers).

444. PRINGLE, *supra* note 313, at 100 (emphasis added); see also CYNTHIA COCKBURN, *IN THE WAY OF WOMEN: MEN'S RESISTANCE TO SEX EQUALITY WITHIN ORGANIZATIONS* 159 (1993) (agreeing with Pringle that "[o]pposition to sexual harassment is only one component of a sexual politics in the workplace," and noting that "[t]he long agenda for the women's movement in organizations must be to strengthen women's position and confidence in many different ways so that we can reintroduce our bodies, our sexuality and our emotions on our own terms" (quoting Rosemary Pringle, *Bureaucracy and Sexuality: The Case of Secretaries*, in *THE SEXUALITY OF ORGANIZATION*, *supra* note 313, at 158, 166)).

445. For writers in this tradition, see WARNER, *supra* note 312; Franke, *supra* note 438; Halley, *supra* note 312; Rubin, *supra* note 419; and Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *STAN. L. REV.* 353 (2000).

446. WARNER, *supra* note 312, at 195.

sexual harassers, but rarely, if ever, protected as harassees.⁴⁴⁷ Within organizations, the drive to suppress sexuality has also created disproportionate problems for homosexuals and other sexual minorities, whose sexual expression—and even mere presence—may be perceived as offensive or threatening in a world governed by the ethic of asexuality.⁴⁴⁸ With these understandings, writers in this tradition have begun to refuse to equate workplace sexual conduct with gender or sexual orientation discrimination.⁴⁴⁹ Instead, like a growing number of feminists, they have adopted a stance that acknowledges the inevitability and power of sexuality in human affairs and calls for tolerating—and even cultivating—a wider scope for sexual diversity and sexual expression in our institutions.

Adopting such a stance does not require a Pollyannaish attitude that workplace sexuality is always benign or even a libertarian one that it is usually private and beyond the scope of inquiry. Sexuality *is* often used as a weapon against others in the workplace, as discussed above. Nor does it require denying that, at present, many women may experience sexual conduct as more threatening, or more uncomfortable, than most men do in many workplace settings.⁴⁵⁰ But the new stance does suggest that we need a different strategy for dealing with these problems. As we have seen, sexual harassment is linked to the gender-based stratification of work, most notably the sex segregation of jobs (and the accompanying pay and status inequalities). Where women have not been fully integrated, promoted, and accepted as equals, it is predictable that some male bosses or workers will be threatened and will engage in sexual (as well as nonsexual) forms of harassment designed to highlight the women's difference or inferiority and keep them in their place. Such harassment occurs in both male-dominated job settings and in female-dominated ones governed by male authority. Thus, to the extent that women may be more likely than others to perceive sexual conduct as threatening, this is because they remain at a structural

447. See Schultz, *supra* note 5, at 1777-89 (showing how under the desire-dominance paradigm, courts presume that homosexuals are acting out of sexual desire while heterosexuals are not, with the effect of casting gay men as harassers but almost never as harassees); Yoshino, *supra* note 445, at 450-51 (showing how the erasure of bisexuality contributes to this dynamic).

448. Cf. WOODS & LUCAS, *supra* note 16, at 20-25, 35-36 (showing how our society's conception of the proper workplace is asexual, and revealing how many gay men buy into the notion that to reveal their sexual orientation would be "unprofessional" and assume that they can and should subordinate their sexual identities to their work roles); *id. passim* (same).

449. See, e.g., Halley, *supra* note 312, at 15 (arguing that current interpretations of sexual harassment facilitate the phenomenon of "sexuality harassment," in which sexual minorities are accused of sexual harassment by homophobic heterosexuals who invite the attentions of sexual minorities but then deny their own desires); Yoshino, *supra* note 445, at 446-58 (arguing in favor of making bisexuality visible so that heterosexuals will no longer be able to take advantage of a presumption that their sexual conduct is always harmless horseplay, and will pressure courts to move away from the current paradigm that equates sexually motivated conduct with sexual harassment and assumes that homosexuals always act with sexual motivations).

450. See GUTEK, *supra* note 47, at 45-49.

disadvantage in most workplaces, and this disadvantage makes them vulnerable to the use of sexual shaming as a badge of gender-based inferiority.

At a cultural level, we must seek ways to empower women to band together to renounce the association of femaleness with sexual shame, while, at a structural level, encouraging management to dismantle the patterns of gender inequality that produce their vulnerability. In a world in which some men seek to degrade women through sexual overtures and ridicule, women can reclaim some control by refusing to exhibit the sense of sexual humiliation and degradation the gestures are designed to inspire. Activists can help women find ways to resist sexual forms of harassment by refusing to cede sexuality as a "technology of sexism."⁴⁵¹ A parallel strategy may apply to men who are perceived as failing to conform to the dominant image of suitable masculinity for the job (including gay men), who are also at risk for sexual harassment and discrimination in sex-segregated job settings.

But as important as it is to mount campaigns of cultural resistance, it is unrealistic to expect many people to do so when they are in a position of structural weakness. To enable women and gender-nonconforming men to adopt strategies of resistance and change, we must put them in positions in which they have the power to participate in shaping their organizations' cultural norms about sexuality along more empowering lines. In other words, we must find ways to disaggregate sexuality from gender hierarchy within organizations, so that no group can monopolize sexuality's power in the name of male dominance, female sexual victimization, or managerial control. Toward that end, we can reshape sex harassment law to offer employers the incentive to desegregate their workplaces—rather than desexualizing them—while, in the transition period, securing even better protection against harassment than Title VII currently provides, as the next Section explains.

B. *Recommitting to Structural Equality Through the Law*

The foregoing analysis opens up a new remedial strategy. Instead of encouraging employers to deal with sex harassment by prohibiting sexual interaction, the law should encourage them to attend to the larger structures of gender inequality in which genuine sex harassment flourishes. We should stop treating sex harassment as an individual transgression to be solved by punishing individual employees and supervisors. Nor should we

451. See Franke, *supra* note 438, at 693 (referring to sexual harassment as a "technology of sexism" because "the act embodies fundamental gender stereotypes" and "is both the manner of accomplishing sexist goals, and the specialized instantiation of a sexist ideology").

regard sex harassment as a problem of male “locker-room culture” that requires management to tear asunder workers’ hard-earned cultures in the name of protecting some employees from subjective offense. Instead, we should create incentives for employers to do away with the structures of sex segregation and hierarchy that give sexualized work cultures and individual sexual behaviors the power to harm.

As a precondition for any legal reform, we must be clear about the types of conduct that can constitute sex harassment. As I have emphasized, it is the misguided emphasis on *sexual* conduct that creates the legal justification for sanitization. It is only by abandoning this sexual focus that the legal system can convey clearly to organizations that their proper goal is *not* to eliminate sexual conduct, but rather to dismantle sex discrimination. Thus, as I have argued elsewhere,⁴⁵² courts and regulators should make crystal clear that the definition of sex harassment does not require sexual conduct but instead may include *any* type of conduct that occurs because of sex—regardless of whether it is sexual, nonsexual but overtly sexist, or even gender-neutral in content.⁴⁵³

But correcting the definition of sex harassment is not enough, so long as our understanding of harassment remains rooted in a conception of individual bad behavior or culturally insensitive conduct, rather than being regarded as a potential manifestation of larger patterns of sex segregation or inequality. In fact, if all we were to do is broaden the definition of harassment to include nonsexual conduct, without also broadening the inquiry to examine whether the alleged harassment is linked to larger workplace inequalities, we might risk merely encouraging employers to prohibit nonsexual, but overtly sexist, speech in addition to prohibiting sexual speech and conduct.⁴⁵⁴

452. See Schultz, *supra* note 5, at 1798 (urging that courts consider “all of the challenged conduct—sexual and nonsexual—in connection with . . . hostile work environment claim[s]”).

453. In the wake of recent criticisms in the scholarly literature, some lower courts have begun to take seriously the notion that both sexual and nonsexual forms of harassment can create a hostile work environment. See, e.g., Gregory v. Daly, 243 F.3d 687, 695 (2d Cir. 2001); O'Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 148-49 (3d Cir. 1999); cf. Cardenas v. Massey, 269 F.3d 251, 262 n.7 (3d Cir. 2001) (applying similar reasoning in a race-based hostile work environment case). One court has even held a sexual harassment policy inadequate on the ground that it did not include a prohibition on nonsexual forms of harassment, in addition to sexual forms. See Smith v. First Union Nat'l Bank, 202 F.3d 234, 245 (4th Cir. 2000) (concluding that such a policy was insufficient as a matter of law to establish an affirmative defense that would relieve the employer of automatic liability for a supervisor-created hostile work environment); see also Crowley v. L.L. Bean, Inc., 303 F.3d 387, 405-06 (1st Cir. 2002) (agreeing with plaintiff's argument that “L.L. Bean's sexual harassment policy is fundamentally flawed insofar as it prohibits only sexually offensive behavior, not nonsexual conduct motivated by gender bias,” but noting in dicta that a company's failure to protect employees adequately from all types of actionable harassment does not amount to a discriminatory policy or practice).

454. Contrary to the suggestion of some commentators, see Young, *supra* note 157, at 31 (suggesting that my approach would “require employers to proscribe politically incorrect comments about gender—for instance, that mothers with small children should stay home—and

The most crucial step, therefore, is to create incentives for organizations to fully integrate their workforces, rather than simply desexualizing their environments, as a means of complying with sex harassment law. The theoretical justification for doing so is straightforward. In an ideal world, the goal would be to put women in a position of complete equality in fully integrated work settings, so that they would have equal power to shape the environments and cultures in which they work to their own liking. In such a world, even if some women ended up working in environments that included a lot of sexual conduct and expression, we would be comfortable concluding that the presence of such conduct was not itself a product of sex discrimination. Of course, even in such egalitarian environments, sexual conduct—like any other form of conduct—might still be used as a weapon of sex discrimination against individual women or men, so we would still need to protect individuals from harassment directed at them because of their sex. But, by definition, we would not equate the mere presence of sexual conduct with sex discrimination.

Many things go into making an environment free from sex discrimination, but for purposes of evaluating whether complained-of sexual conduct is likely to be part of a larger complex of sex discrimination, the available research suggests that the most important variable is the degree of sex segregation in the job and work setting. As we have seen, the gender composition of the work setting makes a difference as to how women and men experience sexual conduct at work: The very same sexual behaviors are understood differently depending on whether they occur in a traditionally sex-segregated job setting or instead in a well-integrated, egalitarian one. Thus, by tying the risk of liability for sex harassment to the degree to which the employer has achieved sex integration and equality in the relevant positions, we can provide women with the power and ability to shape their work cultures along more empowering lines.

The basic idea is simple. For organizations that succeed in achieving a high degree of integration and equality in the relevant positions, we would offer the proverbial “carrot” of a lower risk of liability for sexual harassment claims. But for organizations that remain significantly

perhaps even comments questioning an individual woman’s competence in a ‘masculine’ job”), the point of my approach is not to ban sexist speech. The point is to define hostile work environments in a way that is sensitive to context, recognizing that the same speech or conduct that is likely to signal a larger pattern of discrimination in a highly sex-segregated work setting may have no such implication in a fully integrated, egalitarian one. Thus, in a highly segregated setting, overtly sexist comments—such as comments that women do not belong in a “man’s job”—are likely to be part of a broader campaign of discriminatory conduct designed to drive the women away or undermine their ability to pursue or succeed at the job. *See* *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1495-501 (M.D. Fla. 1991). But in a fully integrated setting in which women have equal responsibility and influence, such comments are unlikely to be part of such a broader pattern of discriminatory conduct and are unlikely to interfere with the women’s employment prospects in any meaningful way.

segregated, we would use the “stick” of imposing an even higher risk of liability for sexual harassment claims than they currently face.⁴⁵⁵ For organizations in the middle, the current liability rules would continue to apply. Under this approach, employers would have the option to desegregate, rather than desexualizing, as a way to avoid sex harassment liability. The shift would make sex harassment law parallel to disparate impact law, which provides employers the option of hiring a balanced workforce *or* validating selection procedures that can be shown to cause imbalance.

Thus, for plaintiffs who work in jobs or settings that remain significantly segregated or unequal, we would make it easier to prove a hostile work environment claim. In addition to permitting them to challenge nonsexual forms of harassment, we would create a rebuttable presumption that *any* type of harassment that has been directed at them, whether sexual or nonsexual, has occurred because of sex within the meaning of Title VII.⁴⁵⁶ This change would extend to nonsexual forms of harassment, such as physical violence and hazing, the same presumption of but-for causation that currently applies to more sexual forms, such as sexual advances and assault.⁴⁵⁷ In addition, we might extend to such plaintiffs the benefit of a rebuttable presumption that any complained-of harassment that had occurred because of sex was sufficiently severe or pervasive to be actionable. Thus, for example, where women who work in the trades or firefighting have knives drawn on them, rats placed in their lunchboxes, or sexual taunts and ridicule hurled at them, courts would presume that such patterns of conduct are sex-based and sufficiently severe and pervasive to cause employment-related harm.

For women who work in male-dominated job categories, such a shift would be warranted because, as we have seen, they are frequently, even predictably, the target of both sexual and nonsexual forms of harassment that undermine their ability to do their jobs. As discussed above, similar pressures may exist and may justify relaxed evidentiary standards for other plaintiffs in sex-segregated settings, such as women who work in female-

455. Cf. Paul J. Spiegelman, *Remedies for Victim Group Isolation in the Workplace: Court Orders, Problem Solving, and Affirmative Action in the Post-Stotts Era*, 29 HOW. L.J. 191, 254 (1986) (describing the threat of court sanctions as the “stick” that would create pressure for employers to desegregate, and *United Steelworkers v. Weber*, 443 U.S. 193 (1979), as the “carrot” that would insulate them from legal liability for reverse discrimination if they did so).

456. See Schultz, *supra* note 5, at 1801 (proposing that “[a]t least in close cases, courts could assume that the challenged conduct is gender-based where it is directed at women who work in ‘traditionally segregated job categories’” (quoting *Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987))).

457. In doing so, it would eliminate the two-tiered structure of causation that I have criticized in earlier work. See Schultz, *supra* note 5, at 1739-43 (documenting that in cases involving sexual advances thought to be motivated by sexual desire, the courts presume that the conduct occurred because of sex, whereas in cases involving other types of harassment, the courts apply no such presumption and often miss the gender dynamics involved).

dominated settings and who experience harassment at the hands of their male bosses,⁴⁵⁸ or men who work in traditionally male-dominated settings and who experience overtly gender-based harassment at the hands of their male coworkers.⁴⁵⁹

At the other end of the spectrum, for plaintiffs who work in settings that are fully integrated and free from discrimination, we would make it more difficult to win hostile work environment claims: Because, by definition, the pressures associated with tokenism and skewed sex ratios would have been alleviated in such settings, we would not expect any gender-based patterns of harassment to occur routinely; nor would we expect any sexual conduct to be part of any larger pattern of sex discrimination. Of course, even in completely integrated, egalitarian settings, particular individuals might still engage in sex-based harassment, and particular individuals might still be singled out for it, so we would still need to protect people from such isolated instances of sex-based harassment, but subject to more stringent standards of proof. Thus, for purposes of establishing the requisite harm in such settings, we might require proof that the challenged conduct materially interfered with the plaintiff's ability to perform or succeed in the job (personal perceptions of abusiveness or offense would not suffice to show severity or pervasiveness). Similarly, for purposes of causation, we might require proof that the conduct was undertaken with a discriminatory purpose of treating the plaintiff differently because of her sex (mere sexual content or presumed sexual desire wouldn't suffice). Under these standards, proving a hostile work environment claim would become similar to proving an individual disparate treatment claim, which requires proof of discriminatory purpose and a material change in the terms or conditions of employment.⁴⁶⁰

458. See *supra* notes 321-326 and accompanying text.

459. See *supra* note 327 and accompanying text. For these plaintiffs it would not be appropriate to presume from the outset that any alleged harassment, however gender-neutral in content, was sex-based. In many male-dominated fields, workers engage in rituals of hazing or horseplay, see *Oncale v. Sundowner Offshore Drilling Servs., Inc.*, 523 U.S. 75, 81-82 (1998), that are motivated by considerations other than gender, including a desire to build solidarity with one another. But once a plaintiff had shown that his gender played some role in the harassment, perhaps through evidence of overtly gender-based comments, see, e.g., *Goluszek v. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988) (adjudicating a claim filed by a male maintenance mechanic whose coworkers taunted him with overtly gender-based comments, such as belittling him for not having a wife or girlfriend and telling him a man had to be married to be a machinist, as they sabotaged his work and physically assaulted him), courts could apply a rebuttable presumption that the pattern of harassment as a whole was based on sex within the meaning of Title VII.

460. As I have explained in earlier work, hostile work environment harassment is best conceptualized as a species of disparate treatment; both claims require proof of causation, harm, and employer liability. See *Schultz*, *supra* note 5, at 1714-16. To satisfy the causation requirement in individual disparate treatment cases, courts typically require a plaintiff to show proof that the complained-of conduct was undertaken with a discriminatory purpose of treating her differently "because of sex"; in hostile work environment cases, courts traditionally have relaxed this requirement by extending plaintiffs the benefit of a presumption that unwelcome conduct of a sexual nature occurred "because of sex" within the meaning of Title VII. See *id.* at 1739-41. To

This approach would shift incentives in the right direction for employers. Employers would no longer face pressure to punish isolated instances of sexual conduct and expression, because under the proposed approach, no amount of sexual conduct or speech, in and of itself, would create sexual harassment liability. Instead, complaints about sexual conduct, like complaints about any other type of conduct, would simply provide a signal for organizations to examine whether they need to “break[] down old patterns of . . . segregation and hierarchy”⁴⁶¹—an inquiry that lies at the heart of employment discrimination law. Once such problems had been addressed, harassment would be actionable only under more stringent disparate-treatment-like standards. Thus, the more organizations integrate women equally into all lines of work and all levels of authority, the less likely they will be to incur liability for hostile work environment harassment.

Similar measures are needed to shift the incentives surrounding quid pro quo sexual harassment claims alleging that supervisors conditioned tangible employment benefits on sexual demands.⁴⁶² As we have seen, the fear of liability for this type of harassment has led firms to adopt extraordinary measures to control supervisors’ sexual behavior, including rules against consensual dating or socializing with subordinates or even meeting with them behind closed doors (for fear of creating the opportunity for, or impression of, sexual harassment). Yet, because suits alleging disparate treatment in the terms and conditions of employment are so hard to win, there is little pressure for firms to address the *nonsexual* forms of discrimination and abuse that many employees experience at the hands of their bosses and coworkers. Particularly in traditionally female-dominated

satisfy the harm requirement in individual disparate treatment cases, courts typically require a plaintiff to show that the complained-of conduct altered the terms and conditions of employment by effecting a tangible job detriment; in hostile work environment cases, courts relax this requirement by allowing plaintiffs to show that even conduct that does not effect a tangible job detriment can be sufficiently severe and pervasive to alter the conditions of employment for the victim and a reasonable person in her position. *See id.* at 1714-16. Thus, under the approach I am proposing here, requiring a hostile work environment plaintiff who works in a fully integrated job setting to show that she was treated differently because of her sex, without presuming that sexual conduct automatically satisfies this requirement, renders the proof of the causation element similar to that required for a disparate treatment claim. Similarly, requiring the plaintiff to show that the complained-of conduct materially interfered with her ability to perform or succeed in the job, without allowing proof of personal offense alone to suffice to satisfy the element, moves the proof of the harm requirement closer to that required for a disparate treatment claim.

461. *Johnson*, 480 U.S. at 628 (citing *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)).

462. In *Burlington Industries v. Ellerth*, the Supreme Court made clear that for purposes of assessing employer liability in cases involving harassment by supervisors, the important distinction is not between quid pro quo harassment and hostile work environment harassment, but between harassment that is backed up by a tangible employment action and harassment that is not. 524 U.S. 742, 751-54, 764-65 (1998). For ease of reference, I will refer to situations in which supervisors condition employment benefits on demands for sexual services or other sex-related, but non-job-related, services as quid pro quo harassment.

settings, as we have seen, male supervisors often exercise paternalistic, sexist forms of authority that demean female employees' intelligence and undermine their self-confidence and competence on the job.

It would be difficult (and not always appropriate) to reverse the trend toward antifraternalization rules. In some organizations (including those characterized by particularly hierarchical relationships or special concerns about abuse between older and much younger people), it may make sense for management to discourage supervisors from initiating sexual or other intimate relationships with subordinates who report to them. But we should take steps to create a legal environment in which quid pro quo harassment is not singled out for more opprobrium than nonsexual sex discriminatory abuses of managerial authority. By treating sexual impositions no better, and no worse, than any other sex-based form of managerial abuse, we can make clear that the law tolerates no form of sexism in the terms and conditions of employment.

Applying the desegregation approach helps shift incentives in the right direction for quid pro quo harassment cases. This type of harassment is often linked to vertical sex segregation, which occurs when members of one sex have job authority over members of another sex (usually male over female, in our society). By tying the risk of liability to the degree of vertical segregation associated with the positions in question, we would encourage organizations to integrate their supervisory positions as well as their line-level jobs. For example, in a setting in which men had traditionally supervised female workers, we might apply to a male supervisor's demand for feminine-stereotyped services that are not in a female employee's job description⁴⁶³ a rebuttable presumption that the demands were based on sex within the meaning of Title VII. This proposal would extend to demands for nonsexual services, such as serving food or cleaning up or performing secretarial services, the same presumption of causation that currently applies to demands for sexual services in vertically sex-segregated settings. But in settings where women had been fully incorporated into the supervisory positions and men into the jobs below, we would require the usual, more concrete proof that any objected-to demands were gender-based. Even in well-integrated, egalitarian firms, managerial abuses of authority might continue, but they would be no longer tied to systematic patterns of sex discrimination and no longer the special province of

463. See, e.g., *Smith v. Tex. Dep't of Water Res.*, 818 F.2d 363, 368-70 (5th Cir. 1987) (Politz J., dissenting) (involving a male division director of a Texas agency, who demanded that his former secretary relieve his own assistant of clerical duties every day while she was on break, despite an earlier promise that she would no longer have to perform clerical work once she transferred into a traditionally male job in the topography department); see also *supra* note 26 and accompanying text.

harassment law; thus, the usual disparate treatment standards would suffice to handle any isolated instances of sex-based mistreatment that may occur.

Some readers may be concerned that by focusing so heavily on achieving desegregation and nondiscrimination at the expense of protecting women from sexual abuse, the approach I am proposing leaves individual women at the mercies of men in an arena that is still largely governed by male norms.⁴⁶⁴ But, it is important to recognize that for women who work in significantly segregated job settings (still the vast majority of women), my approach provides *more*, rather than *less*, protection from harassment than does current law: Regardless of whether the setting is male-dominated or female-dominated, the standards would be lower for proving harassment than they are now and would better cover nonsexual forms of harassment. For women who work in settings that are somewhat mixed but not sufficiently integrated to alleviate the problems associated with skewed ratios, the current liability rules would continue to apply. It is only women who work in fully integrated, structurally egalitarian settings who will face more difficult standards of proof for sexual harassment—and that is as it should be. The ultimate goal should not be a separate-but-equal regime that protects women from exposure to sexual conduct, but the creation of a regime in which they have the power to shape workplace cultures and norms for themselves.

Other readers may worry that I have placed too much emphasis on desegregation and not enough on other forms of discrimination that might prevent women from participating equally in forming their workplace environments. As stressed above, however, desegregation is only being used as a proxy for nondiscrimination. It may turn out that in some organizations that have integrated women into all lines of work and authority, residual or new patterns of sex discrimination in pay, responsibility, or job status will continue to undermine some employees' ability to shape their workplace environments equally. If so, then these patterns would serve as proof of discrimination that could prevent the organization from gaining the benefit of the more favorable liability rules for sex harassment. Over time, as new research proceeds, scholars may be able to specify additional measures that can be used, along with the degree of sex segregation, to predict the circumstances in which organizations will have achieved an equilibrium in which no group of employees lacks meaningful power and influence over their workplace cultures.⁴⁶⁵ In the

464. For an argument that the workplace is an institution that is governed by male norms, see Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1219-20 (1998) (arguing that sexual harassment is a strategy to entrench masculine norms and a masculine imaginary in the workplace).

465. See, e.g., Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319 (2000) (suggesting that such measures as reducing the level of subjectivity in the selection and evaluation processes, providing more and better-quality information about

meantime, social scientists can help flesh out the details of the desegregation approach.

One important issue is the degree of sex segregation that would subject an organization to the less favorable liability rules and the degree of integration required to claim the more favorable rules. Rosabeth Moss Kanter's work provides a clear set of parameters for this analysis. Kanter coined the term "skewed groups" to refer to "those in which there is a large preponderance of one type over another, up to a ratio of perhaps 85:15."⁴⁶⁶ In this situation, she noted, "[t]he numerically dominant types also control the group and its culture in enough ways to be labeled 'dominants.' The few of another type in a skewed group can appropriately be called 'tokens,' for . . . they are often treated as representatives of their category, as symbols rather than individuals."⁴⁶⁷

At the opposite end of the spectrum, Kanter wrote, a minority group would have to achieve proportions of 40-50% in order to establish a "balanced" group in which they would have meaningful influence over the culture: "Finally at about 60:40 and down to 50:50, the group becomes balanced. Culture and interaction reflect this balance. Majority and minority turn into potential subgroups that may or may not generate actual type-based identifications."⁴⁶⁸ In between these extremes, Kanter noted, were "tilted groups," with ratios of "perhaps 65:35," which "begin to move toward less extreme distributions and less exaggerated effects."⁴⁶⁹

Kanter's typology suggests some sensible and easy-to-apply parameters for my proposed approach, as follows: If a plaintiff were part of a skewed group (i.e., one that comprised less than 15% of the relevant positions), the organization would be subject to the less favorable liability rules that apply to organizations that remain significantly segregated. If a plaintiff were part of a balanced group (i.e., one that constituted 40-50% of the relevant positions), the organization would be subject to the more favorable liability rules that apply to organizations that have achieved full integration. In between these extremes, if a plaintiff were part of a tilted group (i.e., one that constituted between 15% and 39% of the relevant positions), the current liability rules would continue to apply.

To the extent that Kanter's work has been confirmed by subsequent research, the potential availability of such clear parameters simplifies the reform process. Organizations would find it easy to predict where they stood in relation to legal requirements, a transparency that makes it more

members of discriminated-against groups who are hired, and requiring supervisors to be accountable for the treatment and performance of such employees may help reduce the harmful dynamics associated with numerical rarity); Fiske & Glick, *supra* note 318 (same).

466. KANTER, *supra* note 13, at 208.

467. *Id.*

468. *Id.* at 209.

469. *Id.*

likely that they would undertake reform. In addition, an organization would have incentive to continue to integrate more and more fully because the organization would continue to receive a benefit with the transition to each new category. Finally, the new approach would be easy to codify. The EEOC could urge the necessary changes through new policy-guidance memos or guidelines, and courts could implement them as a matter of judicial interpretation.⁴⁷⁰ No legislative action would be required.

Another important issue is how to handle harassment involving intersectional minorities. It bears emphasizing that my approach could only benefit such groups. For example, women of color who work in significantly sex-segregated environments (as most do) and who are subjected to harassment based even in part on sex (and perhaps on race, also) would get the benefit of the more lenient rules for proving harassment: Once they showed that they worked in such an environment, both the

470. Presumably, the standards proposed here could be harmonized with the applicable legal standards. One concern is the extent to which employers are legally permitted to engage in voluntary affirmative action or undertake other sex-conscious measures to attract women or gender-nonconforming men. The courts have created legal standards for determining when jobs are sufficiently sex- or race-segregated to justify voluntary sex-conscious remedial action by private employers under Title VII. *See Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987) (citing *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979)), for the notion of “traditionally segregated job categories”). The standard is higher for public employers to justify such remedial action under the Fourteenth Amendment’s Equal Protection Clause, at least in the context of race-conscious action, *see City of Richmond v. Croson*, 488 U.S. 469 (1989) (requiring a firm evidentiary basis for concluding that the underrepresentation of minorities is attributable to past discrimination, including evidence approaching a prima facie case of a constitutional or statutory violation), for which the governing constitutional standard is strict scrutiny, *see Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”). Although the Supreme Court has not squarely addressed the point, some courts of appeals have held that the applicable standard is the same for public employers to undertake sex-conscious remedial action, *see, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993); *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989), but others have held that, because the governing constitutional standard for sex discrimination is only middle-tier scrutiny, the test for justifying sex-based remedial action is lower, *see, e.g., Eng’g Contractors Ass’n v. Metro. Dade County*, 122 F.3d 895, 909 (11th Cir. 1997) (stating that “a gender-conscious affirmative action program can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program”); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1579 (11th Cir. 1994) (applying intermediate scrutiny to gender classifications, and stating that “[w]hile it may seem odd that it is now easier to uphold affirmative action programs for women than for racial minorities, Supreme Court precedent compels that result”).

It bears emphasizing that for most organizations, no sex-conscious action will be required to achieve substantial desegregation. Organizations will simply need to set up systems to ensure against conscious or unconscious discrimination against women or men on the basis of sex. *See, e.g., Reskin, supra* note 465 (discussing measures that might be taken); *cf. Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815-39 (1990) (showing that women’s underrepresentation in male-dominated lines of work is not attributable to any lack of interest in such work, but instead to discriminatory practices of employers); *id.* at 1758 n.25 (documenting that, where courts have held employers liable for sex discrimination, employers have had little trouble attracting large numbers of women to traditionally male-dominated jobs).

sexual and nonsexual harassment (including any racial harassment) would count toward proving a hostile work environment, and plaintiffs would get the benefit of the relaxed evidentiary standards for showing causation and harm.⁴⁷¹ Furthermore, even sex-integrated organizations could not avoid these more stringent liability rules by hiring only white women; under the relevant case law, a firm would have to show that it employed a sufficient number of the particular group of women of color in order to avoid the more stringent liability rules for a combined sex- and race-based harassment claim.⁴⁷² Viewed from a different perspective, some readers may fear that the existence of expanded liability rules in sex-segregated settings could lead to increased and disproportionate monitoring of men of color, because they are often hypersexualized. But, men of color who are falsely accused of sexual harassment should be less likely to be disciplined or punished under my approach, because it encourages companies to engage in structural reform rather than imposing punitive sanctions against individual employees as a way of addressing sex harassment. Apart from these intersectional issues, the application of the desegregation approach to claims of racial harassment alone and to other claims brought by numerical minorities (such as sexual minorities) is an important issue that awaits further work.⁴⁷³

471. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) (allowing a Black female to aggregate proof of racial harassment with sexual harassment for purposes of proving a hostile work environment claim).

472. See, e.g., *Jeffries v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1032-35 (5th Cir. 1980) (holding that an employer could not defend against a disparate treatment claim brought by Black women by showing that it had hired sufficient numbers of white women or Black men, but instead had to show that it had hired sufficient numbers of Black women specifically); see also Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41, 71 (1987) (arguing that to "address the issues of solo status and tokenism, there must be a critical mass of a given minority group," rather than an "accumulation of members of a variety of minority groups").

473. As a theoretical matter, the analysis of the dynamics of tokenism applies to *any* form of discrimination in which it is possible to identify markers of dominance versus markers of disadvantage. Thus, it is not surprising that these same dynamics have been documented for racial minorities, such as African Americans, who enter traditionally white-dominated positions. See, e.g., Pettigrew & Martin, *supra* note 472, at 41, 47-49, 56-58, 62-64 (discussing how Blacks experience numerous forms of hostility and exclusion, including being subjected to an assumption of incompetence and to the "ultimate attribution error," in which positive Black performance is explained away while negative performance is used to reinforce negative stereotypes); see also PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999) (providing a poignant example of how the pressures of tokenism affected an African-American man in a historically white law-firm setting). Yet, the application of my desegregation approach to racial harassment claims made by racial minorities (or sexuality discrimination claims made by sexual minorities) requires special consideration because, unlike women as a whole, these groups are in many areas of the country only a small proportion of the population and thus, even in well-integrated and nondiscriminatory companies, would remain present only in small numbers. Despite these differences, Kanter's typology remains helpful in specifying how the desegregation approach might be applied to such claims. Where a plaintiff who brought a harassment claim was part of a skewed group (i.e., one that comprised less than 15% of the relevant work groups), the organization would be subjected to the less favorable liability rules that apply to organizations that

Ultimately, even readers who are attracted to my approach may be concerned that it is too weak to bring about meaningful change. It is true that the reform suggested here alone will not be adequate to shift incentives away from desexualization, and toward desegregation, for all organizations. But this can be seen as a virtue rather than a defect. For a variety of institutional reasons independent of sexual harassment law, many organizations may wish to prohibit at least some forms of sexual conduct. Acting out of a sense of fiduciary obligation, for example, an organization may want to prohibit sexual relationships between mentors and very young charges, such as interns (though it may want to also protect them from potentially exploitive demands for other non-job-related services, such as babysitting or running errands). Or, in order to guarantee all employees equal access to superiors who can make or break their careers, a large-scale organization may prohibit or discourage sexual relationships between managers and employees they directly supervise (though it may also need to consider what to do about other one-on-one relationships that lead to

are significantly segregated, just as in the sex harassment context. (So, for example, the plaintiff might not have to show racial remarks or racial epithets in order to prove causation; instead, the plaintiff would get the benefit of the rebuttable presumption that the harassing conduct had occurred because of race.) Yet, even where the organization had achieved full integration, the plaintiff's work group would be unlikely to become a "balanced group" (i.e., 40-50% minority) that would secure the organization the benefit of the more favorable liability rules. Instead, even under full integration, the plaintiff's group would be likely to remain a "tilted group" (i.e., 15-39% minority), and, as a result, the current liability rules for such harassment claims would continue to apply.

According to Kanter's predictions, members of numerical minorities who work in tilted groups are not completely powerless; they can form "potential allies among each other, can form coalitions, and can affect the culture of the group." KANTER, *supra* note 13, at 209. Thus, in order to defeat the dynamics of tokenism and significantly improve their status, members of racial and sexual minority groups must work together to gain allies and form effective coalitions in order to obtain the collective numerical strength needed to change their workplace cultures. It is worth noting that, even in the context of sex discrimination, because women are not a monolithic group, women of different races and sexual orientations also have to work together to achieve the numerical strength needed to change their cultures. Thus, almost all campaigns to change hostile work environments will involve numerical minorities who must join forces with other similarly situated groups to change the workplace in ways that benefit all of them. In addition to adopting my proposed reforms, we should consider adopting additional legal changes designed to facilitate coalition building, and to address insider-group preference in a way that would benefit all minority groups who are subject to the dynamics of tokenism. See, e.g., Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 322-26, 352, 410-26 (2000) (proposing a concept of "generalized discrimination" to recognize that discrimination often consists of a dominant group preferring its own members at the expense of other groups, rather than that group acting out bias toward other groups, and proposing appropriate legal reforms); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 123-41 (2002) (proposing that hostile work environment harassment law be expanded to allow claims brought by white men who are discriminated against because they align themselves with the cause of women or racial minorities, in order to facilitate cross-gender and cross-racial efforts at solidarity). More social science research is needed to specify the circumstances in which successful coalition building can occur.

intimacy, such as playing golf or going out to a bar together, as explained more fully below).

In these other situations, some organizations will not be swayed by the proposed rule change, and that is as it should be. The goal of the proposed reform is not to force every organization to have a sexualized culture, nor even to induce all managers to allow sexual expression or conduct to the fullest extent possible. (Indeed, for religious or other cultural reasons other than gender, many people would not be comfortable working in a sexualized company or job setting.) The goal of the proposed reform, rather, is for the managers and employees in each organization, department, and job setting to be able to work together to fashion their own work cultures in a structure that is free from sex discrimination but is also free from the pressure to suppress sexual conduct that sexual harassment law now provides.

Thus, I have not suggested that organizations be prevented from placing limits on their employees' sexual conduct. In fact, I resist the temptation to expand other legal protections in order to develop countervailing pressures on employers not to fire employees who are accused of harassment. Doing so would place companies in a damned-if-you-do, damned-if-you-don't position, and it would not solve the underlying problem with sex harassment law. The problem with sex harassment law isn't simply that it overshoots in regulating private conduct or sexual expression; it is that it misses the mark entirely in targeting sexuality rather than equal work prospects as the underlying harm.

The approach I have proposed is designed to disrupt the current trend toward desexualization in favor of greater pluralism. Organizations that have independent reasons for suppressing sexual conduct may (and may well) continue to do so—although they will no longer be able to rely on sex harassment law or feminism as a justification for their actions. But for organizations that have no such independent reason to prohibit sexual conduct, and for those managers who believe it is good to allow employees a wide degree of latitude in sexual matters, sex harassment law would now provide an option. Instead of feeling that they have to suppress sexual conduct in order to stave off sexual harassment liability, enlightened managers could focus their energies on ensuring that women are recruited, hired, promoted, and accepted equally in their organizations, as the next Section explains.

C. *Valuing Workplace Intimacy*

At the organizational level, there is also much to be done. Most obviously, employers should move away from standardized, stand-alone sexual harassment policies that cover every possible form of "sexual"

behavior. Instead, they should draft broader policies against sex-based harassment and incorporate them into more comprehensive plans to achieve gender integration at all levels of the organization and to prevent and address sex discrimination throughout the firm. As I have emphasized throughout this Article, it is only by creating contexts of structural equality that women can meaningfully shape their own work cultures and sexual norms.

Similarly, I would like to see firms abandon sexual harassment sensitivity training sessions in favor of genuine measures of accountability for achieving equality in all employment decisions—and keeping employees challenged and happy, regardless of their sex. Training sessions that tell male supervisors and employees to curtail sexual talk and conduct in order to avoid insulting women’s sexual sensibilities do nothing to solve the underlying structural problems, and risk reinforcing stereotypes of women as “different” and more easily offended.⁴⁷⁴ Indeed, men who are told to monitor their behavior in the presence of others may resist by claiming that *they* are the victims.⁴⁷⁵ Instead, *all* employees should be taught to treat each other as valuable, respected members of the work group.

Finally, of course, there is no substitute for leadership at the top. Where top management treats women as valuable players and places them in equal positions of responsibility and authority throughout the organization, others are likely to follow suit. Those who might seek to undermine women through sexual or nonsexual means must worry that it is they—rather than the women—who will end up on the margins; the same goes for gender-nonconforming men. Similarly, where management expresses a tolerant attitude toward benign sexual expression that does not undermine gender equality, employees who are merely offended by such expression but who have not been actually discriminated against may be less likely to feel they can gain advantage by playing the sexual victimization card. Instead, all employees may learn by example that gender equality and sexual openness can coexist.

474. See Quinn, *supra* note 301, at 1178 (quoting a woman who claimed that her male coworkers, after a sexual harassment training session, made jokes about how “We better not offend the little girls! Better not say something or we’re all going to get in trouble!”); see also Bisom-Rapp, *Fixing Watches*, *supra* note 298, at 163-65 (criticizing the reliance on sexual harassment training programs, and pointing out that no social science literature has proven their effectiveness); Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 376-77 (1995) (observing that such training can have negative effects, such as prompting fears on the part of senior men about mentoring young women); Elizabeth O’Hare Grundmann et al., *The Prevention of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT* 175, 182 (William O’Donohue ed., 1997) (pointing out that such training programs can have negative effects, including “giv[ing] the impression that ‘something is being done,’” when “the reality is that it is unclear whether the programs make any difference”).

475. See Quinn, *supra* note 301, at 1178-79.

Along these same lines, organizations should also consider carefully whether they really need to curtail dating and other sexual relationships. In general, managers should treat such relationships just as they treat nonsexual, intimate relationships, intervening only where they have clear evidence that specific organizational goals are being undermined. Of course, dealing with sexual and other intimate relationships is not always easy, but both organizations and employees stand to lose something vital when consensual relationships between coworkers are restricted arbitrarily.

For employees, workplace intimacy, in all its forms, is a vital mechanism for combating alienation and building morale and enthusiasm for the job. Paradoxically, in their rush to sanitize the workplace wholesale, some firms may even be sacrificing organizational productivity. Sociological research has shown the importance of intimate bonds of friendship between employees to organizational productivity.⁴⁷⁶ Close relationships among peers, like mentoring relationships, are valuable tools for career advancement and for helping people “develop a continuing sense of competence, responsibility, and identity as experts.”⁴⁷⁷ For similar reasons, sexually charged but platonic “love” relationships among employees, “unleashing as [they do] a great deal of creative energy, [have been] shown to benefit both ‘couple’ and company.”⁴⁷⁸ In fact, a growing body of empirical research shows that, contrary to conventional wisdom, even more traditional forms of workplace romance⁴⁷⁹ do not always undermine employees’ productivity,⁴⁸⁰ but can actually enhance it.⁴⁸¹ In

476. See Christine M. Riordan & Rodger W. Griffeth, *The Opportunity for Friendship in the Workplace: An Underexplored Construct*, 10 J. BUS. & PSYCHOL. 141, 150 (1995); see also Lori J. Ducharme & Jack K. Martin, *Unrewarding Work, Coworker Support, and Job Satisfaction*, 27 WORK & OCCUPATIONS 223 (2000); Jeanne S. Hurlbert, *Social Networks, Social Circles and Job Satisfaction*, 18 WORK & OCCUPATIONS 415 (1991); Leonard I. Pearlin, *Alienation from Work: A Study of Nursing Personnel*, 27 AM. SOC. REV. 314 (1962).

477. Kathy E. Kram & Lynn A. Isabella, *Mentoring Alternatives: The Role of Peer Relationships in Career Development*, 28 ACAD. MGMT. J. 110, 118 (1985); see also James G. Clawson & Kathy E. Kram, *Managing Cross-Gender Mentoring*, BUS. HORIZONS, May-June 1984, at 22.

478. Eyler & Baridon, *supra* note 425, at 60; see also Lobel et al., *supra* note 427, at 10.

479. See *supra* note 233 (defining “workplace romance”). Note that the typical definition of workplace romance does not require physical consummation of the relationship, and hence, the allegedly nonsexual love relationships referred to immediately above would satisfy the definition.

480. For over twenty-five years now, researchers have been examining the consequences of workplace romance on employee productivity and the organizational bottom line. For summaries of the literature, see Pierce et al., *supra* note 226, at 17-26; Gary N. Powell & Sharon Foley, *Something To Talk About: Romantic Relationships in Organizational Settings*, 24 J. MGMT. 421, 434-36 (1998); and Williams et al., *supra* note 313, at 78-79. For studies finding mixed effects or predominantly negative effects on romance participants’ productivity or job performance, see, for example, Quinn, *supra* note 233, at 46-47 tbls.6-7 (reporting from third-party observations that 15.3% of respondents thought that women and 17.1% thought that men in romantic workplace relationships were more productive, while 21.9% thought men and 27.0% thought women in such relationships did less work); and Anderson & Hunsaker, *supra* note 254, at 61-62 (reporting from third-party observations that 21% of the women and 9% of the men in romantic relationships were perceived as more productive, while a lower quality of work was attributed to 24% of the women

terms of larger organizational effects, employees report that workplace romance can create excitement among the work group, enhance communication and cooperation, enhance teamwork, simulate creativity, and create a happier work environment. On the negative side, employees report that romance may take time away from work, increase gossip, and create concerns about favoritism among coworkers.⁴⁸²

Given this mixed picture, a number of management theorists and organizational behavior scholars reject the impulse to sanitize the workplace that human resource managers are promoting. According to these scholars, policies that try to prevent and stop all sexual intimacy and affect-related concerns may be more costly to firms than less restrictive approaches. For one thing, the effort to prohibit romance may lead to discriminatory outcomes because in many firms, for employees in heterosexual couples, women will be more likely than men to be fired or transferred.⁴⁸³ For married couples, no-spouse rules—which can be viewed

and 14% of the men). See also Anne B. Fisher, *Getting Comfortable with Couples in the Workplace*, FORTUNE, Oct. 3, 1994, at 138, 139 (reporting from a poll of CEOs that 39% of them thought couples working together, whether married or unmarried, could undermine productivity, while 29% said they thought it could increase productivity, 22% said either or both could happen, and 10% weren't sure).

481. For example, one recent study found that self-ratings of personal productivity and performance were greater for those involved in workplace romances than for those not involved. See Charles A. Pierce, *Factors Associated with Participating in a Romantic Relationship in a Work Environment*, 28 J. APPLIED SOC. PSYCHOL. 1712 (1998). Other studies have found a positive impact of workplace romance on the performance, job involvement, and enthusiasm of participants who entered the romance out of a "love" motive, or a sincere desire to find affection and long-term companionship. See, e.g., James P. Dillard, *Close Relationships at Work: Perceptions of the Motives and Performance of Relational Participants*, 4 J. SOC. & PERS. RELATIONSHIPS 179, 185 (1987) (finding that 28% of those who had participated in or observed workplace romances thought that the overall performance by men who entered relationships with coworkers improved, while 37% thought female performance improved (compared to 8% assessing declines for men and 15% assessing declines for women)); James P. Dillard & Scott M. Broetzmann, *Romantic Relationships at Work: Perceived Changes in Job-Related Behaviors as a Function of Participant's Motive, Partner's Motive, and Gender*, 19 J. APPLIED PSYCHOL. 93, 106 (1989) (reporting, based on surveys of third parties, that employees "motivated by love were perceived by others to take a more positive approach to their jobs" and "to carry out their work with greater enthusiasm"); see also James P. Dillard et al., *Close Relationships in Task Environments: Perceptions of Relational Types, Illicitness, and Power*, 7 MGMT. COMM. Q. 227, 250-51 (1994) (finding no effects on individual job performance of romance participants with a love motive, and only minimal effects on individual job performance for those with job-related motives). It is worth noting that these empirical studies do not rely on direct measures of job performance, but rather rely on self-reports or third-party reports about the effects of observed romances on productivity and other organizational outcomes.

482. See Williams et al., *supra* note 313, at 79 (collecting sources). Researchers have cautioned that because many of the studies of the consequences of workplace romance have relied on individual reports, they may be affected by a negativity bias in which research participants are more conscious of, and better able to report on, the negative effects of workplace romance. See Lisa A. Maniero, *A Review and Analysis of Power Dynamics in Organizational Romances*, 11 ACAD. MGMT. REV. 750, 755 (1986); Hal Witteman, *The Interface Between Sexual Harassment and Organizational Romance*, in SEXUAL HARASSMENT: COMMUNICATION IMPLICATIONS 27, 48 (Gary L. Kreps ed., 1993).

483. Witteman, *supra* note 482, at 48; see also Williams et al., *supra* note 313, at 80.

as a type of antifraternalization policy—have been demonstrated to have such a discriminatory effect.⁴⁸⁴ But even in the absence of such biased effects, scholars have argued, such policies may interfere with the development of good working relationships that are vital for organizational effectiveness and employee happiness. As one researcher put it, “[E]xplicit use of the policy of stoppage and prevention signals members that they must limit their emotional and interpersonal involvement with fellow workers. Member acquiescence may produce interpersonal anxiety, distance, and formality in the organization and, in general, prevent the emergence of fulfilling interpersonal relationships.”⁴⁸⁵

For these reasons, a number of scholars and popular writers recommend that companies create open climates and take a permissive approach to romantic relationships, intervening only where it is clear that genuine conflicts of interest exist or where it is clear that productivity is being undermined.⁴⁸⁶ To paraphrase the recommendations made in one recent book, companies should maintain a positive or at least neutral attitude toward employee dating and socializing; support the inevitable marriages and partnerships that occur; become involved only when relationships end and cause workforce disturbances; be watchful with chain-of-command relationships, taking steps to deal with potential favoritism charges, but retaining the employees in the relationship; and support concepts of employee trust and gender equality.⁴⁸⁷ According to the author, companies that create an open climate around dating and sexual issues are more likely to also adopt other humanistic measures (such as eliminating no-spouse rules, accommodating couples, and providing day care and family leave) that may promote gender equality for women.⁴⁸⁸ Thus, by recognizing the inevitability of sexuality in organizational life and addressing it with openness and tolerance, as sociologists Christine Williams and Dana Britton put it, “we can begin to formulate less oppressive forms of organizational life, ways of living in organizations that allow for diversity in sexual norms and expressions and that encourage mutual respect. . . . [This] is a crucial first step in making the workplace a more equitable environment for everyone.”⁴⁸⁹

484. See Chandler et al., *supra* note 436, at 64-66.

485. Witteman, *supra* note 482, at 47 (citation omitted).

486. See, e.g., Maniero, *supra* note 482, at 760; Witteman, *supra* note 482, at 52; Anderson & Hunsaker, *supra* note 254, at 63.

487. See DENNIS M. POWERS, *THE OFFICE ROMANCE: PLAYING WITH FIRE WITHOUT GETTING BURNED* 93-94 (1999).

488. *Id.* at 107 (observing from a survey of the “100 Best Companies for Working Mothers” that “the more ‘pro’ a company is toward women and their careers, the more flexible that firm is with romance”).

489. Williams & Britton, *supra* note 295, at 18.

Some readers may be concerned that, if organizations do not have rules against dating and sexual relationships between supervisors and employees, there will be nothing to prevent supervisors from exercising personal favoritism toward employees with whom they are romantically involved. This is a serious concern, but it is important to recognize that the problem of favoritism is not confined to dating and sexual relationships.⁴⁹⁰ After all, supervisors may also develop *nonsexual* attachments that predispose them to favor particular employees. (As women have long complained, playing golf with the boss can lead to gender-based exclusion just as surely as going to bed with him.) Nor is the problem of favoritism confined to boss-employee relations. In organizations in which training or learning occurs horizontally, among coworkers, women are frequently frozen out of the social networks through which crucial job information is shared. (Going out to a sports bar together may be just as likely to lead to gender-based forms of exclusion as going out on a date together.)

As this discussion makes clear, the problem of favoritism cannot be solved by an antifraternalization rule alone. Approaching the problem that way singles out sexual relationships in a way that obscures the exclusionary dynamics that often underlie other personal affiliations. Under my approach, the law would treat sexual and nonsexual forms of intimacy (and exclusion) alike. This does not imply that organizations should ban all forms of contact and intimacy—both sexual and nonsexual—between their employees. But it does mean that organizations should take more seriously the potential for discriminatory dynamics to develop in connection with *nonsexual* forms of affiliation between supervisors and their employees, or between coworkers who can affect each other's employment prospects.

The best way to deal with this problem is through desegregation, just as my approach encourages. Once women are integrated fully into all supervisory positions as well as the jobs below them, any problems of favoritism or exclusion that remain will not be linked to sex discrimination. In a context in which there are relatively equal numbers of male and female supervisors who are overseeing relatively equal numbers of male and female employees, any intimate associations that arise between a particular supervisor and employee (or between one employee and another who can affect her employment status) may still raise concerns about favoritism, but the favoritism will not be linked to any systematic patterns of sexism that exclude people from access to those in charge on the basis of sex.

In a world in which sexual harassment law no longer creates pressures to desexualize, most organizations should have less incentive to address

490. For an illuminating discussion of this issue, see Carol A. Heimer, *Doing Your Job and Helping Your Friends: Universalistic Norms About Particular Others in Networks*, in NETWORKS AND ORGANIZATIONS: STRUCTURE, FORM AND ACTION 143, 143-44 (Nitin Nohria & Robert G. Eccles eds., 1992) (pointing out this paradox).

potential favoritism charges by banning and punishing intimacy. Some scholars have suggested, for example, that organizations with dynamic, liberal cultures—organizations “which are characterized . . . by creativity and innovation,”⁴⁹¹ and “which often contain an atmosphere of intense pressure and activity that stimulates sexual excitement”⁴⁹²—may embrace more relaxed mores about sexual and other forms of intimacy as part of a larger commitment to creating close synergies and an atmosphere of social and intellectual openness within the organization.⁴⁹³ Indeed, some theorists contend that the same forces that have led many firms to debureaucratize in other respects should lead them to be more accepting of employees’ intimate relationships. As one organizational theorist summed it up:

“Warmed up” workplaces, in which interdependence, cooperation, and communication between co-workers are encouraged, offer greater opportunities for interpersonal affection to arise than do workplaces in which workers have less frequent contact with one another. Characteristics of effective relationships (trust, respect, interaction, openness) overlap with characteristics that can promote sexual attraction and romantic involvement.⁴⁹⁴

Thus, if firms want their employees to work together informally to exchange ideas and to work together intensely to accomplish organizational goals, managers may have to set aside traditional ideas of rationality that depict intimacy and sexuality as irrational forces that belong outside organizational life. As a burgeoning new literature on emotions in the workplace suggests, rational aims are always carried out in workplace social contexts alive with personality and passion. Human intimacy and sexuality are the hidden fabric of organizational life, weaving together people who, for better or worse, have linked fates.⁴⁹⁵

491. Powell & Foley, *supra* note 480, at 430.

492. Pierce et al., *supra* note 226, at 16.

493. For an example of this approach, see POWERS, *supra* note 487, at 116-17 (quoting an executive who says they use mediation to resolve “even the knotty problems” such as “claims of favoritism” and to help those involved in workplace romance solve their problems, rather than taking a punitive approach).

494. Sharon A. Lobel, *Sexuality at Work: Where Do We Go from Here?*, 42 J. VOCATIONAL BEHAV. 136, 140 (1993).

495. This is one of the themes of the new literature on emotion in organizations, which emphasizes both the rationality of emotion and the emotional component of rationality. See GHERARDI, *supra* note 313, at 158 (“[F]eelings are at home in organizations. Indeed, the true glue of organizations is the emotional structures that map out invisible walls and corridors according to the positive and negative feelings that tie people together.”); *id.* at 153 (arguing that organizational scholars should “study, not a purported cold and abstract rationality which identifies the emotions with the devil, but an emotional rationality where reason is colored by sentiment and is part of everyday consciousness”); Blake E. Ashforth & Ronald H. Humphrey, *Emotion in the Workplace: A Reappraisal*, 48 HUM. REL. 97, 97 (1995) (“[O]rganizational scholars and practitioners frequently appear to assume that emotionality is the antithesis of rationality. . . . In contrast to this perspective, we argue that emotionality and rationality are

VI. CONCLUSION

No recent legal campaign for equality has seemed to achieve more immediate and complete success than the one against sexual harassment. Yet, the idea that the law has succeeded in creating egalitarian workplaces is largely an illusion. Early on, as we have seen, the promise of sex harassment law to help dismantle sex segregation and inequality was lost and replaced with an emphasis on eradicating workplace sexuality. In the process, sexual harassment law has bestowed new life and increased legitimacy on an age-old managerial dream of achieving a perfectly rational workplace devoid of sexuality and other distracting passions.

As the sexual sanitization campaign advances, some people are harmed more than others, but we all lose. In the name of preventing sexual harassment, employers increasingly ban or discourage employee romance, chilling intimacy and solidarity among employees of both a sexual and nonsexual variety. Many companies are punishing employees for behavior that does not meet the legal definition of sex harassment, costing many workers their jobs and undercutting their ability to express themselves and create their own cultures and sexual norms. Women are encouraged to translate—and perhaps even to understand—broader forms of discrimination and managerial abuse as sexual harms. Perhaps most disturbingly, managers sometimes invoke sex harassment law as a pretext for firing people on discriminatory or otherwise suspect grounds, and employees use it to legitimate their bias against coworkers of a different race, sexual orientation, or class whose sexuality threatens or offends them.

In the face of these developments, neither managers nor their advisers are considering the all-important question that Title VII demands we ask: Is the sexual conduct in question being used to discriminate in purpose or effect? As I hope to have persuaded readers, workplace sexual conduct isn't necessarily discriminatory or harmful; employees often use sexuality in the service of benign and even empowering ends. The sexual model of sex harassment and the resulting sanitization campaign are based on a false premise that sexuality is an individual attribute that can be isolated and purged from institutions. Contemporary theorists of sexuality rightly point out, however, that sexuality is a dynamic process that will inevitably be part

interpenetrated, emotions are an integral and inseparable part of organizational life, and emotions are often functional for the organization.”); Dennis K. Mumby & Linda L. Putnam, *The Politics of Emotion: A Feminist Reading of Bounded Rationality*, 17 *ACAD. MGMT. REV.* 465, 480 (1992) (“Rationality . . . is not a purely cognitive condition that people carry around in their heads; it is a social phenomenon in which emotion plays an integral role. From this perspective, rationality develops intersubjectively and is produced by the consensus that emerges through the communicative practices of institutions.”).

of organizational life. Above all, sexuality can only be understood in context.

Recent sociological studies show that if we succeed in vertically and horizontally integrating workplaces, we can make them safe *for*, rather than *from*, sexuality. In order to achieve the greater gender equality that makes this possible, we must restructure Title VII law to give employers more incentive to desegregate, instead of desexualizing, their workplaces. Toward this end, I have suggested a few simple doctrinal reforms. First, courts and regulators should make crystal clear that any type of conduct can count toward establishing sex harassment—regardless of whether the conduct is sexual, nonsexual, or even gender-neutral in content. Second, courts should adopt standards of proof that reflect widely accepted social science knowledge that sex harassment is more likely to be a problem in sex-segregated work settings. Judges should make sex harassment easier to prove in significantly segregated and unequal settings, and harder to prove in fully integrated and equal workplaces, than it is under current law.

My purpose, however, has not been simply to construct a more transformative body of sex harassment law, for as I have suggested throughout this Article, the law never operates in a vacuum. Those who seek to use the law for social change must develop a more nuanced historical and sociological account of how the law intersects with other social forces to fulfill, and all too often derail, the desired ends.

My account of how sexual harassment law has played out within organizations highlights the importance of the interaction between legal and nonlegal forces in constructing the meaning and content of the law. To a large extent, this process reflects what sociologists call the managerialization of law: I have shown how employers, acting on the advice of human resource specialists and management-side labor lawyers, have mobilized harassment law in the service of a traditional organizational imperative of suppressing sexual conduct. Yet the conventional sociological account's emphasis on legal ambiguity neglects the important role of social movement activists and legal actors in determining the cultural tilt of the law that organizational actors inherit. Although it is true that Title VII itself was silent with respect to the issue of sexual harassment, by the time the law was handed down to organizational actors, it was by no means ambiguous. Feminist arguments had already helped shape the definition of harassment adopted by the EEOC and the federal courts, a definition that emphasized the harm of unwanted sexual advances. This focus on sexuality in the judge-made law, combined with feminist appeals to productivity-oriented arguments for implementing it, meshed well with the classical organizational view of workplace sexuality in a way that appealed to managers and gave them an interest in extending the law's reach in organizational life. By the same token, the fact that employers could justify

their actions with reference to a body of feminist-inspired law facilitated HR managers' ability to implement broad measures to control employees' sexual conduct. Thus, my account emphasizes the role of social activists, lawyers, and judges in shaping the cultural meaning and direction of the law in a way that facilitates a certain type of institutional action. Depending on which way the law gets tilted, institutional actors will be more or less able to interpret and push the law in a way that serves their own interests.

Ultimately, then, the history of sexual harassment law teaches that law makes a difference, but the difference it makes depends on the larger institutional and cultural forces that will shape its meaning in everyday life. This means that those of us who seek to use law to spark social change must think carefully about what we ask for, *and* how we ask for it. To the extent that we make demands and arguments that appeal to conservative traditions of thought and elements in our culture, we may end up unleashing forces that undermine our own goals and produce lasting damage. In the hands of managers and judges, a body of law conceived by feminists has become a force for eradicating a workplace sexuality now cast as disruptive and discriminatory. In my view, we can only hope to halt the drive toward sanitization by articulating a more humanistic, and more appealing, vision in which sexuality and intimacy can coexist with, and perhaps even enhance, gender equality and organizational rationality. Whatever else we are, we are creatures who exist to love and work. Why not dare to envision a workplace where we can stand together as equals and intimates at the same time?
