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Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment

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Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment

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I. INTRODUCTION

In the middle of Herman Cain's campaign for the 2012 U.S. Republican Party presidential nomination, multiple women who were once Cain's coworkers came forward with allegations of sexual harassment. Cain immediately deemed the allegations "totally baseless and totally false."¹ However, after continued questioning about whether his previous actions were inappropriate, Cain responded, "In my opinion no, but as you would imagine, it's in the eye of the person who thinks that maybe I crossed the line."² Unfortunately, Cain's vague and evasive response is evocative of current sexual harassment law, which generally lacks clarity and is often dependent on individual perceptions.

The Equal Employment Opportunity Commission ("EEOC") did not recognize sexual harassment in the workplace as a violation of Title VII of the Civil Rights Act of 1964 until 1980, and the Supreme Court did not define sexual harassment until *Meritor Savings Bank v. Vinson* in 1986.³ In *Meritor*, the Court defined actionable sexual harassment as harassment that "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁴ Today, the Court recognizes two forms of sexual harassment: quid pro quo and hostile work environment.⁵ Quid pro quo harassment occurs when a supervisor demands sexual favors from an employee in return for advancement or continued employment in the workplace.⁶ Hostile work environment harassment occurs when workplace harassment is so severe or pervasive that it alters the conditions of employment.⁷ This latter form of harassment is incredibly difficult for most courts to define, as they must determine what actions meet the vague standard

1. Debra Cassens Weiss, *Is Herman Cain Creating New Legal Headaches by Denying Harassment?*, A.B.A. J. (Nov. 1, 2011), http://www.abajournal.com/news/article/is_herman_cain_creating_new_legal_headaches_by_denying_harassment.

2. *Id.*

3. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–67 (1986); EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDELINES ON VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (2010) [hereinafter EEOC, ENFORCEMENT GUIDELINES], available at <http://www.eeoc.gov/policy/docs/harassment.html>.

4. *Meritor*, 477 U.S. at 67.

5. *Id.* at 65.

6. *See id.* (contrasting quid pro quo with hostile work environment); EEOC, ENFORCEMENT GUIDELINES, *supra* note 3 (describing quid pro quo harassment as a situation in which an employee "rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit").

7. EEOC, ENFORCEMENT GUIDELINES, *supra* note 3.

of “severe or pervasive.”⁸ The task is especially difficult because individuals have different perceptions of what behaviors are severe enough to constitute harassment.

In order to clarify the definition of hostile work environment harassment, legal scholars and judges have developed many standards to assist courts in determining what is severe or pervasive. Certain studies suggest that what is severe or pervasive should be determined by a reasonable woman standard, instead of a reasonable person standard, because women have different perceptions of and reactions to sexual harassment.⁹ To date, only the Ninth and Third Circuits have adopted this theory, and the Supreme Court has not resolved this circuit split.¹⁰ A more recent theory suggests that courts should consider the source of the harassment when determining severity because supervisor harassment is generally perceived to be more severe than coworker harassment.¹¹ One scholar has also suggested that, because the purpose of including sex as a protected class in Title VII is to diminish sex discrimination, plaintiffs who work in businesses that have integrated both sexes equally in the workplace should have a higher burden of proof than plaintiffs who work in sex-segregated businesses when they sue that business or their coworkers and supervisors of that business for sexual harassment.¹² This Note uses empirical evidence to argue that these three theories—the reasonable woman standard, the acknowledgment that individuals view supervisor harassment as more severe, and the importance of workplace integration—should indeed be integrated into sexual harassment law. This Note argues that these legal considerations would improve the incentives employers face under Title VII.

In 1980, 1987, and 1994, the U.S. Merit Systems Protection Board (“MSPB”) issued a survey to a broad selection of federal employees to solicit information on sexual harassment in the workplace.¹³ To date, scholars have only used summary statistics from

8. This difficulty was recognized in the different context of employer liability in *Faragher v. City of Boca Raton*, 524 U.S. 775, 785 (1998) (“Since our decision in *Meritor*, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees.”).

9. See *infra* Part III (providing a description of legal scholars’ support and criticism of the reasonable woman standard).

10. See *infra* Part III (discussing the approaches of the various federal appellate courts as to the reasonable woman standard).

11. Susan Grover & Kimberly Piro, *Consider the Source: When the Harasser Is the Boss*, 79 *FORDHAM L. REV.* 499, 500 (2010).

12. Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2174–83 (2003).

13. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* 1 (1995) [hereinafter *FEDERAL WORKPLACE*].

this study to support the reasonable woman standard. This Note builds on those studies by empirically analyzing the 1994 MSPB survey to empirically support all three above-described theories. Part II of this Note describes the MSPB survey and corresponding dataset. Part III provides background information on the reasonable woman standard by looking at the circuit split, social science literature, and legal literature. Part III also supports the reasonable woman standard by providing empirical results that show women are much more likely than men to believe that certain behaviors constitute sexual harassment. Part IV assesses the theory set forth by Susan Grover and Kimberly Piro that courts should consider supervisor status of the harasser when determining whether behavior is actionable as hostile work environment harassment.¹⁴ Part IV also supports the theory by providing empirical results that show employees are more likely to believe a certain action represents harassment when the harasser is a supervisor. Part V discusses the proposal advanced by Vicki Shultz to alter the hostile work environment standards based on the level of sex integration in the particular workplace. Part V also supports considering the level of sex integration in a workplace when determining actionable sexual harassment by providing empirical results that show women are more likely to experience harassment when they are employed in a male-dominated workplace. Finally, Part VI encourages courts to integrate these theories into hostile work environment law, because without the incorporation of these theories, courts may neither recognize nor deter certain actions that employees perceive as harassment.

II. DATA: THE MSPB SURVEY

The MSPB is a quasi-judicial federal agency that Congress established in 1979 to function as the guardian of federal employment.¹⁵ By statutory mandate, Congress required the MSPB to conduct studies to evaluate the status of federal employees.¹⁶ In 1978, 1987, and 1994, the MSPB conducted surveys to evaluate the prevalence of sexual harassment and sexual harassment training in federal workplaces.¹⁷ The MSPB mailed anonymous, voluntary surveys to almost 13,200 employees, and over 61% returned the

14. Grover & Piro, *supra* note 11, at 500.

15. *About MSPB*, U.S. MERIT SYS. PROTECTION BOARD, <http://www.mspb.gov/About/about.htm> (last visited Sept. 23, 2012).

16. *See id.* ("MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies.").

17. FEDERAL WORKPLACE, *supra* note 13, at 1.

questionnaires.¹⁸ The resulting dataset contains responses from 4,259 females and 3,560 males. The respondents include: blue- and white-collar employees; employees without a high school diploma, as well as those with graduate degrees; supervisors, as well as trainees; and employees from all age groups above the age of eighteen.¹⁹

The 1994 survey—modeled after the previous surveys—solicits the employee's perceptions of sexual harassment, the sexual harassment training in place at the agency, her experience with sexual harassment, and her opinions about sexuality in the workplace.²⁰ The survey also asks for the employee's personal demographics and the characteristics of her workplace.²¹ In order to measure perceptions, the survey asks the employee to report whether she believes a certain action is sexual harassment if conducted by a coworker or if conducted by a supervisor.²² The survey inquires about several behaviors: unwanted letters or calls of a sexual nature, touching or leaning over, sexually suggestive looks or gestures, pressure for sexual favors, pressure for dates, and sexual teasing or remarks.²³ Part III of this Note analyzes the responses to these perception questions to show that men and women have different perceptions of sexual harassment—a result that supports using the reasonable woman standard.²⁴ Part IV of this Note then analyzes these responses to show that federal workers believe more behaviors constitute harassment when the harasser is a supervisor.²⁵ Part V

18. *Id.* at 1, 2. This response rate is consistent with similar surveys that have been empirically analyzed. For example, a 1995 Department of Defense sexual harassment survey had a response rate of 58%. U.S. DEPT OF DEFENSE, DEPARTMENT OF DEFENSE 1995 SEXUAL HARASSMENT STUDY, available at http://www.defense.gov/news/fact_sheets/sxhas95.html. The MSPB provides a sample weight to adjust for the oversampling of females, certain pay grades, and certain agencies. I include this sample weight in the regression analyses and when I determine descriptive statistics. Including this weight lessens the concern of systematic bias associated with certain employees not returning the survey.

19. *Id.* at 2.

20. U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: 1978-1980, 1987, AND 1994: 1994 DATA app. 1 (1997) [hereinafter 1994 DATA], available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/06893>. For simplicity, I only use female pronouns to refer to the respondents; however, both men and women responded to the MSPB survey and are included in this analysis.

21. *Id.*

22. *Id.*

23. *Id.*

24. See *infra* Part III.D (finding that women believe more actions constitute harassment than men).

25. See *infra* Part IV.C (finding that respondents believed that more actions constituted harassment when the harasser was a supervisor).

analyzes the responses to show that the sex integration of the workplace affects perceptions.²⁶

The survey also asks if the employee has experienced any of the above unwanted advances in the past two years.²⁷ If the respondent answers yes, the survey asks him or her to answer a series of questions about the most prominent harassment experience that occurred in the previous two years.²⁸ The respondent reports her personal and workplace demographics at the time of the sexual harassment: age, marital status, education level, supervisor status, pay level, occupation, share of men and women in her workplace, and the agency employer.²⁹ A respondent who has not experienced harassment provides these demographics based on her current employment.³⁰ I control for these personal and workplace demographics, in addition to others that may affect an employee's perceptions of sexual harassment, in determining that women and men have different perceptions of sexual harassment. I also control for these demographics when determining whether the integration of the workplace affects perceptions and occurrences of harassment.³¹

Because the survey covers only federal employees, some may argue that the conclusions of this Note are limited to that context. However, as discussed above, the sample represents the 1.7 million employees of the executive branch of the federal government, contains representatives from a variety of demographics (age, marital status, education, and economic status), and contains a fairly even number of male and female respondents.³² Although the survey responses do not

26. See *infra* Part V.B (finding that male-dominated workplaces lead to more harassment and affect some perceptions of harassment).

27. 1994 DATA, *supra* note 20, at app. 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. See *infra* Parts III.D, V.C (providing empirical analyses of the perception variables). Table 1A of the Appendix provides summary statistics for each of these demographic and perception variables.

32. FEDERAL WORKPLACE, *supra* note 13, at 2. Some readers may be concerned that this data oversamples certain federal employees, including those who were harassed. Fortunately, the survey data include a weighting variable, which takes into account the likelihood that an employee of a certain pay grade, sex, and agency will receive the survey and her probability of returning the survey. This variable is included in each regression in order to make the results representative of the federal government. Oversampling harassed individuals is always a concern and cannot be tested for. However, only 48% of the female respondents report being harassed and 24.5% of the males report being harassed. In addition, women are only 1.5 times more likely than men to be in our sample, compared to the federal workforce, and it is believed that women are at least 2.5 times more likely to be harassed in the workplace. In 1997, women were almost ten times more likely to file a sexual harassment claim than men—men only filed 11.7% of the EEOC claims in 1997. Gary Langer, *One in Four U.S. Women Reports Workplace*

indicate race, the federal government workforce is 57% male,³³ 16.7% African American, 5.7% Hispanic, and 4.6% Asian, which is relatively similar to the composition of the U.S. population as a whole—currently 49.2% male, 12.9% African American, 4.8% Asian, and 16.3% Hispanic.³⁴ As a result, this sample is probably fairly representative of the U.S. population.

III. THE VICTIM'S GENDER MATTERS

A. Background

After the Supreme Court defined hostile work environment sexual harassment in *Meritor*, a circuit split developed over whether the severity or pervasiveness of alleged sexual harassment in the workplace should be looked at from the perspective of a reasonable person or a reasonable woman.³⁵ In response, many scholars have analyzed social science studies on female harassment perceptions, the consequences of each standard, and the rulings that created the circuit split.³⁶ Although scholars have supported the reasonable woman standard with summary statistics from sexual harassment surveys (including the MSPB surveys), this Note advances the argument by offering a true empirical analysis of the 1994 MSPB data in Section D of this Part. The empirical analysis shows that women are up to 13.8 percentage points more likely than men to believe that certain actions constitute harassment, even when controlling for important individual demographics and workplace characteristics that may influence perceptions.³⁷

Harassment, ABC NEWS (Nov. 16, 2011), <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment>; *Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1997 - FY 2011*, EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Sept. 23, 2012).

33. FEDERAL WORKPLACE, *supra* note 13, at 2.

34. EQUAL EMP'T OPPORTUNITY COMM'N, EXECUTIVE BRANCH (NON-POSTAL) EMPLOYMENT BY GENDER, RACE/NATIONAL ORIGIN, DISABILITY STATUS, VETERANS STATUS, DISABLED VETERANS 1994 - 2006, available at <http://www.opm.gov/feddata/demograp/table1-1.pdf>; *State and County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last revised Sept. 18, 2012).

35. Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 533 (2007).

36. Ann Juliana & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 584 (2001).

37. See *infra* Part II.D (providing empirical-analysis results that support the reasonable woman standard).

B. Circuit Split

The development of the reasonable woman standard is often credited to Judge Damon Keith's dissent in *Rabidue v. Osceola Refining Company*, a Sixth Circuit case holding that sexual posters in the plaintiff's work environment did not create a hostile work environment that would interfere with a reasonable person's psychological well-being.³⁸ In his dissent, Judge Keith claimed that harassment should be viewed from the perspective of a reasonable woman, because there is a gap between men's and women's views of appropriate sexual conduct.³⁹ Judge Keith stressed Title VII's goal of preventing discrimination in the workplace and argued that discrimination would continue if the court did not adopt a reasonable woman standard.⁴⁰

In 1991, the Ninth Circuit explicitly adopted the reasonable woman standard in *Ellison v. Brady*.⁴¹ The court reversed a summary judgment ruling for the defendant, holding that unwelcome letters and contact from the plaintiff's coworkers could constitute conduct that a reasonable woman would consider sufficiently severe or pervasive to alter workplace conditions.⁴² The court applied the reasonable woman standard because women have different experiences with harassment and different perceptions about what constitutes harassment.⁴³ The court stated, "We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."⁴⁴ The Third Circuit followed the New Jersey Supreme Court⁴⁵ and applied the reasonable woman standard in *Hurley v. Atlantic City Police Department*, holding that the conduct's severity, pervasiveness, and impact on the working

38. 805 F.2d 611, 620 (6th Cir. 1986); Newman, *supra* note 35, at 535-36. Note that the Supreme Court held that psychological damage was not a requirement of hostile work environment harassment in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

39. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting).

40. *Id.*

41. 924 F.2d 872, 879-80 (9th Cir. 1991).

42. *Id.*

43. *Id.*

44. *Id.*

45. The New Jersey Supreme Court developed a four-prong standard to determine whether the harassment is actionable. *Lehman v. Toys 'R' Us, Inc.*, 132 N.J. 587, 603-04 (1993) (holding that the plaintiff must establish that "the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive").

environment must be viewed from the female perspective, because a gender-specific standard allows for flexibility and “recognize[s] and respect[s] the difference between male and female perspectives on sexual harassment.”⁴⁶ The Third and Ninth Circuits are the only circuits that explicitly apply a reasonable woman standard at this time.

On the other hand, the Fifth, Eighth, and First Circuits explicitly reject the reasonable woman standard.⁴⁷ The Fifth Circuit rejected the standard upon first considering it in *DeAngelis v. El Paso Municipal Police Officers Association*, stating, “The test is an objective one, not a standard of offense to a ‘reasonable woman.’”⁴⁸ In contrast, the Eighth and First Circuits each originally applied the reasonable woman standard in hostile work environment harassment cases, but after the Supreme Court decided *Harris v. Forklift Systems, Inc.*, discussed below, both circuits rejected the reasonable person standard.⁴⁹ In addition, the Eleventh Circuit has applied the reasonable person standard without commenting on the reasonable woman standard,⁵⁰ and the remaining circuits do not explicitly address a reasonableness requirement.⁵¹

The Supreme Court has yet to resolve this circuit split. In the 1993 case *Harris v. Forklift Systems, Inc.*, the Supreme Court had the opportunity to address the lower court’s discussion of the reasonable woman standard.⁵² The Court declined to clarify the vague severe-or-pervasive standard, stating, “But we can say that whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking

46. 174 F.3d 95, 115 (3d Cir. 1999); see also *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 19 (1st Cir. 2002); *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996).

47. Newman, *supra* note 35, at 552.

48. 51 F.3d. 591, 594 (5th Cir. 1995) (emphasis omitted).

49. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). The Eighth Circuit applied the reasonable woman standard in *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962–65 (8th Cir. 1993), but upheld a reasonable person standard after *Harris* in *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996), which is discussed below. See Cynthia A. Dill, *The Reasonable Woman’s Standard in Sexual Harassment Litigation*, 12 ME. B.J. 154, 156 (1997) (discussing a stall in the reasonable woman standard after *Harris*). The First Circuit applied the reasonable woman standard in *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988), but in post-*Harris* cases cited *Harris* and applied a reasonable person standard. *Noviello v. City of Boston*, 398 F.3d 76, 92 (1st Cir. 2005); *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 19 (1st Cir. 2002).

50. See Newman, *supra* note 35, at 552 n.162 (citing cases that explicitly apply a reasonable person standard).

51. See *id.* at 552 n.161 (citing First, Fourth, Seventh, Second, and Tenth Circuit cases that discuss hostile work environment harassment standards).

52. 510 U.S. at 20. Instead, the Supreme Court simply held that if the conduct could reasonably be perceived to create a hostile or abusive environment, there is not an additional requirement of psychological injury. *Id.*

at all the circumstances.”⁵³ The Court described these circumstances as the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁵⁴ Even though the Court did not mention the plaintiff’s gender in its description of the circumstances,⁵⁵ some legal scholars and courts have interpreted the totality-of-the-circumstances standard as the Supreme Court justifying the application of the reasonable woman standard.⁵⁶ On the other hand, scholars and courts who believe the reasonable woman standard is outside the boundaries of Title VII often interpret the Supreme Court’s mention of a “reasonable person” as support for their rejection of the reasonable woman standard.⁵⁷

The Supreme Court most recently addressed sexual harassment standards in *Oncale v. Sundowner Offshore Services, Inc.*⁵⁸ In *Oncale*, the Court addressed the “all the circumstances” standard developed in *Harris* and focused on the fact that severity should be judged from the viewpoint of “the reasonable person in the plaintiff’s position.”⁵⁹ Though this case involved same-sex harassment, proponents have interpreted the Court’s focus on “all the circumstances” and on “the plaintiff’s position” as encouraging the use of the reasonable woman standard.⁶⁰ The Supreme Court also recognized the importance of the “social context” and the “constellation of surrounding circumstances, expectations, and relationships.”⁶¹ Scholars have suggested that this language further

53. *Id.* at 23.

54. *Id.*

55. *Id.* at 17, 21, 22.

56. See Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 206–08 (2001) (arguing for the reasonable woman standard and discussing that the Supreme Court’s mention of the reasonable person in *Harris* only applies to what a plaintiff must present to have an actionable claim); see also Susan Collins, Note, *Harris v. Forklift Systems: A Modest Clarification of the Inquiry in Hostile Environment Sexual Harassment Cases*, 1994 WIS. L. REV. 1515, 1539–40 (“However, the *Harris* Court’s use of the reasonable person standard does not necessarily mean that the victim’s gender will always be irrelevant. In fact, the Court may have left the door open to considerations of the victim’s gender.”).

57. See Leonard Niehoff & Andrea Roumell Dickson, *Title VII and the “Hostile Work Environment”*, 73 MICH. B.J. 76, 77 (1994) (“*Harris* arguably settled the debate by adopting the reasonable person standard to assess sexual harassment cases.”).

58. 523 U.S. 75, 81–82 (1998).

59. *Id.*

60. Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 175 (2005); Newman, *supra* note 35, at 539.

61. *Oncale*, 523 U.S. at 81–82.

supports the reasonable woman standard, because the standard is also context-specific and depends on circumstances and expectations.⁶²

Because the Supreme Court did not settle the circuit split in *Harris* or *Oncale*, the Ninth and Third Circuits continue to apply the reasonable woman standard; however, the Eighth and First Circuits, which once adopted the reasonable woman standard, moved to the reasonable person standard in post-*Harris* hostile work environment harassment cases.⁶³ As a result, the circuit split continues, and the question of whether to view the severe-or-pervasive standard from a gender-specific perspective continues to add to the ambiguity of hostile work environment sexual harassment law.

C. Scholarly Debate

1. Social Science Support

Legal scholars and social scientists also continue to debate the applicability of the reasonable woman standard. Support for the reasonable woman standard primarily stems from assumed systematic differences in how men and women perceive sexual harassment.⁶⁴ As the Ninth Circuit explained in *Ellison*, women are more likely to experience sexual harassment, including sexual assault, making them more likely to be concerned with sexual harassment and more likely to believe certain conduct constitutes harassment.⁶⁵ In addition, proponents of the reasonable woman standard cite the large economic and social disparities that exist between men and women in the workplace as a factor that leads to different perceptions.⁶⁶

Social science literature has helped ascertain the disparity between men's and women's views of sexual harassment. Elizabeth Shoenfelt et al. summarize the social science literature in an article that empirically analyzes the application of the reasonable woman standard and argue that it cannot be accurately enforced because

62. Hill, *supra* note 60, at 175.

63. See *supra* text accompanying note 49 (demonstrating the circuit split regarding the proper standard for these types of cases).

64. Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 633, 648-49 (2002).

65. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) ("Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."); see also Kellie A. Kalbac, *Through the Eye of the Beholder: Sexual Harassment Under the Reasonable Person Standard*, 3 KAN. J.L. & PUB. POL'Y 160, 162-63 (1994) (discussing the reasonable woman application in *Ellison*).

66. Kerns, *supra* note 56, at 210.

juries and judges are not capable of applying a gender-specific perspective.⁶⁷ This synthesis of the literature includes studies finding that women are more likely than men to view a given behavior as sexual harassment.⁶⁸ One of the cited studies, by Mary Gowan and Raymond Zimmermann, had 215 respondents analyze seventeen sexual harassment cases and decide whether they thought the plaintiff should prevail and whether she should be granted monetary damages.⁶⁹ Though this study had mixed results, the general conclusion was that women were more likely than men to find ambiguous conduct more offensive.⁷⁰ Other studies have focused on the general differences in sexual perceptions between men and women. For instance, three studies conducted by Frank E. Saal et al. found that men see “sexiness” in a woman’s behavior when women see “friendliness” in the same behavior.⁷¹ Still other studies found a difference between what actions men and women believe constitute sexual harassment.⁷² In 2001, Maria Rotundo et al. conducted a meta-analysis of sixty-two studies of gender differences in harassment perceptions and found that women perceive more types of sexual conduct as harassment than men do and that this difference was greatest in hostile work environment situations.⁷³ This Note adds to this literature by actually isolating the female difference by including workplace and personal demographic controls in the empirical analysis and by analyzing a more representative and larger sample than did the majority of these studies.⁷⁴

67. Shoenfelt et al., *supra* note 64, at 647–51.

68. *Id.* at 648 nn.107–08.

69. Mary A. Gowan & Raymond A. Zimmermann, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 J. APPLIED SOC. PSYCHOL. 596, 613 (1996); Shoenfelt et al., *supra* note 64, at 648–49.

70. Gowan & Zimmerman, *supra* note 69, at 613; Shoenfelt et al., *supra* note 64, at 648–49.

71. Frank E. Saal et al., *Friendly or Sexy?: It May Depend on Whom You Ask*, 13 PSYCHOL. WOMEN Q. 263, 274–75 (1989).

72. See Maria Rotundo et al., *A Meta-Analysis Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCHOL. 914, 914 (2001) (analyzing and providing a detailed account of social science studies on harassment perceptions).

73. *Id.*

74. The studies typically analyzed university students and employees. For an example of one of the university studies, see generally Roger C. Katz et al., *Effects of Gender and Situation on the Perception of Sexual Harassment*, 34 SEX ROLES 35 (1996). In Part III.D.1 of this Note, I discuss Thacker and Gohmann’s study—which analyzes the 1987 MSPB data and is included in Rotundo et al.’s meta-analysis—and provide an explanation of how this Note advances that study. See *infra* Part III.D.1.

2. Legal Literature Split

Because some social scientists report a disparity between male and female perceptions of sexual harassment, legal scholars who are proponents of the reasonable woman standard argue that the reasonable person standard is inherently biased.⁷⁵ Arguing that a gender-neutral standard ignores the gender differences that exist in sexual harassment, proponents contend that only a gender-specific standard can accurately compensate women for sexual harassment and actually deter all actions that are perceived as sexual harassment.⁷⁶ In addition, proponents suggest that because the reasonable person has traditionally “maintained a masculine identity,” this standard allows sex discrimination to continue in the workplace.⁷⁷ However, Leslie Kerns argues that everyone should embrace the reasonable woman standard, because “[i]f women are predominantly the victims and men are predominantly the aggressors, how can feminists expect male judges to properly enforce the law that prohibits sexual harassment unless the judges consider the alleged conduct from the female victim’s perspective?”⁷⁸

Proponents of the reasonable woman standard also argue that the purpose of Title VII is to achieve equal opportunities for women in the workplace.⁷⁹ They argue that Congress did not establish Title VII to simply maintain the status quo, but to eliminate sex discrimination and the disparity that exists between men and women in the workplace.⁸⁰ Proponents of the reasonable woman standard hope that a gender-specific standard will help the courts enforce Congress’s goal. They argue that a gender-specific standard can help reach this goal because “heightened sensitivity will bridge the gender gap on perceptions of harassing conduct.”⁸¹ These proponents hope that this “heightened sensitivity” will alter the perceptions of men in the workplace and more adequately deter sexual harassment, a significant form of sex discrimination.⁸²

According to critics, there are four main potential problems with the reasonable woman standard: (1) it does not reflect the interests of all women; (2) men cannot objectively apply a reasonable

75. Kerns, *supra* note 56, at 211.

76. Newman, *supra* note 35, at 542.

77. Kerns, *supra* note 56, at 210–11.

78. *Id.* at 209.

79. Newman, *supra* note 35, at 544–45.

80. *Id.*

81. *Id.* at 544.

82. *Id.*

woman standard; (3) it makes women look weak and vulnerable in the eyes of the law;⁸³ and (4) a gender-specific standard is contrary to the basic goals of Title VII because it reinforces stereotypes and will create a slippery slope of defenses where parties argue for ethnicity-specific, religion-specific, education-specific, or economic-specific standards.⁸⁴

Some feminist critics of a reasonable woman standard are concerned that establishing a difference between a reasonable woman and a reasonable man only encourages female stereotypes and expands the male-female disparity in the workplace.⁸⁵ Whereas proponents for the reasonable woman standard argue that it helps achieve the integrated workplace that Congress hoped Title VII would create,⁸⁶ opponents believe that a reasonable woman standard, by encouraging stereotypes, can hinder Title VII's most basic goal of preventing sex discrimination.⁸⁷

Other opponents argue that the reasonable woman standard is impractical because male judges and jurors cannot accurately adopt the viewpoint of a reasonable woman.⁸⁸ Further, even if they could adopt that viewpoint, it would be subjectively based on particular females in their lives.⁸⁹ After all, if the male-female perspective on harassment is different enough to justify different standards, then how could one expect a man to be able to apply the female perspective?⁹⁰ Shoenfelt et al. conducted a study in order to test this exact difficulty and found not only that males were less likely to perceive certain advances as sexual harassment but also that "[t]he particular standard under which an individual was asked to evaluate the case did not have an impact on whether or not a change in perceptions occurred."⁹¹

Other critics focus on the fact that women are not one homogeneous group and that no two women have identical thoughts or perceptions.⁹² They argue that women who do not fit into a "typical" female profile—arguably white, upper-class, and heterosexual—may

83. Kerns, *supra* note 56, at 222.

84. Newman, *supra* note 35, at 548–50.

85. Kerns, *supra* note 56, at 223; Newman, *supra* note 35, at 547; Shoenfelt et al., *supra* note 64, at 656–57.

86. Newman, *supra* note 35, at 544.

87. *Id.* at 549–50.

88. Kerns, *supra* note 56, at 223.

89. *Id.*

90. Newman, *supra* note 35, at 548–49.

91. Shoenfelt et al., *supra* note 64, at 659–67.

92. Newman, *supra* note 35, at 547.

be excluded from the reasonable woman standard.⁹³ Opponents believe that the adoption of the reasonable woman standard could lead to arguments for gender- or race-specific standards in other Title VII cases outside of sexual harassment because Title VII also prohibits harassment on the basis of race, religion, and national origin.⁹⁴ Opponents explain that this would unfairly burden employers and perhaps make it even more difficult to meet the goals of Title VII by establishing an unclear standard that would be difficult to enforce.⁹⁵ Ultimately, both the federal courts of appeals and legal scholars have not resolved whether the reasonable woman standard is consistent with the purpose of Title VII or whether its application will assist in diminishing sexual harassment and sex discrimination.

D. The MSPB Survey Supports Adoption of the Reasonable Woman Standard

1. The MSPB Literature

Although the MSPB last conducted the sexual harassment survey in 1994, scholars continue to heavily cite the survey and frequently analyze it because more recent sexual harassment data is not readily available.⁹⁶ Social scientists and economists have analyzed the survey in order to determine what characteristics of the workplace, including sexual harassment training and sex integration, are more likely to abate harassment.⁹⁷ Meredith A. Newman et al. reported that females were statistically significantly more likely to report being harassed than men, when controlling for many workplace

93. *Id.*

94. *Id.*

95. Kalbac, *supra* note 65, at 167. Some scholars even suggest that victims could argue for a reasonable person of the same gender and socioeconomic level. *E.g.*, Saba Ashraf, *The Reasonableness of the Reasonable Woman Standard: An Evaluation of the Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483, 498–99 (1992).

96. For an example of a similar study, see Heather Antecol & Deborah Cobb-Clark, *The Changing Nature of Employment-Related Sexual Harassment: Evidence from the U.S. Federal Government, 1978–94*, 57 INDUS. & LAB. REL. REV. 443 (2004).

97. *See, e.g.*, Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826, 829 (2003) (finding that sexual harassment training influences MSPB respondents' perceptions of harassment); Robert A. Jackson & Meredith A. Newman, *Sexual Harassment in the Federal Workplace Revisited: Influences on Sexual Harassment by Gender*, 64 PUB. ADMIN. REV. 705, 711 (2004) (finding that MSPB female respondents were more likely to experience harassment in male-dominated workplaces).

and personal demographic characteristics.⁹⁸ Scholars have also analyzed how sexual harassment perceptions have changed between the 1987 and 1994 surveys, because during those years there was growing attention to sexual harassment after the Supreme Court defined it in *Meritor*.⁹⁹ J. Mitchell Pickerill et al. studied this change and also analyzed the effect that being female had on one's perceptions of sexual harassment in 1987 and 1994.¹⁰⁰ They found that females were almost always more likely than men to believe certain actions constituted sexual harassment.¹⁰¹ However, this analysis did not include controls for other important characteristics and demographics, such as occupation, race, or pay grade.¹⁰²

Scholars and the MSPB have also reported summary statistics from the MSPB surveys. After completing the 1994 survey, the MSPB compiled a report that included a discussion of the summary statistics and how the agency would respond to the surprising results, which indicated that 44% of female respondents and 17% of male respondents had experienced unwelcome sexual attention in the previous two years.¹⁰³ Shoenfelt et al. reported that 4% of the female respondents reported that they experienced actual or attempted sexual assault.¹⁰⁴ Saba Ashraf reported summary statistics from the 1987 survey that show women believed more frequently than men that certain behavior constituted sexual harassment; for instance, 64% of women, compared to only 47% of men, believed unwelcome sexual remarks constituted sexual harassment.¹⁰⁵ Thacker and Goman also found support for the reasonable woman standard in the results of the 1987 MSPB survey, which showed that women's responses about their perceptions were statistically different than men's.¹⁰⁶ This Note not only updates these studies with an analysis of the 1994 MSPB data but also goes a step further by employing a multiple regression

98. Meredith A. Newman et al., *Sexual Harassment in the Federal Workplace*, 63 PUB. ADMIN. REV. 472, 475-76 (2003).

99. J. Mitchell Pickerill et al., *Changing Perceptions of Sexual Harassment in the Federal Workforce, 1987-94*, 28 L. & POL'Y 368, 371-72 (2006).

100. *Id.* at 379.

101. *Id.* at 381 tbl.3.

102. *Id.*

103. FEDERAL WORKPLACE, *supra* note 13, at vii. Note that the summary statistics reported in this Note are slightly different because the means are weighted.

104. Shoenfelt et al., *supra* note 64, at 643.

105. Ashraf, *supra* note 95, at 488. Note that Ashraf still concludes that the reasonable woman standard should be discontinued because of the consequences discussed above. *Id.* at 504.

106. Rebecca A. Thacker & Stephen F. Gohmann, *Male/Female Differences in Perceptions and Effects of Hostile Environment Sexual Harassment: "Reasonable" Assumptions?*, 22 PUB. PERSONNEL MGMT. 461, 465, 467 (1993).

analysis in order to control for personal and workplace characteristics, which allows the observer to isolate the effect of being female on sexual harassment perceptions.

2. Theory and Empirical Specification

In order to add some clarity to hostile environment harassment law, I use linear regressions to determine if being female significantly affects the belief that certain behaviors constitute sexual harassment. These linear regressions analyze the employee's responses to the 1994 MSPB sexual perception questions. As discussed in Part II, the survey asked the respondent to report whether she believes a certain action "definitely," "probably," "probably not," or "definitely does not" constitute sexual harassment.¹⁰⁷ The respondent could also respond that she does not know if the conduct constitutes sexual harassment.¹⁰⁸ The survey prompted the respondent to report her perceptions of the following conduct: uninvited letters, telephone calls or materials of a sexual nature (*Supervisor Calls* and *Coworker Calls*); uninvited and deliberate touching, leaning over, cornering, or pinching (*Supervisor Touch* and *Coworker Touch*); uninvited sexually suggestive looks or gestures (*Supervisor Looks* and *Coworker Looks*); uninvited pressure for sexual favors (*Supervisor Favors* and *Coworker Favors*); uninvited pressure for dates (*Supervisor Dates* and *Coworker Dates*); and uninvited sexual teasing, jokes, remarks, or questions (*Supervisor Teasing* and *Coworker Teasing*).¹⁰⁹ In addition, the survey asked the respondent to answer the question both as if the harassment came from a supervisor and as if it came from a coworker.¹¹⁰ An example of a perception-related survey question follows:

1. Uninvited letters, telephone calls, or materials of a sexual nature.
 - a. If a supervisor did this, would you consider this sexual harassment?
 - b. If another worker did this, would you consider this sexual harassment?

Please mark one response for each question: definitely yes, probably yes, don't know, probably not, definitely not.¹¹¹

My empirical specification takes the following form:

$$(1) \quad \Pr(\text{Perception}=1) = \Phi [\beta_0 + \beta_1 \text{Female} + \beta_2 \text{PC} + \beta_3 \text{WC} + \epsilon]$$

107. 1994 DATA, *supra* note 20, at app. 1.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

The dependent variable, *Perception*, is a dichotomous variable for whether or not the respondent believes the behavior constitutes harassment. The variable is equal to 1 if the respondent answered “definitely yes” or “probably yes.” If the respondent answered “probably not” or “definitely not,” the variable is equal to 0, meaning the respondent did not believe the behavior constitutes actionable harassment. I coded as missing those respondents who did not answer the question or responded that they did not know what their perceptions were, and missing respondents are not included in the sample.¹¹² *PC* is a vector of personal characteristics coded as indicator variables; it includes marital status (*Single, Married, Divorced/Widowed*), employment type (*Management, Professional, Clerical, Blue Collar, Trainee, Other Job*), federal pay-grade level (*Pay Grades 1–4, 5–10, 11–12, 13–15, SES*), education level (*High School Diploma or Less, Technical School, Some College, College Degree, Some Grad School, Grad Degree*), age (*16–24, 25–34, 35–44, 45–54, Over 55*), and supervisor status (*Supervisor*). *WC* is a vector of workplace characteristics; it includes dichotomous variables for the sex integration of the workplace (*All Male Employees, More Male Employees, Equal Male/Female, More Female Employees, All Female Employees*), the sex of the employee’s supervisor (*Male Supervisor, Female Supervisor*), and whether the agency is part of the Department of Defense (*DOD*). Controlling for these demographics allows me to isolate the effect on perceptions attributable to the differences between men and women, after netting out the effects of respondents having different levels of education, pay, or power. The independent variable of interest is whether the respondent is female (*Female*).

I utilize a probability model using ordinary least squares (“OLS”)¹¹³ regressions to estimate the effects.¹¹⁴ A positive and significant coefficient on *Female* suggests that being female makes an

112. See *infra* Appendix Table 1A (providing summary statistics of each of these dependent variables measuring perceptions).

113. OLS is a regression technique that provides estimates for the variable coefficients. The resulting coefficients can be interpreted as marginal effects on the binary dependent variable—whether or not the respondent believed a certain behavior constituted harassment.

114. Some may argue that a linear regression is not preferred for equations with a binary dependent variable because it can predict impossible values, outside of the zero to one range, so that the probit or logit regression would be preferred. SCOTT M. LYNCH, INTRODUCTION TO APPLIED BAYESIAN STATISTICS AND ESTIMATION FOR SOCIAL SCIENTISTS 193 (2007). However, I utilize OLS because the model makes fewer assumptions and because certain variables in my models perfectly predict outcomes, and probit or logit did not allow the inclusion of those variables. I also ran probit regressions and got very similar results in each regression where the probit model allowed for the inclusion of each variable, and these results are on file with the author and the Vanderbilt Law Review. In addition, I report robust standard errors to address heteroskedasticity.

employee more likely to view the unwanted sexual behavior as harassment. In addition, because the coefficients represent marginal effects, the coefficient can be interpreted as a percentage-point change in the probability that the respondent believed the behavior constituted harassment due to the respondent being female.

A main criticism of the reasonable woman standard is that women are not a homogeneous group and thus cannot be treated as one.¹¹⁵ In order to reduce the heterogeneity that causes concerns among critics of the gender-specific standard, my empirical specifications control for as many personal demographics and workplace characteristics as the survey allows.¹¹⁶ These demographics include the respondent's marital status, employment type, pay-grade level, education level, age, supervisor status, the sex of the respondent's supervisor, the male-female integration of the respondent's workplace, and the particular agency for which the respondent works.¹¹⁷ These controls allow me to compare the perceptions of a male to the perceptions of a female with the same workplace and personal characteristics. As a result, the coefficient on *Female* actually represents the effect that being female had on sexual harassment perceptions for the respondents of the MSPB survey, not the effect of different characteristics that might be correlated with being female.

Previously, legal scholars have only compared the percentage of men and women who believe a certain action constitutes harassment in order to show differing perceptions.¹¹⁸ This Note advances this literature because a positive and significant coefficient on *Female*, when controlling for other characteristics that may affect perceptions, provides stronger evidence of the difference between male and female perceptions of what constitutes sexual harassment.¹¹⁹ This result would strengthen the argument that sexual harassment law must account for these different perceptions and that the reasonable woman standard is a simple and successful way to do that.

115. See *supra* Part III.C.2 (discussing legal scholars' critiques of the reasonable woman standard).

116. 1994 DATA, *supra* note 20, at app. 1.

117. See *infra* Appendix Table 1A (detailing summary statistics for each of these variables).

118. *E.g.*, Thacker & Gohmann, *supra* note 106, at 467. I report these summary statistics in Table 1A of the Appendix.

119. Though Pickerill et al. reports the effect that being female had on these responses in 1994, the study did not seem to control for personal demographics or workplace characteristics, but only controlled for a female coefficient and interactions with the year. In addition, the study focused on comparing the 1994 coefficient to the 1987 coefficient. Pickerill et al., *supra* note 99, at 381 tbl.3.

3. Results

Table 1 reports results for each of the regressions measuring the effect of gender on perception. The column headings of Table 1 contain the dependent variable being analyzed in each regression. Each column provides the coefficients on the independent variable of interest, *Female*, for the corresponding regressions and the coefficients' standard errors. Each column also provides the size of the sample that the particular regression tested.¹²⁰ As discussed above, the regressions also include each of the personal and workplace variables in order to control for the heterogeneity of the sample and to isolate the true difference between male and female perceptions.

The results clearly show that male and female perceptions of sexual harassment are different. Each coefficient on *Female* is positive and significant,¹²¹ meaning that being female increases the likelihood that a respondent will report that the sexual behavior at issue constitutes harassment. The largest results are for *Coworker Teasing* and *Coworker Looks*, and these results are significant at the 1% level, meaning the probability of erroneously concluding that being female has a statistically significant effect on one's view of sexual teasing and looks or gestures from a coworker when in fact it does not is 1% or less.¹²² A female employee is 13.8 percentage points more likely to report that sexually suggestive looks from a coworker constitute harassment and 12.9 percentage points more likely to believe sexual jokes and teasing from a coworker constitute sexual harassment. These behaviors are likely to be found in a hostile work environment case, and courts often have difficulty determining whether the behavior reached the level of severe or pervasive.¹²³ The smallest results are for specifications where the dependent variables are more similar to quid pro quo harassment: pressure for sexual favors (*Supervisor Favors* and *Coworker Favors*), unwanted touching (*Supervisor Touch* and *Coworker Touch*), and unwanted pressure for dates (*Supervisor Dates* and *Coworker Dates*). Men, women, and the

120. Note that the number of observations differs in each regression. If the sample size is smaller, it is either because more respondents did not answer the question, or more respondents answered that they did not know if the action constituted harassment, because both responses are coded as missing.

121. Most are strongly significant, meaning they are significant at the 1% level.

122. To be more specific, if the coefficient on female is 0.12, then being female increases the respondent's probability of believing that the behavior constitutes harassment by twelve percentage points.

123. See, e.g., *Billings v. Town of Grafton*, 515 F.3d 39, 48–50 (1st Cir. 2008) (discussing the issues of fact when determining whether a male coworker staring at a female coworker's breasts could constitute hostile work environment harassment).

courts generally agree that these actions constitute sexual harassment, so it is not surprising that being female has a smaller effect on perception in these cases.¹²⁴ In addition, the effect of being a female is smaller when the dependent variable measures the perception of behavior by a supervisor. The fact that supervisor harassment is viewed as more severe than coworker harassment is further discussed and analyzed in Part IV of this Note.

These results, especially for behaviors that resemble more vague hostile work environment behaviors, strongly support the reasonable woman standard. Females are as much as 13 percentage points more likely to believe that some behavior constitutes harassment. This difference is too substantial for courts to ignore. In addition, the full regression results show that the other personal demographic variables, which opponents of the reasonable woman standard believe may also affect perceptions and lead to a slippery slope of arguments for more standards, do not consistently affect perceptions of harassment. Instead, *Female* is the only variable that significantly affects each perception of harassment.¹²⁵ These results support the integration of the reasonable woman standard into sexual harassment law. Women clearly have a different standard for what actions constitute sexual harassment, and it does not consistently vary by demographics or other characteristics; thus, if courts continue to apply a gender-neutral standard, then they may not capture behaviors that women believe to be sexual harassment—behaviors that could interrupt their work performance. Because the threat of liability may be necessary to properly encourage employers to prevent this type of sex discrimination in their workplaces, the Supreme Court should resolve the circuit split and adopt the reasonable woman standard.¹²⁶

124. *See, e.g., id.* at 48 (“Of course, behavior like fondling, come-ons, and lewd remarks is often the stuff of hostile environment claims, including several previously upheld by this Court.”).

125. The full regression results are available on file with the Vanderbilt Law Review and the author.

126. *See infra* Part VI (arguing for the adoption of the reasonable woman standard).

Table 1
Coefficients on the Independent Variable *Female* for Each Perception Regression

| | Dependent Variables | | | | | |
|---------------------|---------------------|--------------------|---------------------|---------------------|---------------------|---------------------|
| | Sup Favors | CW Favors | Sup Dates | CW Dates | Sup Touch | CW Touch |
| Female | 0.010** (0.004) | 0.011** (0.005) | 0.045*** (0.013) | 0.049*** (0.014) | 0.028*** (0.006) | 0.041*** (0.008) |
| Observations | 6,438 | 6,219 | 4,864 | 5,832 | 6,338 | 6,159 |

| | Dependent Variables | | | | | |
|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| | Sup Calls | CW Calls | Sup Teasing | CW Teasing | Sup Looks | CW Looks |
| Female | 0.055*** (0.009) | 0.081*** (0.012) | 0.091*** (0.015) | 0.129*** (0.017) | 0.098*** (0.013) | 0.138*** (0.015) |
| Observations | 6,234 | 5,989 | 5,776 | 5,569 | 5,920 | 5,710 |

Data Source: U.S. Merit Systems Protection Board 1994 Sexual Harassment Survey.

Notes: Robust standard errors are reported in parentheses, and the regression includes many control variables and a constant term. **, *** indicate significance at the 5% and 1% levels, respectively. All values are weighted by the provided MSPB weight. See Appendix Table 1A for all control variables and reference categories.

IV. THE SUPERVISOR STATUS OF THE HARASSER MATTERS

A. Background

The totality-of-the-circumstances test developed in *Harris* and *Oncale* considers the relationships and social context surrounding the harassment; courts and scholars often interpret these considerations to include the power dynamic at a workplace.¹²⁷ Susan Grover, a professor of law at William and Mary Law School, and Kimberly Piro, an attorney with the Department of Justice, suggest in their 2010

127. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993); see also Grover & Piro, *supra* note 11, at 507 (arguing that the list of circumstances in *Oncale* was merely suggestive).

article *Consider the Source: When the Harasser is the Boss* that courts should take into account the source of harassment when considering whether or not an action constitutes sexual harassment.¹²⁸ Because social science studies have suggested that supervisor harassment is perceived to be more severe and to have more detrimental effects than harassment from a coworker, Grover and Piro suggest that if the supervisor was the harasser, then courts should consider that fact when determining whether the harassment was severe or pervasive.¹²⁹ While this suggestion would add an additional component to hostile work environment sexual harassment law, it would also promote clarity and accuracy. My empirical analysis of the MSPB survey confirms the social science studies that support this theory.¹³⁰ My results show that federal employees are significantly more likely to believe that sexually suggestive actions constitute harassment if they are performed by a supervisor than if they are performed by a coworker.

B. Theory

Grover and Piro discuss the emergence of sexual harassment law and the severe-or-pervasive standard.¹³¹ Key to this discussion is the Supreme Court's focus on objectivity and the "all the circumstances" standard in *Harris*.¹³² Grover and Piro believe that the supervisor distinction should be part of the "circumstances" that the court considers when determining severity in every case.¹³³ Grover and Piro criticize several lower courts that have treated the list of circumstances described in *Harris* and *Oncale* as an all-inclusive list of factors that contribute to the harassment determination, instead of treating it as merely suggestive of a broader list.¹³⁴ They argue that treating the list as complete imposes an unfair test that the Court did not intend to establish in *Harris* or *Oncale*.¹³⁵

Instead, Grover and Piro believe that the Supreme Court intended the severe-or-pervasive standard to be malleable and that the Court showed that preference in *Oncale*.¹³⁶ Grover and Piro argue

128. Grover & Piro, *supra* note 11, at 500.

129. *Id.* at 513–15, 518.

130. *See infra* Part IV.D (presenting empirical data supporting this assertion).

131. Grover & Piro, *supra* note 11, at 501–09.

132. *Id.* at 506.

133. *Id.* at 518.

134. *Id.* at 506.

135. *Id.* at 507.

136. *Id.*

that the Court's focus on the perspective of a person in the plaintiff's position and the social context and relationships surrounding the harassment gave rise to "a broad, context-sensitive approach" that should always be used to determine if the conduct was severe or pervasive enough to constitute actionable sexual harassment.¹³⁷

Grover and Piro suggest that the Court should require the status of the abuser—supervisor or coworker—to be analyzed as part of the "broad, context-sensitive approach."¹³⁸ This is not a drastic proposal because the Supreme Court has noted the difference between supervisor and coworker harassment in another context.¹³⁹ In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court developed standards for vicarious liability in sexual harassment cases, and these standards differ depending on whether the harasser was a supervisor or a coworker of the victim.¹⁴⁰ If the harasser was a supervisor and the harassment resulted in a tangible employment action, then the employer is automatically vicariously liable for the harassment; however, if the harasser was a coworker, then the employer is only liable if it did not take adequate steps to prevent and correct the harassment and the victim followed the procedures in place.¹⁴¹ Though this distinction was largely based on agency law, Grover and Piro argue that it should also be recognized when determining if the sexual harassment is severe or pervasive enough to be legally actionable.¹⁴²

In order to further support this theory, Grover and Piro provide examples of lower court cases where the harasser was the supervisor.¹⁴³ They argue that if the courts had considered the status of the harasser in the totality of the circumstances, then the courts would have likely concluded that the harassment was severe or

137. *Id.* at 508.

138. *Id.*

139. *See id.* (noting that the supervisor/coworker distinction is relevant when determining "whether employers should be liable for harassment once the harassment itself has been proven"); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) ("On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation."); *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) ("[A] supervisor might discriminate racially in job assignments in order to placate the prejudice pervasive in the labor force.").

140. *Ellerth*, 524 U.S. at 762; *Faragher*, 524 U.S. at 802–03; *see also Grover & Piro, supra* note 11, at 508, 508 nn.62–64 (describing the standards set forth in *Ellerth* and *Faragher*).

141. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807; Grover & Piro, *supra* note 11, at 508.

142. Grover & Piro, *supra* note 11, at 508, 518.

143. *See id.* at 509–11 (discussing a range of cases where courts were unable to find actionable conduct despite instances of verbal and physical abuse by supervisors).

pervasive enough to be actionable under *Meritor*.¹⁴⁴ This different result would occur because supervisor harassment is generally understood to be more severe.¹⁴⁵ Many experts believe that the power differential between the supervisor and the victim can elevate the severity of the harassment.¹⁴⁶ Grover and Piro cite the conclusions of several sociology studies for support, including the observation that a supervisor's power is based on her ability to determine the pay and responsibilities of the employee and her ability to sanction the employee if the employee does not submit.¹⁴⁷ Another study showed that victims of supervisor harassment opt for less assertive responses, are more frequently forced out of their jobs, and experience worsening feelings about work.¹⁴⁸ Grover and Piro also cite a lower court case where the court found that the "status of the harasser is a 'relevant factor' in the 'all the circumstances' test" because "incidents of harassment become proportionally more severe" when the harasser is a supervisor.¹⁴⁹ It is this consideration that Grover and Piro want every court to adopt in hostile work environment cases.¹⁵⁰

C. The MSPB Survey Supports Adoption of the Supervisor Distinction

1. Theory and Empirical Specification

My empirical analysis of the 1994 MSPB survey shows that employees have very different perceptions about what constitutes sexual harassment depending on whether it comes from a supervisor or a coworker. Antecol and Cobb-Clark report summary statistics from the MSPB survey in their study analyzing the impact of sexual harassment training.¹⁵¹ Pickerill et al. also report this result in their analysis of how perceptions changed between the 1987 and 1994 surveys.¹⁵² However, neither study discusses these results or provides an analysis of the statistical difference between these perceptions.

144. *Id.* at 512–13.

145. *Id.* at 513–14.

146. *Id.*

147. *Id.* at 514 (citing Rebecca A. Thacker & Stephen F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 J. PSYCHOL. 429, 439 (1996)).

148. *Id.* (citing James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543 (1995)).

149. *Id.* at 514–15 (citing *Steck v. Francis*, 365 F. Supp. 2d 951, 972–73 (N.D. Iowa 2005)).

150. *Id.* at 518.

151. Antecol & Cobb-Clark, *supra* note 97, at 830–33.

152. Pickerill et al., *supra* note 99, at 376–79, 387.

By simply comparing the percentage of respondents who believe a certain behavior by a supervisor constitutes harassment to the percentage who believe the same behavior by a coworker constitutes harassment, it seems likely that the status of the harasser makes a difference in an employee's perceptions of harassment.¹⁵³ In order to corroborate the importance of this supervisor distinction, I conducted t-tests—a form of hypothesis testing that analyzes whether the means of two variables are equivalent.¹⁵⁴ The t-tests test for a statistically significant difference between the percentage of respondents who perceive supervisor behavior as harassment to the percentage who perceive the same coworker behavior as harassment. The t-tests I utilize are dependent (or paired) t-tests because the same sample is answering each question. My hypothesis was that the percentage of respondents who believe the unwanted behavior constitutes harassment would be statistically significantly greater when the behavior was performed by a supervisor. This hypothesis stems from Grover and Piro's argument that employees generally perceive supervisor behaviors as more detrimental and more often think supervisor behaviors constitute harassment.

2. Results

Table 2 shows that, for each of the six behaviors, the percentage of respondents who believe a behavior performed by a supervisor is harassment is statistically different from the percentage of respondents who believe the same behavior performed by a coworker is harassment.¹⁵⁵ As predicted, the difference between these percentages is positive and significant at the 1% level in each comparison. These results signify that respondents believe there is a difference between actions performed by a coworker and a supervisor and that unwanted sexual behavior is more likely to be viewed as harassment when it is performed by a supervisor. The largest differences are for behaviors that are more similar to hostile work environment harassment, such as sexual teasing (*Teasing*), unwanted calls and contact (*Calls*), and sexually suggestive looks and gestures (*Looks*). These results support the theory that courts should take into account the status of the harasser when determining whether unwanted behaviors are severe or pervasive enough to constitute actionable hostile work environment harassment. If courts do not

153. See *infra* Table 2 (providing the raw percentages and t-test results).

154. I utilize dependent sample t-tests (or paired sample t-tests in Stata) because the same sample is answering both questions.

155. See *infra* Table 2 (illustrating the disparity).

recognize that employees perceive supervisor harassment as more severe, then current sexual harassment standards will not capture unwelcome and severe supervisor harassment. Because the goal of sexual harassment liability is to deter each of these behaviors that interfere with an employee's workplace, courts should consider the status of the harasser and adopt the supervisor distinction when determining if certain behaviors constitute sexual harassment.

Table 2
Results of T-Tests Comparing Mean Perceptions of Supervisor and Coworker Harassment

| Variable | Supervisor – Coworker Difference |
|-----------------------------|-------------------------------------|
| Favors (n= 7,512) | 0.0015*** (0.0005) |
| Dates (n=5,652) | 0.0292*** (0.0023) |
| Looks (n=6,799) | 0.0206*** (0.0018) |
| Calls (n= 7,167) | 0.0259*** (0.0019) |
| Teasing (n=6,558) | 0.0364*** (0.0024) |
| Touch (n= 7,405) | 0.0117*** (0.0014) |

Data Source: U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: Means for the *Difference* between *Supervisor* and *Coworker* are reported, standard errors are reported in parentheses, and *** indicates that the percentage of respondents who believe the supervisor actions are harassment is statistically significantly greater (at the 1% level) than the percentage who believe the coworker action is harassment. Note that the sample is not stratified by sex in each analysis, and the values are not weighted due to programming limitations. These results are for dependent sample t-tests (or paired sample t-tests in Stata).

V. INTEGRATION OF SEXES IN THE WORKPLACE MATTERS

A. Brief Overview and Theory

In *The Sanitized Workplace*, Vicki Schultz discusses the many difficulties—including vague standards—that plague sexual harassment law and that have led employers to ban all forms of sexuality from the workplace.¹⁵⁶ Schultz suggests that courts could help clarify sexual harassment law by considering the integration of both sexes in the workplace when determining whether actions constituted sexual harassment.¹⁵⁷ Schultz's argument is that employers who have successfully integrated both sexes into their workplaces—by employing an equal number of men and women and distributing them in equal positions—are more likely to have successfully decreased sex discrimination, which is the goal of Title VII.¹⁵⁸ Shultz argues that these employers should be given the benefit of the doubt when defending against sexual harassment.¹⁵⁹ Thus, plaintiffs suing those employers should face a higher burden when proving that harassment did occur.¹⁶⁰ Conversely, Shultz suggests that plaintiffs working for employers who have not integrated their workplaces should have a lower burden of proof.¹⁶¹ Though this theory is controversial and there may be reasons to avoid its implementation, my analysis of the 1994 MSPB survey results does show that sexual harassment is more common in poorly integrated workplaces; however, there is little empirical support for the argument that the integration of sexes in the workplace influences perceptions of sexual harassment.

Shultz provides a fairly detailed description of how current sexual harassment laws should be altered to encourage integration.¹⁶² In hostile work environment cases against employers that maintain "significantly segregated or unequal" workplaces, there would be a rebuttable presumption that the harassment experienced by the plaintiff was a direct result of her gender and constituted sex

156. Schultz, *supra* note 12, at 2063-72.

157. See *id.* at 2174-83 (offering a framework for evaluating sexual behavior from the range of sex-segregated to well-integrated job settings).

158. See *id.* at 2174 ("[F]or purposes of evaluating whether complained-of sexual conduct is likely to be part of a larger complex of sex discrimination . . . the most important variable is the degree of sex segregation in the job and work setting.")

159. *Id.*

160. *Id.* at 2176.

161. *Id.* at 2175.

162. See *id.* (providing suggestions for the achievement of complete integration).

discrimination under Title VII.¹⁶³ In addition, there would be a rebuttable presumption that the harassment was severe or pervasive enough to be actionable under *Meritor*.¹⁶⁴ If the plaintiff is an employee of an organization that maintained an integrated workplace, it would become more difficult for the plaintiff to prove sexual harassment.¹⁶⁵ Courts would enforce current sexual harassment liability rules for employers that maintain a workplace that is in the middle of these extremes.¹⁶⁶

Shultz supports strengthening the harassment laws when the workplace is male dominated because women are more frequently harassed in those environments.¹⁶⁷ She cites social science literature that has shown that hostility and abuse are more frequent in sex-segregated settings, often due to the power that men maintain.¹⁶⁸ In addition, Shultz argues that the degree of integration affects how sexual conduct is perceived at work, suggesting that the same sexual behavior is interpreted differently in a well-integrated workplace than in a sex-segregated environment.¹⁶⁹ Because women are likely in lower positions in these environments and sexual harassment is likely a more frequent problem, Schultz assumes that more forms of sexual conduct are viewed as sexual harassment in sex-segregated as compared to well-integrated workplaces.¹⁷⁰

163. *Id.* Note that Shultz also suggests that vertical sex integration, the integration of the minority sex into equal authority positions, should be considered in quid pro quo sexual harassment cases. *Id.* at 2178. As with her hostile environment proposition, when the environment is poorly vertically integrated, the plaintiff would have a lower standard of proof, and in vertically integrated workplaces, the plaintiff would have a higher burden than in the current system. *Id.* at 2178–79.

164. *Id.* at 2175.

165. The suggested changes include requiring proof that the actions “materially interfered with the plaintiff’s ability to perform or succeed in the job” and recognizing that subjective perceptions of severity or pervasiveness would not be sufficient proof. *Id.* The suggestions also included requiring the plaintiff to prove that the alleged harasser acted with the purpose to discriminate because of the plaintiff’s gender, which would prevent sexual content alone from sufficing as proof. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 2139–40.

169. *Id.* at 2174.

170. *Id.*

B. The MSPB Survey Supports Considering the Integration of the Workplace

1. Theory and Empirical Specification

The MSPB survey asked respondents, "Are (were) the people you work(ed) with during a normal work day: All men, more men than women, about equal numbers of men and women, more women than men, or all women?"¹⁷¹ Thus, the survey provides a way to analyze whether the degree of integration in an employee's workplace affects either the employee's perceptions of sexual harassment or the employee's likelihood of being sexually harassed. Jackson and Newman analyzed the 1994 MSPB survey and reported that the degree of sex integration in the workplace does affect a federal employee's likelihood of being sexually harassed.¹⁷² Jackson and Newman's results showed that when the ratio of male to female employees decreases, a female employee's likelihood of being harassed decreases.¹⁷³ They also found that men have the greatest likelihood of being sexually harassed in a female-dominated workplace and the least likelihood in a male-dominated workplace.¹⁷⁴ This Part replicates these results and analyzes them in light of Shultz's suggested liability spectrum. In addition, I empirically analyze, for the first time, whether integration has a similar effect on respondents' perceptions of harassment.

Like the perception analyses performed in Part III, I utilized OLS regressions¹⁷⁵ to determine what effect the degree of sex integration had on a respondent's likelihood of having been sexually harassed. The empirical specification takes the following form:

$$(2) \quad \Pr(\text{Harassment}=1) = \Phi [\beta_0 + \beta_1' \text{Integration} + \beta_2' \text{PC} + \beta_3' \text{WC} + \varepsilon]$$

The dependent variable *Harassment* is a dichotomous variable for whether the respondent reported that she was sexually harassed in the previous two years. *Integration* is a vector of the independent variables of interest; it represents the level of sex integration in the workplace and the sex of the supervisor. The level of sex integration is measured with dichotomous variables for each of the following: a

171. 1994 DATA, *supra* note 20, at app. 1.

172. Jackson & Newman, *supra* note 97, at 710–12.

173. *See id.* at 711 ("Moving from an environment in which all coworkers are male to one in which all coworkers are female decreases her [a woman respondent's] probability of having been harassed by 31 percentage points (50 percent).").

174. *Id.* at 711–12. Table 2 and Table 3 of the article provide coefficient estimates and percentage interpretations. *Id.*

175. *See supra* notes 113–14 (providing a discussion of the OLS model).

workplace having all men (*All Male*), more men than women (*More Male*), more women than men (*More Female*), or all women (*All Female*). The omitted category is the dichotomous variable for equal men and women (*Equal Male/Female*). This category acts as the baseline against which each of the other workplace variables is compared. The sample is separated into men and women in order to see the effect of less integration on the minority sex; as a result, a variable for whether or not the respondent is female is not included in the regression. In order to control for the effect that socioeconomic factors and other workplace and personal characteristics have on the respondents' likelihoods of being harassed, the same variables controlled for in Equation 1 are controlled for in these regressions. For the results of the regressions to fully support Shultz's theory, the independent variables *More Men* and *All Men* must have a positive and significant coefficient in the female sample and *All Women* and *More Women* must have a positive and significant coefficient in the male sample. This would show that employees at poorly integrated workplaces are more likely to experience sexual harassment.

I use a similar empirical specification to determine if the degree of sex integration has an effect on the respondent's perceptions of sexual harassment:

$$(3) \quad \text{Pr}(\text{Perceptions} = 1) = \Phi [\beta_0 + \beta_1' \text{Integration} + \beta_2' \text{PC} + \beta_3' \text{WC} + \varepsilon]$$

Similar to the specification used to analyze the reasonable woman standard, the dependent variable *Perceptions* is a dichotomous variable for whether the respondent believes a certain action is harassment.¹⁷⁶ Again, the sample is split into men and women, personal characteristics (*PC*) and workplace characteristics (*WC*) are controlled for, and the independent variables of interest are dichotomous variables for degrees of workplace integration (*Integration*). If these integration variables have significant effects on the respondent's perceptions that are in line with the segregation theory, then the results support Schultz's theory that employees view harassment differently based on the degree of integration in the workplace.

2. Results

Table 3 reports the results showing how the composition of the workplace and the sex of the respondent's supervisor affect the

176. Note that this variable was created by coding the responses "probably yes" and "definitely yes" both as 1 to represent believing the action is harassment and "probably not" and "definitely not" as 0 ("don't know" and missing responses are dropped as missing variables).

likelihood that the respondent experienced sexual harassment in the previous two years. As the results show, women are statistically significantly more likely to experience harassment in a workplace that has more men. A woman working in a workplace with *more* men is approximately 8.7 percentage points more likely to have experienced harassment in the previous two years than a woman working in an environment with an *equal* amount of men and women, and a woman working in a workplace with *all* men is approximately 15.5 percentage points more likely to report having this experience. Because none of the male integration coefficients are statistically significant, the results do not show that men are more likely to experience harassment when they work in a female-dominated workplace.¹⁷⁷

These results are partially consistent with Shultz's theory because harassment of women is indeed more likely in a workplace where women have not been successfully integrated. Thus, the results support the idea that it should be easier for a female plaintiff to prove sexual harassment in a workplace that has not achieved integration of the sexes. However, the results do not show that a woman is less likely to experience harassment in a well-integrated workplace, because the coefficients on *More Female* and on *All Female Employees* are not statistically significant. Because of the lack of consistently significant results for each theory, I do not believe that these statistics support altering the burden of proof in order to make it harder for a plaintiff to prove sexual harassment when complaining in well-integrated workplaces, but I believe that they do support introducing the integration of the workplace as a factor in the totality-of-the-circumstances standard.

177. Note that these results are different than those reported by Jackson and Newman, who find statistically significant results for female workplaces in a male regression, because they control for demographic variables in a different manner, do not seem to include a weighting variable, and do not seem to report robust standard errors. Jackson & Newman, *supra* note 97, at 710-12.

Table 3
Coefficients on the Independent Integration Variables for the
Dependent Variable *Experience*

| Variable | Male | Female |
|--------------------------|-------------------|---------------------|
| Female Supervisor | 0.041 (0.033) | Omitted |
| Male Supervisor | omitted | -0.016 (0.029) |
| All Male | -0.034 (0.057) | 0.155** (0.069) |
| More Male | 0.005 (0.034) | 0.087*** (0.033) |
| More Female | 0.049 (0.036) | 0.013 (0.032) |
| All Female | 0.122 (0.192) | -0.079 (0.138) |
| Observations | 2,973 | 3,576 |

Data Source: U.S. Merit Systems Protection Board 1994 Sexual Harassment Survey.

Notes: Robust standard errors are in parentheses, and the regressions include multiple control variables and a constant term. **, *** indicate significance at the 5% and 1% levels, respectively. Reference categories are *Female Supervisor* and *Equal Male/Female* for the female regression and *Male Supervisor* and *Equal Male/Female* for the Male regression. All values are weighted by the provided MSPB weight. See Table 1A of the Appendix for all controls and for all reference categories.

Tables 4 and 5 provide the results for the regressions that follow Equation 3, where the dependent variables are the perception variables for male and female respondents respectively. Though some of the resulting coefficients are statistically significant, these results are extremely varied and do not provide a definite pattern that would support Shultz's theory. Shultz states not only that harassment is more likely in poorly integrated workplaces, but that certain unwelcome behaviors are also more likely to be perceived as harassment in those environments.¹⁷⁸ The directions of the coefficients on both well-integrated and poorly integrated workplaces do not follow a specific pattern, which shows that perceptions were not affected by the integration of the workplace in a systematic way. However, some of the results are statistically significant and would support Shultz's theory. For almost every perceived behavior, men in an all-female environment are more likely than men in an equal-male-and-female

178. Schultz, *supra* note 12, at 2174.

environment to believe it constitutes harassment. In addition, women respondents are more likely to report that touching from a supervisor or coworker (*CW Touch* and *Sup Touch*) and pressure for dates from a supervisor (*Sup Dates*) are harassment when working in an all-male environment.

In addition, having a male supervisor does significantly affect a female respondent's likelihood of reporting that certain behaviors constitute harassment in certain circumstances. Female respondents with a male supervisor (*Male Supervisor*) are 4.9 percentage points more likely to report that teasing from a coworker (*CW Teasing*) is harassment, 2.4 percentage points more likely to report that pressure for dates from a supervisor (*Sup Dates*) is harassment, and 3.7 percentage points more likely to report that pressure for dates from a coworker (*CW Dates*) is harassment. This result is consistent with Shultz's proposal that vertical sex integration should be taken into account when determining harassment.¹⁷⁹ Because being in a workplace with a male supervisor makes a female more likely to view an action as harassment, Shultz proposes that sexual harassment should be easier to prove for a female plaintiff working in those environments.¹⁸⁰

Ultimately, these results provide varied insights into how the integration of sexes in a workplace affects the likelihood of employees experiencing workplace sexual harassment or perceiving a behavior as sexual harassment. This empirical analysis does not provide strong insight into perceptions of sexual harassment. However, the results do provide some support for Shultz's proposal. Because Shultz focuses on the male-dominated workplace and is concerned with the continuing prevalence of sex discrimination against females, the fact that the results for male respondents are weak does not necessarily negate her arguments.¹⁸¹ Instead, the fact that women were more likely to experience harassment in male-dominated workplaces and, in some circumstances, were more likely to view a behavior as harassment if they worked in male-dominated workplaces supports Shultz's call for lowering the plaintiff's burden when the harassment occurred in that type of environment.¹⁸² However, the fact that respondents were not *less likely* to experience harassment in *integrated* workplaces counsels against Shultz's suggestion that harassment should be more difficult

179. *Id.* at 2178–79.

180. *Id.*

181. *See id.* at 2180 (discussing male/female ratios for the parameters for each of the suggestions).

182. *Supra* Table 3; *infra* Table 5; *see* Shultz, *supra* note 12, at 2175 (suggesting lowered burdens on plaintiffs in poorly integrated workplaces).

to prove in those situations.¹⁸³ Because it is important to encourage employers to integrate their workplaces and for courts to recognize the prevalence of harassment in poorly integrated environments, I draw the conclusion that the level of sex integration should be considered when determining what behaviors constitute harassment; however, because the results do not strongly show that working in a poorly integrated environment causes respondents to perceive behaviors as harassment, courts should not go so far as to use the degree of integration in the plaintiff's workplace as a basis for changing the burden that the plaintiff bears.

Table 4. Coefficients on the Independent Integration Variables from Each Male Perception Regression

| Variable | Sup Favors | CW Favors | Sup Looks | CW Looks | Sup Teasing | CW Teasing |
|------------------------------|--------------------|--------------------|--------------------|---------------------|---------------------|---------------------|
| Female Supervisor | 0.005 (0.007) | 0.001 (0.009) | 0.017 (0.030) | 0.006 (0.034) | 0.049* (0.028) | -0.002 (0.039) |
| All Male | -0.029 (0.032) | -0.014 (0.031) | 0.014 (0.051) | -0.013 (0.062) | 0.018 (0.061) | 0.040 (0.070) |
| More Male | 0.021 (0.014) | 0.023 (0.015) | 0.011 (0.031) | 0.024 (0.035) | 0.079** (0.035) | 0.080* (0.041) |
| More Female | 0.020 (0.012) | 0.020 (0.014) | -0.005 (0.031) | -0.033 (0.036) | 0.058 (0.036) | 0.014 (0.041) |
| All Female | 0.029** (0.014) | 0.036** (0.015) | 0.097** (0.044) | 0.174*** (0.060) | 0.197*** (0.063) | 0.305*** (0.073) |
| Observations | 2,902 | 2,753 | 2,563 | 2,465 | 2,539 | 2,452 |

183. See Shultz, *supra* note 12, at 2176 (suggesting more stringent burdens on plaintiffs in well-integrated workplaces).

Table 4 Continued

| Variable | Sup Dates | CW Dates | Sup Touch | CW Touch | Sup Calls | CW Calls |
|------------------------------|-------------------|---------------------|--------------------|--------------------|---------------------|---------------------|
| Female Supervisor | 0.017 (0.025) | 0.004 (0.028) | 0.013 (0.012) | 0.002 (0.016) | -0.007 (0.024) | 0.000 (0.029) |
| All Male | -0.042 (0.055) | -0.119** (0.058) | -0.021 (0.039) | -0.035 (0.043) | -0.009 (0.044) | -0.005 (0.053) |
| More Male | 0.019 (0.028) | 0.004 (0.028) | 0.036* (0.019) | 0.043** (0.021) | 0.023 (0.025) | 0.074** (0.032) |
| More Female | 0.001 (0.031) | -0.053* (0.031) | 0.034** (0.016) | 0.024 (0.020) | 0.025 (0.023) | 0.036 (0.030) |
| All Female | 0.066* (0.040) | 0.019 (0.111) | 0.041** (0.018) | 0.056** (0.023) | 0.101*** (0.032) | 0.152*** (0.042) |
| Observations | 2,029 | 2,568 | 2,823 | 2,711 | 2,766 | 2,634 |

Data Source: U.S. Merit Systems Protection Board 1994 Sexual Harassment Survey.

Notes: Robust standard errors are in parentheses, and each regression includes multiple control variables and a constant term. *, **, *** indicate significance at the 10%, 5%, and 1% levels, respectively. All values are weighted by the provided MSPB weight. See Appendix Table 1A for full controls and reference categories.

Table 5. Coefficients on the Independent Integration Variables from Each Female Perception Regression

| Variable | Sup Favors | CW Favors | Sup Looks | CW Looks | Sup Teasing | CW Teasing |
|----------------------------|-------------------|-------------------|-------------------|-------------------|-------------------|--------------------|
| Male Supervisor | -0.006 (0.006) | -0.004 (0.004) | 0.008 (0.013) | 0.010 (0.013) | 0.028 (0.018) | 0.049** (0.021) |
| All Male | 0.008 (0.008) | 0.005 (0.004) | 0.012 (0.030) | 0.020 (0.031) | -0.010 (0.045) | 0.008 (0.048) |
| More Male | 0.005 (0.007) | 0.001 (0.006) | 0.020 (0.014) | 0.017 (0.014) | 0.033* (0.020) | 0.039* (0.024) |
| More Female | 0.006 (0.007) | 0.006 (0.004) | 0.019 (0.015) | 0.026* (0.015) | 0.025 (0.020) | 0.042* (0.023) |
| All Female | -0.074 (0.050) | -0.081 (0.051) | -0.030 (0.055) | -0.024 (0.058) | -0.004 (0.064) | 0.030 (0.085) |
| Observations | 3,536 | 3,466 | 3,357 | 3,245 | 3,237 | 3,117 |

Table 5 Continued

| Variable | Sup Dates | CW Dates | Sup Touch | CW Touch | Sup Calls | CW Calls |
|--------------------|-------------------|--------------------|-------------------|---------------------|---------------------|---------------------|
| Male Supervisor | 0.024* (0.015) | 0.037** (0.017) | -0.002 (0.006) | -0.003 (0.005) | 0.003 (0.011) | -0.004 (0.013) |
| All Male | 0.002 (0.042) | 0.028 (0.036) | 0.014* (0.008) | 0.020*** (0.006) | 0.039*** (0.013) | 0.067*** (0.015) |
| More Male | 0.029* (0.016) | 0.019 (0.020) | 0.003 (0.006) | 0.006 (0.007) | 0.011 (0.013) | 0.027* (0.016) |
| More Female | 0.024 (0.017) | 0.024 (0.020) | 0.004 (0.007) | 0.007 (0.007) | 0.015 (0.012) | 0.032** (0.014) |
| All Female | -0.037 (0.060) | 0.004 (0.058) | -0.068 (0.049) | -0.073 (0.051) | -0.065 (0.054) | -0.046 (0.055) |
| Observations | 2,835 | 3,264 | 3,515 | 3,448 | 3,468 | 3,355 |

Data Source: U.S. Merit Systems Protection Board 1994 Sexual Harassment Survey.

Notes: Robust standard errors are in parentheses, and the each regression includes multiple control variables and a constant term. *, **, *** indicate significance at the 10%, 5%, and 1% levels, respectively. All values are weighted by the provided MSPB weight. See Appendix Table 1A for full controls and reference categories.

VI. HOW TO CLEAR THE WAY: SOLUTION AND INTEGRATION OF STANDARDS

Current sexual harassment law is vague and unclear. Because the instrumental phrase “severe or pervasive” is subjective, whether or not a behavior creates a hostile work environment depends on the perceptions of the person experiencing the behavior. Additional legal standards must be implemented in order to advance Title VII’s goal of ridding the workplace of discrimination. The Supreme Court should resolve the circuit split over the reasonable woman standard and recognize that there is a difference between the conduct that men and women perceive as sexual harassment.¹⁸⁴ The empirical results found in Part III.D of this Note illustrate these differing perceptions and support the adoption of the reasonable woman standard.¹⁸⁵

184. This difference in perceptions is proven in the results *supra* Part III.D.3.

185. See *supra* Part III.D.

The Court should also clarify that the circumstances considered as indicative of a hostile work environment in *Harris* and *Oncale* were not all inclusive.¹⁸⁶ Instead the Court should encourage courts to consider additional factors, such as the supervisor status of the harasser and the level of sex integration in the workplace. The empirical results developed in Part IV.C show that employees are more likely to perceive supervisor behaviors as actionable harassment than coworker behaviors, which supports using the status of the harasser as a factor to establish severity.¹⁸⁷ Though the empirical results of Part V.B do not show that working in a poorly integrated workplace *always* leads to perceiving more actions as harassment, the results do show that these environments lead to more instances of harassment and occasionally affect an employee's perceptions of harassment.¹⁸⁸ These results may not be strong enough to suggest that the Court should lower the burden of proving severity for a plaintiff in a poorly integrated workplace, as Schultz suggests, but they do support the consideration of the level of sex integration as a factor when determining what constitutes harassment.¹⁸⁹ If courts ignore empirical evidence establishing that different characteristics of the harassment, different characteristics of the workplace, and different characteristics of the plaintiff alter the employee's perceptions of sexual harassment, courts will likely disincentivize employers from advancing Title VII's goals.

The EEOC and the Supreme Court have recognized that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."¹⁹⁰ Although Shultz has a point when she argues that sexual harassment law should not overdeter or focus on preventing harmless sexual conduct,¹⁹¹ the law exists primarily to protect the minority sex of the workplace from discriminatory actions that interrupt the employee's work environment.¹⁹² In order to properly deter employers from allowing the type of sex discrimination that interrupts the employee, the law must more precisely reflect the employee's perception of what actions constitute sexual harassment.

186. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

187. *See supra* Part IV.C.

188. *See supra* Part V.C.

189. *See* Shultz, *supra* note 12, at 2175 (proposing a change in the burden of proving sexual harassment based on the level of sex integration in the workplace).

190. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

191. Schultz, *supra* note 12, at 2174.

192. *Meritor*, 477 U.S. at 65.

Of course, it will be difficult for the Supreme Court to define hostile work environment sexual harassment more precisely, because the perceptions of it are so varied. However, the Court can account for the employees' differing perceptions by considering particular factors in the totality-of-the-circumstances test developed in *Harris* and *Oncale*.¹⁹³ If the Court recognizes these differing perceptions, then more behaviors that actually disrupt the workplace will be deterred.

Though adding standards may seem like it will only complicate sexual harassment law, they are needed to address behavior that is currently overlooked. In 2005, the Sixth Circuit upheld the Western District of Kentucky's determination that a supervisor's behavior did not satisfy the severe-or-pervasive standard of hostile work environment.¹⁹⁴ However, if the Sixth Circuit had applied the three standards discussed in this Note, the court would have likely found differently.

The plaintiff, Rhonda Knoop, was an employee of the United Parcel Service ("UPS"), a corporation that has a history of defending sex discrimination claims and is generally known to be a male-dominated workplace.¹⁹⁵ Knoop alleged that her male supervisor told sexual jokes in front of her and other employees and that he once pulled on her overalls in order to look down them after asking what was underneath them.¹⁹⁶ Additionally, Knoop recounted that the supervisor twice placed his vibrating pager on her upper thigh and asked her if it "felt good."¹⁹⁷ Comparing this case to other cases where the court did not find a hostile work environment and emphasizing that the behaviors occurred over two years, the court upheld the summary judgment motion for UPS.¹⁹⁸ The Sixth Circuit held that "[a]lthough Knoop's allegations of harassment by Brock [the harasser]

193. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

194. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 351–52 (6th Cir. 2005). Note that the Sixth Circuit also upheld the district court's denial of summary judgment for Sandra Clark, holding that she presented "more of an ongoing pattern of unwanted conduct and attention" from the supervisor. *Id.* at 352.

195. On the UPS website describing a women's leadership program, a female employee is quoted describing the challenges of working in a male-dominated industry. *Leadership Development*, UNITED PARCEL SERVICE, INC., <http://www.community.ups.com/Diversity/Programs/Leadership+Development> (last visited Sept. 23, 2012). A Westlaw search for sex discrimination cases against UPS returns almost twenty cases.

196. *Clark*, 400 F.3d at 345.

197. *Id.*

198. *Id.* at 352.

could certainly be construed as offensive, they are simply not substantial enough to satisfy the prima facie showing.”¹⁹⁹

Had the Sixth Circuit applied the theories analyzed in this Note, Knoop’s claim of sexual harassment might have survived summary judgment. If the court had applied a reasonable woman standard, then the court would have granted summary judgment only if a reasonable woman could not have perceived the supervisor’s actions as severe or pervasive.²⁰⁰ Had the court taken into account the fact that the behavior was performed by Knoop’s supervisor and that UPS was a male-dominated workplace, the court may have come to a conclusion that fairly reflected the power differential and the consequences of supervisor behavior, and its result could have deterred poorly integrated workplaces from allowing any form of sex discrimination.²⁰¹ If each of these theories had been adopted, then the severity of the harassment would have been greatly elevated and Knoop would have likely established a “closer case” that her supervisor’s actions were severe and interfered with her workplace.²⁰² Instead, Knoop did not receive her day in court, and the court missed an opportunity to incentivize employers to take proactive steps toward eliminating sexual discrimination and harassment in male-dominated workplaces.

The above-mentioned case is only one of many that might have had a different outcome if the three theories empirically supported in this Note had been applied. It highlights a situation where a woman who was uncomfortable in her male-dominated workplace was not provided a full trial on the merits because of the vague state of sexual harassment law. The employer was not punished and, thus, was not properly encouraged to establish preventative procedures. Courts can and should take steps to clarify sexual harassment law, starting by introducing the theories empirically supported in this Note; if they do not, sexual harassment will continue to be a major problem in the workplace and a major contributor to workplace sex discrimination.

199. *Id.*

200. *See supra* Part III (discussing the reasonable woman theory and providing an empirical analysis that supports this theory).

201. *See supra* Part IV (discussing the theory of the supervisor status of the harasser being a part of the severe-or-pervasive test and providing empirical support for this theory).

202. The court determined the other plaintiff’s case to be a “closer case” and denied summary judgment. *Clark*, 400 F.3d at 352.

VII. CONCLUSION

Ultimately, each court must take a case-by-case look to determine whether a behavior is severe or pervasive and constitutes actionable sexual harassment. Because perceptions are such an important part of determining the definition of these terms and the reasonableness of a sexual harassment case, the empirical evidence developed in this Note is persuasive support for the integration of the reasonable woman standard into sexual harassment law. This Note's empirical evidence also supports considering the supervisor status of the harasser and the degree of sex integration when deciding what constitutes harassment. The application of these theories can improve courts' ability to determine which actions constitute hostile work environment harassment. Having empirical support for the introduction of these theories can only strengthen the argument for application. Without the integration of clearer standards into sexual harassment law, courts will likely continue to overlook certain forms of sexual harassment, and employers will not be properly incentivized to develop workplaces free of sex discrimination.

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APPENDIX

Table 1A. Summary Statistics: The 1994 MSPB Survey

| Variables | | |
|----------------------------------|--------------------------|------------------------|
| Perceptions | Female | Male |
| Coworker Looks | 0.939 | 0.811 |
| Female (n=3,857) Male (n= 2,934) | | |
| Supervisor Looks | 0.949 | 0.865 |
| Female (n= 3,989) Male (n=3,051) | | |
| Coworker Calls | 0.955 | 0.883 |
| Female (n=3989) Male (n= 3134) | | |
| Supervisor Calls | 0.971 | 0.924 |
| Female (n=4,121) Male (n=3,295) | | |
| Coworker Touching | 0.985 | 0.941 |
| Female(n=4,095) Male(n=3,234) | | |
| Supervisor Touching | 0.989 | 0.961 |
| Female (n=4,180) Male(n=3,363) | | |
| Coworker Favors | 0.994 | 0.979 |
| Female(n=4,119) Male (n= 3,282) | | |
| Supervisor Favors | 0.992 | 0.981 |
| Female(n=4,208) Male (n=3,468) | | |
| Coworker Dates | 0.906 | 0.856 |
| Female(n= 3,871) Male (n=3,063) | | |
| Supervisor Dates | 0.943 | 0.900 |
| Female(n= 3,381) Male(n=2,420) | | |
| Coworker Teasing | 0.859 | 0.749 |
| Female(n=3,705) Male (n=2,930) | | |
| Supervisor Teasing | 0.903 | 0.827 |
| Female(n=3,862) Male (n=3,037) | | |
| Harassed | Female (n=4,259) | Male (n=3,560) |
| Respondent Was Harassed | 0.480 | 0.246 |
| Education | Female (n= 3,733) | Male (n=3,067) |
| High School or Less | 0.134 | 0.056 |
| Technical School | 0.157 | 0.146 |
| Some College | 0.362 | 0.277 |
| College Degree | 0.186 | 0.221 |
| Some Grad School | 0.058 | 0.111 |
| Grad Degree | 0.087 | 0.179 |
| Marital Status | Female (n= 3,884) | Male (n= 3,203) |
| Single | 0.209 | 0.129 |
| Divorced / Widowed | 0.234 | 0.115 |
| Married | 0.556 | 0.755 |

Table 1A *Continued*

| Age | Female (n=3,961) | Male (n= 3,278) |
|----------------------------------|--------------------------|------------------------|
| 16-24 | 0.029 | 0.007 |
| 25-34 | 0.207 | 0.155 |
| 35-44 | 0.349 | 0.323 |
| 45-54 | 0.311 | 0.365 |
| Over 55 | 0.104 | 0.149 |
| Pay Grade | Female (n= 3,521) | Male (n= 4,213) |
| Pay Grades 1-4 | 0.081 | 0.036 |
| Pay Grades 5-10 | 0.619 | 0.398 |
| Pay Grades 11-12 | 0.216 | 0.325 |
| Pay Grades 13-15 | 0.083 | 0.234 |
| Pay Grade Higher than 15 | 0.001 | 0.007 |
| Occupation | Female (n= 3,878) | Male (n= 3,200) |
| Trainee | 0.009 | 0.009 |
| Blue Collar | 0.045 | 0.201 |
| Clerical | 0.475 | 0.169 |
| Professional | 0.223 | 0.345 |
| Management | 0.222 | 0.239 |
| Other Job | 0.026 | 0.037 |
| Supervisor | 0.149 | 0.297 |
| Female (n=3,880) Male(n=3,206) | | |
| Workplace Characteristics | Female (n= 3,895) | Male (n= 3,214) |
| Male Supervisor | 0.628 | 0.855 |
| Female Supervisor | 0.323 | 0.256 |
| All Male Employees | 0.039 | 0.074 |
| More Male Employees | 0.306 | 0.536 |
| Equal Male/Female | 0.289 | 0.243 |
| More Female Employees | 0.357 | 0.479 |
| All Female Employees | 0.008 | 0.004 |

Data Source: U.S. Merit Systems Protection Board 1994 Sexual Harassment Survey.

Notes: Weighted means are reported, with their standard errors in parentheses. Each of the personal demographic variables described in Table 1A are included in each of the regressions found in Parts III and V of this Note, with the exception of an omitted variable for each category of demographics. The omitted categories in each regression are: *High School or Less, Married, 16-24, Pay Grade Higher than 15, Other Job, Male Supervisor* (for pooled and male regressions), *Female Supervisor* (for female regressions), and *Equal Male/Female*. Full regression results are on file with the author and the Vanderbilt Law Review. Each regression includes a constant term, and all values are weighted by the provided MSPB weight.
