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Customer Domination at Work: A New Paradigm for the Sexual Harassment of Employees by Customers

Einat Albin
Hebrew University of Jerusalem

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CUSTOMER DOMINATION AT WORK: A NEW
PARADIGM FOR THE SEXUAL HARASSMENT OF
EMPLOYEES BY CUSTOMERS

*Einat Albin**

This Article introduces a novel legal paradigm—customer domination at work—to address the sexual harassment of employees by customers. This new approach challenges the prevailing paradigm, which focuses on the employer-employee binary relationship. I show how, under current Title VII law, the prevailing paradigm leads to a weaker form of employer liability than other instances where employers are liable for the sexual harassment of their employees. The protection for workers is also limited. The same is true of two other legal regimes discussed in the Article: Germany and Britain. More importantly, I argue that the prevailing paradigm precludes a true understanding of the problem of third-party harassment that recognizes the power of customers within an employer-employee-customer triangular relationship, seeing the customer as integral to the organization of work. Within the triangular relationship, customer domination at work is created, consisting of three aspects: masculinity, authority, and service market power. Customer domination is shaped and reinforced by employers, and is exploited by customers in these cases of harassment. This should lead, I claim, to placing stricter legal liability on employers, incentivizing them to change workplace practices that provide customers with such power, and to customers bearing legal responsibility that parallels employer liability.

* Einat Albin is an Assistant Professor at the Hebrew University of Jerusalem Faculty of Law. I would like to thank Guy Davidov, Noah Zatz, Ulrike Lembke, Tammy Katsabian, Orit Kamir, Lena Rudkowski, Claudia Schubert, Lizzie Barmes and participants in the Israel Labour Law Scholars Seminar and the Hebrew University Faculty Seminar for their extremely helpful comments on earlier drafts. This Article has also benefited greatly from the excellent research assistance of Ina Hanson and Gil Omer, both of whom I was very lucky to work with. I also want to thank Yuval Bresler for his work on the footnotes. This research was supported by a Grant from the GIF, the German-Israeli Foundation for Scientific Research and Development.

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INTRODUCTION

In the past few centuries, services have become a main characteristic of economies in most Western countries.¹ Within service economies, customers are integrated into the organization of work. This creates what has been termed in academic literature “a triangular work relationship,” consisting of an employer, an employee, and a customer.² Research has revealed how the

1. See ORG. FOR ECON. COOP. & DEV., BUSINESS AND INDUSTRY POLICY FORUM SERIES: THE SERVICE ECONOMY, 4, 10, 13 (2000). According to OECD, manufacturing has been slipping to less than 20% of GDP, while services have risen to more than 70%, in some OECD countries. *Id.* at 3.

2. I offered the term “a worker-employer-customer triangle” in a previous piece of work. See Einat Albin, *A Worker-Employer-Customer Triangle: The Case of Tips*, 40 INDUS. L.J. 181 (2011). Other studies have also pointed to the interrelations of all three parties. See, e.g., ROBIN LEIDNER, FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE 1, 7, 125–77 (1993) (explaining “interactive service work” as a term that describes “jobs that require workers to interact directly with customers and clients” and where employees have to deal with both their employer’s demands as well as those of customers); Linda McDowell, Adina Batnitzky & Sara Dyer, *Division, Segmentation, and Interpellation: The Embodied Labors of Migrant Workers in a Great London Hotel*, 83 ECON. GEOGRAPHY 1, 3 (2007)

varied interests of the three parties shape power relations in a variety of work relationships, emphasizing the power of customers.³ The power of customers and their interrelations with employers and employees within the triangular relationship has not entered, however, into legal thought, even though it can substantially shift existing legal paradigms. This is very much evident in relation to the paradigm of sexual harassment of employees by customers, as argued in this Article.

In the United States, employer liability for third-party sexual harassment (including customers) has been established, noted as the start of a sexual harassment revolution⁴ and as a third wave of sexual harassment litigation and scholarship.⁵ Employer liability for third-party harassment aims to address one of the most troubling forms of sexual harassment at work. Numerous studies have shown that the sexual harassment of employees by third parties is destabilizing and traumatizing for women.⁶ Some have argued that it might be even more disturbing than other types of harassment in the workplace.⁷ This type of harassment is a barrier to women's advance-

(discussing interpellation as a dual process that involves the interrelationship of employees, employers, co-workers and customers in the context of a hotel).

3. See Albin, *supra* note 2, at 181–85. See also Linda Fuller & Vicki Smith, *Consumers' Reports: Management by Customers in a Changing Economy*, 5 WORK, EMP'T & SOC'Y 1, 5–8 (1991) (looking into the ways in which employers use customers to monitor, evaluate, and assess workers in services).
4. See Amy Mathews, *The Sexual Harassment Revolution: Employer Liability for Third Party Sexual Harassment*, 65 UMKC L. REV. 977, 977 (1997).
5. Lea B. Vaughn, *The Customer is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1, 2–3 (2002). The first wave of sexual harassment litigation was recognition of sexual harassment as a form of sex discrimination, and the second wave was the acknowledgement of a hostile workplace. *Id.* at 3 n.6. See also Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment by Clients, Customers and Suppliers: How Employers Should Handle an Emerging Legal Problem*, 20 EMP. REL. L.J. 85, 85–86 (1994) (noting that employer liability for sexual harassment is an emerging body of law to which managers should be alert).
6. Vaughn, *supra* note 5, at 3–4, 6. See *infra* notes 8–16 and accompanying text.
7. Aalberts and Seidman wrote that the impact of third-party harassment on a victim might be greater than the impact of harassment by a fellow employee because much of it occurs outside the traditional office or factory. Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 449 (1994). This makes harassment less visible and, therefore, less easily prevented. *Id.* As a consequence, female professionals and sales representatives, who often must meet on their customers' premises or in restaurants and drinking establishments to conduct business, become more vulnerable targets. *Id.*

ment and success.⁸ It may also affect their job satisfaction and health, as it has been shown that women who have endured harassment “experience more psychological stress, feel less attached to their organizations, and spend more time thinking about quitting.”⁹ Studies have also shown that harassment by third parties crosses sectors, affecting lawyers,¹⁰ nurses,¹¹ waitresses,¹² bartenders,¹³ accountants,¹⁴ salespersons,¹⁵ hotel employees,¹⁶ and workers in many other occupations.¹⁷

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8. Hilary J. Gettman & Michele J. Gelfand, *When the Customer Shouldn't Be King: Antecedents and Consequences of Sexual Harassment by Clients and Customers*, 92 J. APPLIED PSYCHOL. 757, 768 (2007).
 9. *Id.* at 765.
 10. Peter Jan Honigsberg et al., *When the Client Harasses the Attorney: Recognizing Third Party Sexual Harassment in the Legal Profession*, 28 U.S.F. L. REV. 715 (1994); Alan Deutschman & Sara Hammes, *Dealing with Sexual Harassment*, FORTUNE, Nov. 1991, at 145. The Prentice Hall Law & Business Survey of Women Litigators from 1993 revealed that 44.9% of all women attorneys surveyed reported they had been harassed by clients during the past five years. J. Stratton Shartel, *Female Litigators Report, Discrimination by Clients Limits Opportunities*, INSIDE LITIGATION, Feb. 1993, at 1, 20; Debra Baker, *Plague in the Profession: Success in The Legal World Is No Safeguard Against Sexual Harassment*, 86 A.B.A. J. 40 (2000).
 11. See Kay M. Libbus & Katherine Bowman, *Sexual Harassment of Female Registered Nurses in Hospitals*, 24 J. NURSING ADMIN. 26 (1994); Tammy Mcguire et al., “Paradoxing the Dialectic”: *The Impact of Patients' Sexual Harassment in the Discursive Construction of Nurses' Caregiving Roles*, 19 MGMT. COMM'N Q. 416 (2006).
 12. See Elaine J. Hall, *Smiling, Deferring, and Flirting: Doing Gender by Giving “Good Service”*, 20 WORK & OCCUPATIONS 452 (1993); Yvonne Guerrier & Amel S. Adib, “No, We Don't Provide that Service”: *The Harassment of Hotel Employees by Customers*, 14 WORK, EMP'T, & SOC'Y 689 (2000); Karla Erickson, *Bodies at Work: Performing Service in American Restaurants*, 7 SPACE & CULTURE 76 (2004); Kaitlyn Matulewicz, *Law and the Construction of Institutionalized Sexual Harassment in Restaurants*, 30 CAN. J. L. & SOC'Y 401 (2015).
 13. See Anonymous, *How I Feel As a Bar Waitress When You Sexually Harass Me*, MUNCHIES, Aug. 30, 2016, <https://munchies.vice.com/en/articles/how-i-feel-when-you-sexually-harass-me-as-your-bar-waitress>.
 14. See Gerald J. Miller et al., *Sexual Harassment and Public Accounting: Anecdotal Evidence from the Profession*, 5 J. DIVERSITY MGMT. 7, 12 (2010).
 15. See Leslie M. Fine et al., *Sexual Harassment in the Sales Force: The Customer Is Not Always Right*, 14 J. PERS. SELLING & SALES MGMT. 15 (1994); Leslie M. Fine et al., *Insights into Sexual Harassment of Salespeople by Customers: The Role of Gender and Customer Power*, 19 J. PERS. SELLING & SALES MGMT. 19 (1999).
 16. See Dan Gilbert et al., *Sexual Harassment Issues in the Hospitality Industry*, 10 INT'L J. CONTEMP. HOSPITALITY MGMT. 48 (1998); Ingebjørg S. Folgerø & Ingrid H. Fjeldstad, *On Duty—Off Guard: Cultural Norms and Sexual Harassment in Service Organizations*, 16 ORG. STUD. 299 (1995); Guerrier & Adib, *supra* note 12.
 17. See Gettman & Gelfand, *supra* note 8, at 763, 766. Gettman and Gelfand conducted two studies on the sexual harassment of working women by customers. The first addresses professional women and the second addresses women in the retail industry working in a large grocery store chain. They found that 86% of the professional women who participated in their study had experienced sexist hostility: 67% sexual

Yet, I argue in this Article that the achievements of this third wave of sexual harassment regulation and litigation have been limited. The prevailing legal paradigm has, in many cases of such harassment, led to a weaker form of liability that provides limited protection to employees suffering from harassment. It also increases women employees' subordination in the market. In the U.S., as well as in other countries such as Germany and Britain (discussed herein at length), liability in cases of sexual harassment by customers has been placed on employers, based on a view of the employment relationship as binary. Title VII of the Civil Rights Act declares that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."¹⁸ Once liability for sexual harassment at work is bound to the employer-employee binary, employer liability for third-party harassment seems apparent. A review of the literature on the sexual harassment of employees by third parties shows that almost all scholars have rooted their arguments in this existing paradigm.¹⁹

By challenging this existing paradigm the Article offers a novel theoretical and practical legal approach to third-party sexual harassment—*customer domination at work*. This new paradigm shifts the focus to *customer domination*, offering an understanding of the power customers have within employment; a power that serves as a setting for their acts of sexual harassment. *Customer domination* is built within an employer-employee-customer triangular relationship. Therefore the proposed paradigm also emphasizes the role that employers have in shaping the power of these dominating customers. This paradigm justifies the placing of stricter liability on employers when their workplace practices provide customers with dominating power, incentivizing employers to re-shape such practices. It also justifies placing specific liability on customers.

hostility, 40% reported unwanted sexual attention, and 8% sexual coercion. They also compared harassment rates based on age, race, industry, job tenure, and self-employment status. According to their findings, there were no significant differences in the frequency of harassment based on industry, age, or tenure in current position, though differences were found based on race, with non-white participants experiencing more harassment than white participants. A total of 394 women participated in the study, with the participants' ages ranging from 23 to 70. They worked in a variety of professions, including law, human resources consulting, medical technology consulting, sales, business, and political action. In their second survey, 3445 women responded, reporting that they also experience harassment by customers to a large extent. *Id.*

18. 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 115-51).

19. See *infra* Part I.

The nearly non-existent legal scholarship on the role of customers in situations of harassment is, on the one hand, surprising. Given that the rapidly growing service economy requires employees to deal directly with customers on a daily basis, one would expect the law to address these third parties.²⁰ Obviously, under state law, criminal claims can be brought (when appropriate) against customers for harassing workers, or civil claims can be brought for emotional stress and other harms. However, this does not lead to recognition of the important phenomenon of customer domination at work as proposed in this Article. On the other hand, though, lack of recognition of customer domination is in line with current legal perceptions, for disregard of customer domination is not unusual in the law. Such disregard aligns with the focus placed on the employer-employee binary that sees the customer as external, and with the perceived legal view of customers as generally vulnerable and deserving of legal protection, which is the story told to us by consumer protection laws. What emerges is a highly problematic paradigm that values customers over workers, particularly women workers. This paradigm has become a precondition of an ungendered legal regime, and consequently, of the economic regime.

By offering a novel theory of customer domination at work, this Article presents three sub-arguments. First, the Article provides an understanding of customer domination by pointing to three aspects building such domination: *masculinity*, *authority*, and *service market power*. It leans on gender literature to reflect on the *masculinity* of customers in relation to women employees; it builds on literature about bureaucracy in work relations to show how customers have *authority* over employees and on service literature to expose what I call *service market power*. In parallel with traditional employers, customers are performing various employment functions, such as paying salaries through the provision of tips or other gratuities, impacting decisions about hiring and firing, and determining work time. Masculinity, consumer culture, and the monetary capital of customers (which places

20. This type of interaction is what Leidner terms “interactive service work”. LEIDNER, *supra* note 2, at 1. See also Anat Rafaeli, *When Cashiers Meet Customers: An Analysis of the Role of Supermarket Cashiers*, 32 ACAD. MGMT. J. 245 (1989) (discussing the “service encounter” of supermarket cashiers with customers, among other parties); JOHN R. BRYSON ET AL., SERVICE WORLDS: PEOPLE, ORGANIZATIONS, TECHNOLOGIES 109–29 (2004) (addressing the involvement of customers in work relations); Einat Albin, *Labour Law in a Service World*, 73 MOD. L. REV. 959 (2010) (where I argued that in service work customers are an integral part of work relationships and that therefore employment law should consider applying legal responsibilities to these customers along “a nexus of service work” that is offered in that article); Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167 (2015) (using the term “intimate work” to address the “paid provision of services entailing intimacy to a range of customers,” and discussing the potentials and pitfalls of such work).

them in a powerful position within the organizational hierarchy), combined with the view that a customer should receive “service with a smile” from a docile and appealing worker, allows customers to dominate the employees who provide them with services. Such domination is highly evident from the descriptions of employees provided in numerous academic studies on customer harassment, as well as from the situations discussed in detail in court decisions.

Second, the Article shows that an analysis of masculinity, authority and service market power reveals that customer domination is tightly entwined within employment relations, and, more specifically, that an employer-employee-customer triangular exists.²¹ This triangular view of the relationship leads to customers being seen as *integral* to the workplace and to employment, not external to it as the focus on the employer-employee binary leads us to think. I will show how employers shape their businesses in a way that is aimed to please customers, and in the process, transfer their employer functions to these customers. Customers partake in these employment practices, exploiting at times the power they receive, with the law protecting their interests and biases. In many ways customers are more internal to the business than are employees.

Third, the varied ways in which customer power is shaped should urge us to recognize the significance of customer domination, and at times to place specific and rigid liability on dominating customers when they sexually harass workers alongside the liability placed on employers. In some circumstances, it should also bring the law to place stricter liability on employers. Viewing customers as integral to the work organization justifies taking both steps, as does examining the social and legal shortcomings of the current legal approach. The social problems are weak protection of women employees and exacerbation of their subordination. The legal problems are that, first, under the prevailing paradigm, equality doctrines that are currently being applied in other cases of sexual harassment under Title VII are distorted. These are the doctrines of disparate treatment and disparate impact,²² and their distortion is a result of viewing the customer as external to the organization. The second legal problem is that the focus on

21. See *infra* Part IV.

22. The most common formulation of disparate treatment is the treatment of a person “in a manner which but for that person’s [sex or other protected class membership] would be different.” See Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1374–75 (2009) (citations omitted). Disparate impact differs from disparate treatment in that it does not require discriminatory intent, and it does not analyze causation at an individual level at all but instead requires that the challenged employer practice harm a group defined by a protected trait. *Id.* at 1382–83.

the employer-employee binary obstructs our understanding of third-party domination in work relationships in today's societies, especially when the third party is a customer. In other words, the focus on the binary obstructs the law's understanding of *customer domination at work*.

While current law sets the legal basis for placing stricter legal liability on employers, the establishment of parallel liability on customers is more challenging. I suggest two ways to address this challenge. The first is by acknowledging customer domination as creating particular legal liability under Title VII. The second is by interpreting the notion of "employers" in Title VII and state laws to include customers, while applying the *joint employer doctrine*. This is relevant only when there is close proximity between the customer and the employee.

These proposals are offered with the goal of furthering what Robin West has called "reconstructive feminist jurisprudence," which means "re-construct[ing] the reforms necessary to the safety and improvement of women's lives in direct language that is true to our own experience and our own subjective lives."²³ Indeed, adopting the proposed paradigm of *customer domination at work* would help achieve West's goal. It is now time to take this step.²⁴

The Article is structured as follows: *Part I* introduces the prevailing legal paradigm in the U.S., which focuses on employer liability in cases of third-party sexual harassment through the employer-employee binary prism. *Part II* analyzes two additional legal systems—those of Germany and Britain. *Part III* aims to understand the prevailing paradigm for addressing customer harassment of employees, examining the strengths and shortcomings of the current approach. *Part IV* proposes the theory of customer domination at work, while *Part V* discusses the proposals to address the shortcomings of the existing paradigm. *Part VI* concludes.

23. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 70 (1988).

24. Significantly, this Article does not enter into the debate on whether sexual harassment norms in the workplace are good or bad, whether they portray feminists as anti-sex, as moralists, and as people who see sex at work as contaminating the workplace while trying to sanitize it from flirtation and eroticism or to promote sexual correctness. See Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German and U.S. Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 582 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003), and KATHRIN S. ZIPPEL, *THE POLITICS OF SEXUAL HARASSMENT: A COMPARATIVE STUDY OF THE UNITED STATES, THE EUROPEAN UNION, AND GERMANY* (2006), for a discussion of those topics. Rather, this Article uses the example of sexual harassment of workers by customers to shed light on the neglect of customer domination, noting that if sexual harassment at work is seen as an issue of gender equality and of women's rights, then neglecting customer domination is problematic.

I. EMPLOYER LIABILITY FOR THE SEXUAL HARASSMENT OF WORKERS BY CUSTOMERS

U.S. law places legal liability on employers in cases of third-party harassment, including harassment by customers. The liability of employers for customer sexual harassment was established in the 1993 Equal Employment Opportunity Commission (EEOC) guidelines, and was later adopted in the Code of Federal Regulations.²⁵ The regulations note that “[a]n employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”²⁶ This protection is built upon the recognition of sexual harassment as a discriminatory issue, as declared in 1980 by the EEOC when it acknowledged sexual harassment to be a violation of Section 703 of Title VII.

On this basis, the EEOC established criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defined the circumstances under which an employer may be held liable, and suggested affirmative steps an employer should take to prevent sexual harassment.²⁷ The EEOC regulations supplement the Supreme Court cases *Meritor Savings Bank v. Vinson*²⁸ and *Harris v. Forklift Sys., Inc.*²⁹ Together, these sources expressly acknowledge that sexual harassment is unwelcome conduct that either affects a tangible job benefit or renders the work environment “hostile,” and that both types of harassment can be committed not only by a supervisor or co-worker but also by a third party. The Supreme Court stated that sexual harassment can affect job performance, discourage employees from remaining in their jobs, and keep them from advancing in their careers, and that it therefore undermines the protection of “sexual equality in the workplace” under Title VII.³⁰

As noted above, the EEOC regulations place responsibilities on employers in cases of customer sexual harassment when the employer knows or should have known of the harassment, and when the employer fails to take immediate and appropriate corrective action.³¹ The regulations also consider

25. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC N-915-050, Policy Guidance on Current Issues of Sexual Harassment (1990) [hereinafter EEOC Regulations]; 29 C.F.R. § 1604.11 (Westlaw through 2017).

26. 29 C.F.R. § 1604.11(e) (Westlaw through 2017).

27. See 29 C.F. R. § 1604.11 (Westlaw through 2017).

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

29. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

30. *Meritor*, 477 U.S. at 67 (citing *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

31. EEOC Regulations, *supra* note 25.

the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of such non-employees.³² If the employer takes reasonable steps to address the harassment, he is not liable, nor is he liable when the complainant has not shown that the harassment was severe.³³ Additionally, if the employer has a clear policy against sexual harassment and no control over the act of harassment, the employer will not be held responsible for it.³⁴

Numerous court decisions have addressed these regulations while developing legal requirements, with two types of situations generally underlying the legal discourse. The first type of situations addressing employer responsibility for third-party harassment are those where employees were required to act or present themselves in sexual ways at work, such as by flirting with customers or wearing specific clothing, which subjected them to harassment by customers. Here, two sub-types of cases have been at the center of discussions. In the first sub-type, employers required their employees to act in a sexual manner towards customers, even when the business itself was not of a sexual nature at all; in the second sub-type, the dress code and activities were sexual because the business was built on the commodification of female sexuality.³⁵ While the first sub-type of cases is relatively easy to address, due to direct employer liability in creating a sexualized work environment, the second is more complicated, given that some argue that employees have willingly entered a type of work environment that builds on

32. *Id.*

33. *See Meritor*, 477 U.S. at 67 (developing the requirement that harassment be severe); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (same); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2002) (applying the severity requirement). *See also* EEOC Regulations, *supra* note 25.

34. EEOC Regulations, *supra* note 25.

35. I look at these as two types of situations, although others have proposed alternative ways to look at and divide U.S. case law on this subject. Kelly and Sinclair, for example, divide U.S. cases into three categories: the first category consists of situations where the employer asked the employee to perform in a certain sexual manner towards the customer, making it easy to see how the court finds the employer liable for the harassment; the second category consists of cases of third-party harassment in workplaces that are not usually associated with sex or sexual insinuations; and the third category consists of high-risk areas of employment, where employers take part in creating a sexual environment. Joseph M. Kelly & Adele Sinclair, *Sexual Harassment of Employees by Customers and Other Third Parties: American and British Views*, 31 TEX. TECH L. REV. 807, 813–14 (2000). The division adopted in this Article groups Kelly and Sinclair's categories one and three under one type of court cases: where the employer required sexual behavior or dress from the employee. It does so in order to deal separately with my second type of situations—where no such requirement exists—in order to flesh out the idea of customer domination and customer and employer liability.

sexuality and therefore have voluntarily accepted the consequences of such work.³⁶

Sage Realty Corp., a landmark case of third-party liability, is an example of the first sub-type of cases, where employers require their employees to dress in a sexualized manner, even when the business is not of a sexual nature.³⁷ In this case, a lobby receptionist in a Manhattan office building was required to wear a uniform that revealed both sides of her body, leading to numerous incidents of third-party harassment. The court determined that the required uniform was short and sexually provocative, and it found the employer liable for the sexual harassment the employee experienced from the public and the building's tenants.³⁸ Since *Sage*, courts have discussed several other situations that fall into this sub-type of cases.³⁹ In severe situations, liability has been found when employers required their employees to have sexual relations with customers for the interest of the business,⁴⁰ or when they communicated an unstated message that doing so was part of the job.⁴¹ In summarizing these cases, Lea Vaughn argues that they establish two principles: first, that an employer cannot use its mandatory dress code as a means to legitimize a policy that requires an employee to dress in a sexually provocative manner, and second, that in situations where job requirements place employees in positions where they are likely to be harassed, courts are willing to deem the harassment as foreseeable and as a violation of Title VII.⁴² Indeed, finding the employer liable for third-party harassment is more justified according to the prevailing anti-discrimination

36. See *id.* at 814–17, 823–31 for an elaborated discussion of various cases within these categories.

37. See generally *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981). It is important to note that this case was decided 5 years before *Meritor*.

38. *Sage Realty*, 507 F. Supp. at 607.

39. See, e.g., discussions in *E.E.O.C. v. Newtown Inn Assocs.*, 647 F. Supp. 957 (E.D. Va. 1986) (where cocktail waitresses were required to wear provocative outfits, flirt with customers and to dance in a sexually provocative manner), and *Schonauer v. DCR Entm't, Inc.*, 905 P.2d 392, 395–97 (Wash. Ct. App. 1995) (a worker hired to be a waitress—not a dancer—in a topless night club was solicited by the manager to participate in a “nude waitress contest” and was fired after refusing). A summary of cases where sexual conduct was required of the worker can be found in Kelly & Sinclair, *supra* note 35, at 814–17.

40. See *Thoreson v. Penthouse Int'l Ltd.*, 563 N.Y.S.2d 968 (N.Y. App. Div. 1990) (noting that an employee was terminated because she refused to have sex with a Japanese businessman after being pressured to have sexual relations with associates of her employer, which, in the words of Justice Kassal, were designed to “further the employer's financial interests”).

41. See, e.g., *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); *Magnuson v. Peak Tech. Servs., Inc.*, 808 F. Supp. 500 (E.D. Va. 1992).

42. Vaughn, *supra* note 5, at 33.

doctrines when the employer's responsibility for the resulting harm is more obvious.

A debate over employer responsibility arose with regard to the second sub-type of cases, in which dress requirements or sexual acts were part of the job, such as in cases concerning "Breastaurant" (*i.e.*, Hooters) or casino work. These cases concern businesses that request that their female employees dress sexually or act in a sexual manner, thus consciously crafting the image of the business in a way that includes explicit or implicit sexual messages.⁴³ A series of lawsuits against Hooters, as well as cases regarding casinos, led to an extensive debate in which three main approaches have prevailed: the first, stemming from a radical feminist perspective, argues that sexualized dress and behaviors are demeaning to women, and thus that the entire concept of Breastaurant and casino activities is an offensive objectification of women.⁴⁴ The second approach adopts a liberal prism, which sees employees as agents who choose to work in a certain setting and to profit from their looks.⁴⁵ The third approach argues that employers have a right to

43. Due to its business model, which focuses on women's sex appeal and has provocative dress requirements for waitresses, the successful Hooters restaurant chain has been the subject of much litigation and public debate. In the early 1990s, a few waitresses filed sexual harassment suits against Hooters, arguing that the work environment at Hooters encourages harassment by customers. Those cases were settled, but they raised the question of liability under Title VII regarding the commodification of women's sexuality and women's freedom of sexual expression. In her article, Jeannie Sclafani Rhee discusses these suits and suggests a way to deal with harassment without settling this question, namely by imposing liability for third-party acts when the employer knows of the harassment and fails to take action against the harasser. See Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163 (1997). This is also highly relevant for casinos, as shown by Ann C. McGinley, *Harassing Girls at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229 (2007) [hereinafter McGinley, *Harassing Girls*], and other sexualized occupations as discussed in Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65 (2006) [hereinafter McGinley, *Sex(y) Workers*].

44. Rhee termed this approach the "exploitation theory of liability." Rhee, *supra* note 43, at 166. The "exploitation theory of liability" imposes legal liability on the restaurant for commodifying female sexuality and is based on the radical feminist theories of Andrea Dworkin and Catharine MacKinnon, who objected to the commodification and objectification of women, which shapes, enables and strengthens women's subordination to men, while sustaining their vulnerability. *Id.* at 180-85.

45. Rhee termed this the "risk acceptance theory of non-liability." *Id.* at 167. This view sees women as autonomous rational actors with freely exercisable market rights; it argues that the employees were fully aware of their working conditions prior to their acceptance of the work, so Hooters should not be held liable for harassment. *Id.* at 190-93; see also Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995) (discussing whether workers who knowingly and voluntarily

shape their business in a sexualized manner, and that they therefore have a Bona Fide Occupational Qualifications defense, which permits discrimination if sex is a legitimate occupational qualification of the job.⁴⁶ Several arguments were made regarding the application of the *Sage* decision to cases with a sexual work environment.⁴⁷ Some argue that because *Sage* does not distinguish between women who choose to advance their sexuality at work and those who do not, the decision should not be applied in these cases where sexual acts or dress codes were part of the business model, because in these cases it is an issue of choice.⁴⁸ Another argument was that there should be more severe requirements for employers in these situations to ensure that they take extra precautions to protect their employees from sexual harassment.⁴⁹

The second type of situations underlying the legal discourse, in which employer responsibility for third-party harassment is seen by current law as more difficult to assess, occurs where the employer does not require sexual behavior or dress from his employees.⁵⁰ This body of cases has expanded dramatically in recent years, and the responsibility of the employer is based on whether he knew or should have known of the harassment.⁵¹ In these particular cases, the courts adopt a weaker form of liability for employers, which is that of “reasonable accommodation.” This point has been made by Noah Zatz, who focused more on the divergence of the test adopted in cases

work in sexualized workplaces like Hooters assume the risk resulting from their work and concluding that, due to two important benefits, the assumption of risk defense should be introduced into hostile environment sexual harassment law. These benefits are that employers who market their workers’ sex appeal would be entitled to do so and that under this defense women would be perceived as free to choose sexually appealing occupations).

46. 42 U.S.C. § 2000e-2(e)(1) (Westlaw through Pub. L. No. 115–84); McGinley, *Harassing Girls*, *supra* note 43, at 1270–75.

47. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (stating that courts should consider context in determining whether actionable sexual harassment occurred).

48. *See Rhee*, *supra* note 43, at 179, stating:

A strict adherence to the rule of *Sage Realty* would exact a cost from women who assert and advance their sexuality in public. Regardless of whether her sexuality is exposed by employer mandate or by the woman’s own agency, the logic of *Sage Realty* suggests that public expression of female sexuality instigates sexual harassment. In either case, female sexuality would best be left at home; in public it is a danger. At its core, *Sage Realty* is a decision against the commodification of female sexuality, with troubling ramifications for all public expressions of female sexuality.

Id.

49. McGinley, *Harassing Girls*, *supra* note 43, at 1275–77.

50. *See Kelly & Sinclair* *supra* note 35 at 814–17.

51. EEOC Regulations, *supra* note 25.

of third-party harassment from traditional Title VII anti-discrimination theories of disparate treatment or disparate impact, arguing that it “cannot be squared” with either one of these tests.⁵²

However, in addition to its divergence from those other tests, reasonable accommodation places limited legal responsibility on employers in comparison to other situations of sexual harassment at work. This provides a lower degree of protection to the harassed employees.

Reasonable accommodation requires that reasonable steps be taken to prevent future harassment and to address complaints. If employers do not accommodate the situation, the EEOC and courts view them as violating Title VII. Problematically, courts have been satisfied when employers removed the employee from the customer’s account, or when employers talked with the customers. This is seen in a number of court decisions. In the case of *Folkerson v. Circus Enterprises Inc.*,⁵³ the court found that the employer (a casino) took reasonable steps to ensure that a worker who had performed as a living doll on the casino floor would not suffer from customer harassment.⁵⁴ The casino provided her with a sign saying “Stop. Do Not Touch,” asked a male employee to escort her while she worked, and requested other employees to notify security if the employee needed assistance.⁵⁵

Such an approach has also been adopted in extremely severe situations of harassment, including rape. The case of *Little v. Windermere Relocation, Inc.*⁵⁶ exemplifies this phenomenon. Maureen Little was employed as a Corporate Services Manager, a position that required her “to develop an ongoing business relationship and relocation contacts with corporations in order to obtain corporate clients needing relocation services for their employees.”⁵⁷ She was terminated from her position, but until her termination, she had received only positive feedback from her supervisors and had the best transaction closure record of all corporate managers by a large margin.⁵⁸ One of Windermere’s clients was Starbucks Corporation, and in 1997, Little performed some relocation services for the company, believing that, as part of her job, she was to build a business relationship with Starbucks Human Resources Director to secure the account.⁵⁹ She had at least two business lunches with the Director toward this end, and one evening she

52. Zatz, *supra* note 22, at 1357.

53. *Folkerson v. Circus Enterprises, Inc.*, 107 F.3d 754, 756 (9th Cir. 1997).

54. *Folkerson*, 107 F.3d at 756.

55. *Folkerson*, 107 F.3d at 755.

56. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 965 (9th Cir. 2002).

57. *Little*, 301 F.3d at 964.

58. *Little*, 301 F.3d at 964.

59. *Little*, 301 F.3d at 964.

was invited by him to dinner, after which he raped her three times. Little was reluctant to tell anyone at Windermere about the rape because, in her own words, “I knew how important the Starbucks account was.”⁶⁰ After a few days, however, she reported the incident to the company’s Director of Relocation Services, who advised her not to tell anyone.⁶¹

Nine days passed and Little informed the Vice President of Operations about the rape. The Vice President “thought it would be best that [Little] try to put it behind [her] and to keep working in therapy” and that she discontinue working on the Starbucks account.⁶² She did not, however, give Little any advice on going to the police and did not conduct an investigation into the complaint. The story continues; only after six weeks did Little report the rape to Windermere’s President, who responded that “he did not want to hear anything about it,” and that she would have to respond to the President’s attorneys.⁶³ Shortly afterwards, Little’s pay was reduced, and two days later, her position was terminated. The court found that Little had provided sufficient evidence regarding her hostile work environment claim and the severity of the rape,⁶⁴ but it also noted that if the employer had reacted immediately by accommodating the situation, it would not have been found liable for creating a hostile work environment.⁶⁵

This line of cases strengthens Zatz’s point that reasonable accommodation is the discrimination doctrine adopted for third-party harassment in cases where the employer has not treated the worker disparately based on her sex, but where the sexual harassment resulted from a third party’s conduct outside the employer’s control. As noted above, and explored in more detail in Part III below, the application of the test of “reasonable accommodation” results in a fundamental social problem—it leads to weaker protection of employees from acts of sexual harassment, while strengthening women’s subordination in the market. A central part of the problem is the sole focus on the employer, without recognizing customer domination at work and its causes (particularly its existence within a triangular relationship). Part III below shows that it is very difficult for employers to address sexual harassment in these situations, mainly because they do not wish to

60. *Little*, 301 F.3d at 964.

61. *Little*, 301 F.3d at 964.

62. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 965 (9th Cir. 2002).

63. *Little*, 301 F.3d at 965.

64. *Little*, 301 F.3d at 966–67.

65. *Little*, 301 F.3d at 966–67. A similar approach was adopted in *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005), *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003), *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001), and other cases discussed below.

miss out on potential profits or irritate customers. And, the law does not require them to do so.

Importantly, in a 2011 decision, the Fourth Circuit held that not all accommodations can suffice. There, an employer's offer to transfer a sexually harassed employee from second shift to first shift, which would have resulted in the worker being worse off, was insufficient to meet the legal requirement.⁶⁶ In this case the suggestion also came too late (months after the employee first complained about the harassment),⁶⁷ and when those previous complaints were not dealt with in a serious manner.⁶⁸ It is unclear how the court would have reacted if the employer had taken appropriate steps directly after he knew of the harassment.

II. GERMANY AND BRITAIN

Other countries have also placed responsibilities on employers for third-party harassment within the confines of the employer-employee binary.⁶⁹ Two will be discussed in this article: Germany and Britain. The choice to analyze these particular countries stems from the intent to study how liability is placed on employers in cases of third-party harassment in other national contexts where such legal liability exists. This is done in order to assess in more depth academic calls to place greater liability on employers, following the prevailing paradigm, and to question whether this can indeed work. The chosen countries vary in the theories that guide their approaches to sexual harassment (a mixed dignity-equality approach in Germany and an equality approach in Britain, similar to that of the U.S.). They also differ as to the involvement of the courts in interpreting such liability (many cases in the U.S., no cases at all in Germany, and a moderate number of cases in Britain). Lastly, they have different legal frameworks (Title VII together with the EEOC guidelines and activities in the U.S., the Equal Treatment Act of 2006 in Germany, and the Equality Act of 2010 in Britain). What the analysis shows is that despite these differences, and as de-

66. *E.E.O.C. v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 608 (4th Cir. 2011). In that case, the employee specifically requested to work in the second shift because he needed to take his child to the hospital during the time of the first shift. *Id.*

67. *Cromer*, 414 F. App'x at 608.

68. *Cromer*, 414 F. App'x at 608.

69. In addition to Germany and Britain, which have established employer responsibility for third party harassment and will be discussed in this Part, other countries that have also established such liability include Austria and Belgium. See Ann Numhauser-Henning & Sylvaine Laulom, *Harassment Related to Sex and Sexual Harassment Law in 33 European Countries*, EUROPEAN COMMISSION 35, 38–39, 46 (2012), http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassment_en.pdf, for information on Austria and Belgium.

tailed below, the problems in addressing harassment of employees by customers under the binary paradigm are similar.

A. Germany

The political, institutional, and legal situation in Germany differs from that in the U.S., especially with regard to employment. Although in the U.S. the legal regulatory route is preferred over State regulation, in Germany, generally, the statutory-corporatist path lends flexibility to workplace organization and allows employers and unions to regulate the workplace, preferably through collective agreements.⁷⁰ The feminist movement, too, has a different history, with limited activism in the courts. This is very much evident in the legal situation in Germany, which differs from that of the U.S. in that in Germany there have been no court decisions on the sexual harassment of employees by customers, despite the obligations that the law places on employers and the availability of opportunities to file complaints against customers.⁷¹ Hence, the discussion rests mainly on the requirements imposed on employers by legislation, and on German commentators who have provided interpretations of these requirements. In Germany's legal setting, these commentaries are taken very seriously and are frequently referred to in judgments, even though they are not binding. In this part of the Article, I will introduce the German legislation and commentaries pertaining to employers' liability in cases of customer harassment of employees.

Historically, Section 2, subsection 1 of the Employment Protection Act of 1994 (*Beschäftigungsschutzgesetz*), which created a general protection for employees from sexual harassment, was considered to place responsibilities on employers for the sexual harassment of employees by third parties. This was stated in the legislative reasoning given by the German Parliament.⁷² Under the Employment Protection Act, sexual harassment was seen as violating one's dignity. Susanne Baer, a leading German feminist legal scholar and a justice of the Federal Constitutional Court in Germany, explained that turning to the idea of dignity in Europe was culturally related to "a European understanding of harm, and particularly to the understanding of harm developed in Europe after 1945, where human dignity became

70. ZIPPEL, *supra* note 24, at 4.

71. Earlier this year, a judgment was given on employer responsibilities according to the AGG in a case of sexual harassment by a supervisor at work. See Decision of the Labour Court in Weiden (16th of September 2015).

72. Gesetzentwurf [Law Draft], Deutscher Bundestag: Drucksachen [BT] 12/5468, <http://dipbt.bundestag.de/doc/btd/12/054/1205468.pdf> (Ger.).

the referent for harm of the worst kind.”⁷³ Moreover, dignity links to the Constitution, or Basic Law of Germany, which places it as the first and most fundamental individual right.⁷⁴ The Employment Protection Act indeed defined sexual harassment as an intentional sexually-oriented behavior that violates the employee’s dignity.⁷⁵ Despite the particular definition of sexual harassment within the Act, the courts addressed situations of sexual harassment through the doctrine of mobbing, which deals with long term attacks at work, including, but not exclusively focusing on, sexual harassment.⁷⁶ Baer argues that this might have resulted from the shortcomings of the dignity-based approach, which “renders the European and the German law against sexual harassment at work inadequate to address the problem.”⁷⁷

In 2006, with the enactment of the German Equal Treatment Act, (*Allgemeines Gleichbehandlungsgesetz*) (hereinafter, “AGG”), employers’ obligations to prevent sexual harassment by customers were clearly established.⁷⁸ According to Section 15 of the AGG, an employer is liable for breaches of organizational duties, including those of Section 12.⁷⁹ Section 12, subsection 4 of the AGG notes that “[w]here employees are discriminated against in the pursuance of their profession by third persons within the meaning of Section 7(1), the employer shall take suitable, necessary and appropriate measures, chosen in a given case, to protect the employee in question.”⁸⁰ Employers also have a duty of care arising out of the employment relationship.

The AGG took a different declarative direction than the Employment Protection Act. Following the European Directives,⁸¹ the AGG sees sexual

73. Baer, *supra* note 24, at 588.

74. *Id.* at 590.

75. Ulrike Lembke, *Sexuelle Belästigung: Recht und Rechtsprechung*, BUNDESZENTRALE FÜR POLITISCHE BILDUNG (July 2, 2014), <http://www.bpb.de/apuz/178676/sexuelle-belaestigung-recht-und-rechtsprechung?p=all>.

76. ZIPPEL, *supra* note 24, at 9, 123. Zippel describes mobbing in Germany as “psychoterror at work” and as “a conflict-laden communication among colleagues or between superiors and employees, a process by which one or more persons systematically, over a long period, attack someone directly or indirectly with the goal of marginalizing and getting rid of him or her.” *Id.* at 9.

77. Baer, *supra* note 24, at 590–93.

78. Allgemeines Gleichbehandlungsgesetz [Equal Treatment Act] [AGG], Aug. 14, 2006, BUNDESGESTZBLATT, Teil I at 1897 (Ger.) (available in English at http://www.anti-diskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/agg_in_englischer_Sprache.pdf;jsessionid=9F1872173F37BE44A68D4C34B8967805.2_cid340?__blob=publicationFile&v=2 (last accessed Feb. 21, 2017)).

79. AGG, Aug. 14, 2006, BGBL. I at 1897, § 15(1–2) (Ger.).

80. AGG, Aug. 14, 2006, BGBL. I at 1897, § 12(4) (Ger.).

81. The AGG represented the implementation of four European Directives: Directive 2000/43/EG; 2000/78/EG; 2002/73/EG (today 2006/54/EG) and 2004/113/EG. Its definition of sexual harassment is based on Article 2(1)d of Directive 2006/54/

harassment protections as measures intended to address a problem that affects women in particular,⁸² thereby introducing into German law the view of sexual harassment as a form of unlawful discrimination. The AGG's objectives are to prevent or stop discrimination on the grounds of race, ethnic origin, sex, religion or belief, disability, age, and sexual orientation,⁸³ with Sections 3 and 7 of the AGG prohibiting harassment on any of those grounds. According to Section 3:

Sexual harassment shall be deemed to be discrimination in relation to § 2(1) Nos. 1 to 4, when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.⁸⁴

Despite the clear language of the AGG and indications that sexual harassment of employees by customers is indeed a prevalent phenomenon in Germany, there has been no case law on the subject (generally, there were

EG, which defines sexual harassment as “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.” The definition of sexual harassment in Section 3, subsection 4 of the AGG was following Article 2 of Directive 2006/54/EG, which also referred to an “unwanted action,” while the Employment Protection Act still asked for intentional behaviour of the perpetrator. *See* Jobst-Hubertus Bauer & Steffen Krieger, *Allgemeines Gleichbehandlungsgesetz (Agg)* 87 § 3 Recital 48 (2015).

82. *See* European Commission Press Release IP/00/588, The Commission Bids to Outlaw Sexual Harassment at the Workplace (June 7, 2000) (on file with author) (“Anna Diamantopoulou EU Employment and Social Policy Commissioner said: ‘No one contests that sexual harassment takes place and that it is an unacceptable affront to the individual concerned, *normally—but not always—a woman.*’”) (emphasis added).

83. AGG, Aug. 14, 2006, BGBL. I at 1897, § 1(1) (Ger.).

84. AGG, Aug. 14, 2006, BGBL. I at 1897, § 3 (Ger.). This English translation of the Article is the one offered by the German Antidiscrimination Agency, referring to sexual harassment as a form of discrimination. *See generally* FED. ANTI-DISCRIMINATION AGENCY, ACT IMPLEMENTING EUROPEAN DIRECTIVES PUTTING INTO EFFECT THE PRINCIPLE OF EQUAL TREATMENT (2009). However, the German wording of this Article does not use the word “discrimination” but rather the word “*Benachteiligung*” (“putting at a disadvantage”). This legal term is not intended to weaken the protection as compared to the Directives, but can be explained by conflicts in connection with the adoption of equal treatment law in Germany. *See* EUROPEAN COMMISSION, *supra* note 69, at 109.

very few cases on sexual harassment). This might be because sexual harassment has never been a central issue in German legal policy debates. Writing in 2006, Kathrin Zippel opens her book *The Politics of Sexual Harassment* by presenting an interview she conducted with a German employee who expressed the belief shared by many in Germany that “Europeans do not have a problem with ‘sexual harassment’—it’s an American Problem.”⁸⁵ In Germany, discussions of sexual harassment only began in 1983 with the “Busengrapscher Affäre,”⁸⁶ when Klaus Hecker, a member of parliament of the West German Green party, sexually molested his female employees.⁸⁷ Later on, several other incidents of sexual harassment were reported and discussed in the German media,⁸⁸ and in academic studies, particularly Baer’s work. As noted above, the Employment Protection Act did not have a substantial impact in Germany. It was hardly known by employers and employees, as a survey conducted by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth in 2002 has shown.⁸⁹ The marginality of sexual harassment discussions in political debates continues to typify Germany today,⁹⁰ but it does not represent the reality of sexual harassment in the country. Studies have shown that a high percentage of women in Germany do experience sexual harassment at work,⁹¹ in the army,⁹² and in universities.⁹³ All of this led the Federal German Anti-Discrimination Agency to proclaim 2015 to be the year for dealing with sexual discrimination, in-

85. ZIPPEL, *supra* note 24, at ix.

86. Translated to English as the “Beast Groping Scandal.”

87. ZIPPEL, *supra* note 24, at 126–27.

88. *See id.* at 2 (discussing these incidents).

89. ALMUT PELÜGER, SUSANNE BAER, GABRIELE SCHLICK, MILENA BÜCHS, & UTE KALENDER, BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND, BESCHÄFTIGTENSCHUTZGESETZ IN DER PRAXIS (2002).

90. *See* EUROPEAN COMMISSION, *supra* note 69, at 108.

91. The latest study conducted by the German Federal Anti-Discrimination Agency on sexual harassment at work from 2015 found that every second employee experienced sexual harassment. *See* FED. ANTI-DISCRIMINATION AGENCY, SEXUAL HARASSMENT AT WORK—INCIDENCE, CURRENT STATE OF KNOWLEDGE AND MANAGEMENT STRATEGIES (2015) (“[A]pproximately 50 percent of each group, women and men, state that they have directly experienced [sexual harassment] once.”).

92. Several studies on sexual harassment in the army have been conducted in Germany in the years 2005, 2011, and 2014, all showing that a high percentage of women experience sexual harassment, as do a percentage of men. The most recent study has shown that 55% of women and 12% of men in the army have experienced some form of sexual harassment, including sexist jokes, exposure to pornographic material, unwanted physical contact, sexual assault, and rape. *See* GERHARD KÜMMEL, TRUPPENBILD OHNE DAME?: EINE SOZIALWISSENSCHAFTLICHE BEGLEITUNTERSUCHUNG ZUM AKTUELLEN STAND DER INTEGRATION VON FRAUEN IN DIE BUNDESWEHR (2014).

93. *See* THOMAS FELTES, KATRIN LIST, ROSA SCHNEIDER, & SUSANNE HÖFKER, GENDER-BASED VIOLENCE, STALKING AND FEAR OF CRIME (2012).

cluding sexual harassment.⁹⁴ Despite this proclamation, case law on sexual harassment is still very minimal.

Another reason there has been minimal case law in Germany regarding sexual harassment is related to the limited sanctions employers face if they do not comply with sexual harassment laws. Zippel has noted that even though the U.S. state capacity to address sexual harassment is considered weak, the EEOC has pursued civil rights litigation and has slowly extended its institutional capacity to address the issue, with employers risking costs from complaints and punitive damages for failure to take action.⁹⁵ This is not the case in Germany, where there is no German agent that has a responsibility similar to that of the EEOC,⁹⁶ compensatory damages are insignificant, the concept of punitive damages does not exist, and many employers ignore the law.⁹⁷

Furthermore, the AGG places weak requirements on employers. According to the AGG, the employer must take appropriate measures to put a stop to discriminatory harassment by employees or third parties. These appropriate measures include disciplinary actions such as suspension of work, transfer, reduction in salary, demotion or discharge as consequences for employees in the civil service, and warning, transfer, or dismissal of employees in private enterprises.⁹⁸ Appropriate training can be understood as a disclaimer of responsibility according to Section 12, subsection 2 of the AGG (“training defense”).⁹⁹ Generally, it is sufficient if the employer informs its staff through notices, letters, etc. about sanctions for discriminatory behavior.¹⁰⁰

Due to the weakness of the law, its application, and its enforcement, the feminist movement in Germany has generally not used the labor courts as a vehicle for promoting change in this area.¹⁰¹ The weakness in

94. See FED. ANTI-DISCRIMINATION AGENCY, SURVEY TO MARK THE LAUNCH OF THE THEMATIC YEAR “GLEICHES RECHT. JEDES GESCHLECHT [EQUAL RIGHTS. EVERY SEX]”: MAJOR KNOWLEDGE GAPS AMONG WORKFORCE REGARDING SEXUAL HARASSMENT IN THE WORKPLACE (2015).

95. See ZIPPEL, *supra* note 24, at 38.

96. See EUROPEAN COMMISSION, *supra* note 69, at 113 (“The German Anti-Discrimination Body does not have the power to deal with individual cases, so there is no case law.”).

97. See ZIPPEL, *supra* note 24, at 38.

98. See FED. ANTI-DISCRIMINATION AGENCY, GUIDE TO THE GENERAL EQUAL TREATMENT ACT: EXPLANATIONS AND EXAMPLES (2016), at § 4.2.

99. See URSULA RUST & JOSEF FALKE, ALLGEMEINES GLEICHBEHANDLUNGSGESETZ MIT WEITERFÜHRENDEN VORSCHRIFTEN (AGG) 655–56 (2007).

100. See Monika Schlachter, *Allgemeines Gleichbehandlungsgesetz (AGG)*, in *ERFURTER KOMMENTAR ZUM ARBEITSRECHT* 237, 275–78 (Rudi Müller-Glöge, Ulrich Preis & Ingrid Schmidt eds., 17th ed. 2017).

101. See ZIPPEL, *supra* note 24, at 125.

implementing the AGG might also be attributed to the fact that the AGG continues to emphasize the infringement of dignity in assessing whether an act is sexual harassment. The language of dignity has continued to be used and embedded in the definition of sexual harassment. According to that definition, the act of harassment has to take place “with the purpose or effect of violating the dignity of the person concerned.”¹⁰² In determining whether dignity has been violated, weight is given to the seriousness of the harassment.¹⁰³ The analysis of the situation is conducted in reference to the notion of dignity, with a lesser emphasis on equality.¹⁰⁴ Although anti-discrimination directives are clear that discriminatory harassment is not limited to intentional behavior, most German commentaries on the law do not address unintentional discrimination, including sexual harassment.¹⁰⁵ Indeed, seeing sexual harassment as a form of discrimination has great potential, but this has yet to be fully realized and implemented in Germany.¹⁰⁶

This background might explain the limited case law on sexual harassment generally. However, there are further reasons for the absence of cases addressing customer harassment. Similar to the legal approach in the U.S., the focus on employer liability leads Germany to adopt less strict requirements in cases involving third parties. Once focus is placed on the binary employment relationship and requirements within the boundaries of that relationship, opportunities to take more effective measures, which might involve customer liability, may be questioned. Hence, although the law can potentially see customers as liable in tort according to Sections 823 and 825 of the BGB (“Bürgerliches Gesetzbuch”—The German Civil Code),¹⁰⁷ no

102. AGG, Aug. 14, 2006, BGBL. I at 1897, Art. 1, § 3–4 (Ger.).

103. See EUROPEAN COMMISSION, *supra* note 69, at 113–14.

104. A good example is a decision by the German Federal Labour Court in 2014. There, the court stressed—as it had before—that a violation of another person’s dignity would be found particularly in cases where the perpetrator establishes a certain environment of intimidation, hostility, humiliation or insult. See Fed. Lab. Ct. Judgment, 2 AZR 651/13 at para. 14 (Nov. 20, 2014). The judges decided that the comment of a male worker addressed to a female colleague that she had nice breasts was not a compliment but rather an “inappropriate comment of a sexual nature.” *Id.* Touching the woman’s breasts following the comment was analyzed as being a “sexually intended infringement of an intimate sphere of privacy.” *Id.* The woman’s dignity was seen as infringed upon by these actions, as they could objectively be defined as “unwanted treatment,” which could further be understood as a degradation of the woman as being solely seen and treated as a sexual object. *Id.* Hence, a violation of her dignity had occurred. As the court had already decided before, a single action can qualify as a form of sexual harassment—actions need not be repeated. See Fed. Lab. Ct. Judgment, 2 AZR 323/10 (Jun. 9, 2011).

105. See EUROPEAN COMMISSION, *supra* note 69, at 108.

106. On such potential, see *id.* at 115.

107. According to Civil Code § 823,

lawsuits have been filed, and customer domination as proposed in this Article has not yet been acknowledged.

In Germany, the focus on the employment relationship rests on Section 2, subsection 1 of the AGG, which applies sexual harassment prohibitions solely to employment relations.¹⁰⁸ Sections 7 and 3 of the AGG prohibit the employer from discriminating against his employees, and according to Section 3, subsection 4, this includes the prohibition on sexual harassment. The commentaries provide measures in accordance with Section 12, subsection 4 that can be taken by employers when their employees are sexually harassed by third parties (customers included).¹⁰⁹ These include warning letters and the shifting of jobs or responsibilities so the employee and the harassing customer do not have to work together.¹¹⁰

Other commentaries also mention the option of ceasing a business relationship with the customer.¹¹¹ According to the law, the employer has to take “suitable, necessary and appropriate measures, chosen in a given case to

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- (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this; (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, Aug. 18, 1896, last amended July 20, 2017, BGBl. I at 2787 (Ger.); *see also* § 825 (“A person who induces another person to undertake or acquiesce in sexual acts by cunning, duress or abuse of a dependency relationship is liable to him for the resulting damage incurred”).

108. Jens Schubert & Peter Schrader, § 3 *Begriffsbestimmungen*, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ (AGG): HANDKOMMENTAR 225, 258 (Wolfgang Däubler & Martin Bertzbach eds., 2013).
109. Rudolf Buschmann, § 12 *Maßnahmen und Pflichten des Arbeitgebers*, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ (AGG): HANDKOMMENTAR 497, 499–500 (Wolfgang Däubler & Martin Bertzbach eds., 2013).
110. *See, e.g.*, RUST & FALKE, *supra* note 99, at 659; § 12 *Maßnahmen und Pflichten des Arbeitgebers*, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ (AGG) BASISKOMMENTAR ZU DEN ARBEITSRECHLICHEN REGELUNGEN 216, 224 (Christine Nollert-Borasio & Martina Perreng eds., 2015).
111. RUST & FALKE, *supra* note 99, at 651; *cf.* §12 *Maßnahmen und Pflichten des Arbeitgebers*, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ (AGG): KOMMENTAR ZUM AGG UND ZU DEN ANDEREN DISKRIMINIERUNGSVERBOTEN 637–38 (Klaus Adomeit & Jochen Mohr eds., 2011) (claiming this measure would not be appropriate in most cases); Buschmann, *supra* note 109 at 590 (noting that barring a customer from a bar would in most cases be appropriate, rather than ceasing a business relationship with the customer, which would jeopardize the entire business economically).

protect the employee in question.”¹¹² The wording shows that the employer has a margin of discretion in choosing the right measure. The decision regarding which measures are suitable, necessary, and appropriate has to be made based on the individual circumstances. The employer’s discretion has been noted as especially relevant in customer-related cases, and is mentioned in the explanatory memorandum of the AGG.¹¹³

German scholars have debated whether ceasing a business relationship is an appropriate measure. Following the judgment by the European Court of Justice in the *Feryn* racial discrimination case,¹¹⁴ where it was stated that the business interests of the employer, such as customer wishes and preferences, cannot serve as a justification for discrimination, it can be argued that employers are required to take the risk of losing customers. However, current German law requires that employers weigh various factors before taking such steps, including the duration of the business relationship, the severity of the harassment, and the danger that it will be repeated.¹¹⁵ Also, the commercial relevance of the business relationship may be of great importance when analyzing the employer’s interests.¹¹⁶ The business interests of the employer also have to be taken into account, which includes the interests of other employees in the continued profitability of the workplace. As the right to choose business partners and the freedom of occupation are constitutional rights, according to Section 12 of the AGG,¹¹⁷ measures that would affect the economic existence of the employer are not seen as appropriate.¹¹⁸ There are scholars who rely on the following differentiation: in the case of scattered or selected business relations, it could be necessary to take immediate measures (*e.g.*, to ban someone from a bar/pub), whereas in the case of long-lasting business relationships, talking to the customer and informing the business partner are understood to be appropriate measures,¹¹⁹ and a sincere effort would be sufficient. Däubler, Bertzbach, and Buschmann mention that even if ending the business relationship is not appropriate, effective protection is necessary,¹²⁰ and Bauer and Krieger noted that in

112. AGG, Aug. 14, 2006, BGBL. I at 1897, § 12(4) (Ger.).

113. Regierungsentwurf, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/1780, July 8, 2006, at 37, <http://dip21.bundestag.de/dip21/btd/16/017/1601780.pdf> (Ger.).

114. Case C-54/07, Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV, 2008 E.C.R. I-5187 at I-5194.

115. RUST & FALKE, *supra* note 99, at 655–56.

116. NOLLERT-BORASIO & PERRENG, EDS., *supra* note 110, at 223–24.

117. Gesetz über die Rechtsverhältnisse der Mitglieder der Bundesregierung [Bundesministergesetz] [BMinG] [Federal Minister Act], §12, July 17, 2015, BGBL. I at 1322 (Ger.).

118. *See supra* note 111 and accompanying text.

119. RUST & FALKE, *supra* note 99, at 655.

120. Buschmann, *supra* note 109, at 577.

“extreme cases,” an employer would have to stop business relations with a customer in response to the sexual harassment of employees.¹²¹ Evidently, the question of whether ceasing the business is appropriate is highly debatable.

In Germany, employers’ obligations towards employees in cases of customer sexual harassment are limited and can generally be satisfied once the employer provides information on the prohibition of sexual harassment or takes accommodation measures. Moreover, collective agreements that are widespread in Germany,¹²² including agreements on sexual harassment,¹²³ do not contain, to the best of my knowledge, specific regulations regarding third-party harassment. Hence, despite the different legal systems in Germany and the U.S., in the end, the legal requirements under German law that apply to employers in cases of customer harassment of employees are quite similar to those in the U.S.

B. Britain

The Sex Discrimination Act of 1975 is the historical piece of legislation providing workers with protections from sexual harassment. Since the 1980s, sexual harassment claims were dealt with by British Courts, which interpreted employers’ obligations under the Sex Discrimination Act to include dealing with third-party harassment.¹²⁴ The 1996 case of *Burton v. De Vere Hotels Ltd.* was the first important decision on third-party harassment.¹²⁵ In *Burton*, two waitresses of Afro-Caribbean origin, employed by the hotel, were harassed by an after-dinner speaker in the hotel’s banqueting room.¹²⁶ During the show, jokes were made about the sexual organs and

121. Bauer & Krieger, *supra* note 81, at 215.

122. In Germany, two different types of such agreements exist: collective agreements (“Tarifvertrag”) between an employer association or between a single employer and Unions, regulated by the Collective Bargaining Act (“Tarifvertragsgesetz,” or “TVG”), and company agreements (“Betriebsvereinbarungen”) between the works council of a certain company and the employer, regulated by the Works Constitution Act (“Betriebsverfassungsgesetz,” or “BetrVG”). Bernd Waas, *Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives in Germany*, in Japan Institute for Labour Policy and Training, Report No. 3, 2006 13–31, <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no3.pdf>.

123. See discussion in EUROPEAN COMMISSION, *supra* note 69, at 110–11, 115.

124. See, e.g., EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUSTRIAL RELATIONS, AND SOCIAL AFFAIRS, EMPLOYMENT & SOCIAL AFFAIRS, SEXUAL HARASSMENT IN THE WORKPLACE IN THE EUROPEAN UNION (1998); see also LIZZIE BARMES, BULLYING AND BEHAVIOURAL CONFLICT AT WORK: THE DUALITY OF INDIVIDUAL RIGHTS 72–77 (2015).

125. *Burton and another v. De Vere Hotels Ltd.* [1997] ICR 1 (Emp’t App. Trib.) (Eng.) [hereinafter *Burton*].

126. *Burton*, *supra* note 125, at 3.

ability of black men.¹²⁷ After the act was over, one of the guests asked one of the waitresses “what a black woman’s vagina tasted like,”¹²⁸ while the other waitress had problems with another guest who tried to put his arms around her and made racially and sexually offensive remarks.¹²⁹ The waitresses went to court against their employer, claiming racial discrimination under the Race Relations Act 1976.¹³⁰ The Employment Appeal Tribunal (EAT), reversing the industrial tribunal’s decision, accepted the waitresses’ claim and offered what is known as “the control test.”¹³¹ Under the control test, an employer subjects an employee to the detriment of racial harassment if he causes or permits the harassment to occur under circumstances in which he could control whether the harassment happened.¹³² The control test limits employers’ liability even more than the U.S. test of “known or should have known,” because it places liability only when the employer has some control over the situation.

The control test was subsequently adopted in the sexual harassment case of a female employee in *Go Kidz Go v. Bourdouane*.¹³³ There, a children’s birthday organizer was harassed by one of the parents. She complained to her employer, who encouraged her to return to the party because other staff were occupied and “there was not long to go.”¹³⁴ The acts of harassment continued and, finally, the worker was dismissed after she declared her intention of reporting the incident to the police.¹³⁵ The court decided that the employer did have sufficient control to stop the harassment.¹³⁶

Yet, the House of Lords took a step back from the control test in *Pearce v. Mayfield School*.¹³⁷ In that case, the House of Lords decided that the question of control was insufficient to determine employer responsibility, and that attention should also be paid to (a) the context of the required acts of control and (b) the question of whether the employer would have behaved otherwise if the harassed worker was a man.¹³⁸ In *Pearce*, a lesbian

127. *Burton*, *supra* note 125, at 3.

128. *Burton*, *supra* note 125, at 3.

129. *Burton*, *supra* note 125, at 3.

130. *Burton*, *supra* note 125, at 4.

131. *Burton*, *supra* note 125, at 10.

132. *Burton*, *supra* note 125, at 10.

133. *Go Kidz Go Ltd. v. Bourdouane* [1996] EAT/1110/95 (Emp’t App. Trib.) (Eng.) [hereinafter *Go Kidz Go*].

134. *Go Kidz Go*, *supra* note 133, at para. 6.

135. *Go Kidz Go*, *supra* note 133, at para.10.

136. *Go Kidz Go*, *supra* note 133, at para. 24.

137. *Pearce v. Governing Body of Mayfield School* [2003] UKHL 34, (appeal taken from EWCA Civ) (UK) [hereinafter *Pearce*].

138. *Pearce*, *supra* note 137, at para. 54, 60–62.

teacher had been constantly insulted and bullied by students.¹³⁹ The employment tribunal found that even though the school took some measures to stop the acts, it did not do enough. Lord Justice Judge noted that applying the control test in this case was insufficient, because educational considerations, which the school cited as the reasons for its inaction, were important as well.¹⁴⁰ Moreover, Justice Judge said that the employee had to prove that the school would have taken other steps to control the situation in different circumstances, such as if the target of harassment were a male homosexual employee.¹⁴¹ In the words of the Court:

Liability does not arise simply because it is established that the school authorities were less understanding and organised, or indeed less alert to contemporary attitudes to issues of sexual orientation, but depends rather on whether their approach to the problem (whether this merited approval or criticism) was less favourable to the appellant than it would have been to a male teacher, in the same position, facing the same problems.¹⁴²

Hence, the *Pearce* judgment gave greater weight to the view that employer liability for third-party harassment should also be judged on the basis of a direct discrimination test, sticking to the exact wording of the legislative provision in the Sex Discrimination Act 1975,¹⁴³ instead of on the question of control.¹⁴⁴

The British legislature, however, soon decided differently, with the amendment of the relevant discrimination laws in Britain to the European-derived statutory definition of harassment.¹⁴⁵ This occurred in April 2008, when important changes to the Sex Discrimination Act of 1975 came into force, including the placing of specific responsibility on employers in cases of third-party harassment.¹⁴⁶ A similar provision was later established in the Equality Act of 2010,¹⁴⁷ which has replaced the Sex Discrimination Act,

139. *Pearce*, *supra* note 137, at para.1.

140. *Pearce*, *supra* note 137, at para. 60–63.

141. *Pearce*, *supra* note 137, at para. 54.

142. *Pearce*, *supra* note 137, at para. 81.

143. BARMES, *supra* note 124, at 73.

144. James Hand, *Employer's Liability for Third-Party Harassment: An 'Unworkable' and Superfluous Provision*, 42 *INDUS. L.J.* 75, 75 (2013).

145. First, the Race Relations Act of 1976 and the Employment Equality Regulations (based on both Religion or Belief, as well as Sexual Orientation) were amended in 2003, then the Disability Discrimination Act of 1995 was amended in 2004, and the Sex Discrimination Act of 1975 was amended in 2005.

146. The Sex Discrimination Act 1975, SI 2008/656, reg. 4.

147. Equality Act 2010, c.3, § 26(5).

expanding employer liability to prevent harassment across seven relevant protected bases.¹⁴⁸ Section 40, subsection 2 of the Equality Act stated that “[t]he circumstances in which A is to be treated as harassing B under subsection (1) include those where—(a) a third-party harasses B in the course of B’s employment, and (b) A failed to take such steps as would have been reasonably practicable to prevent the third-party from doing so,” limiting such liability to situations in which the person has been harassed by a third party on at least two other occasions. However, this Section was soon removed from the Act. The government claimed that it was “unworkable” and that it placed a regulatory burden on businesses.¹⁴⁹ The 2011 “Plan for Growth” declared that “[t]o make Britain one of the best places in Europe to start, finance and grow a business,” de-regulation steps needed to be taken, including “stripping back proposed regulation on dual discrimination and third-party-harassment from the Equalities Act 2010.”¹⁵⁰ The removal of this section was justified on the basis of the argument that employers have no direct control over third-party harassment and removing this section of the law would save £0.3 million.¹⁵¹

James Hand argued that the abolition of Section 40, subsection 2 in the Equality Act does not deny that employers bear responsibility for third-party harassment.¹⁵² The broad definition of harassment, as stated in Section 26 of the Equality Act, enables the placing of such responsibility regardless, thus establishing employer obligations under Section 40. However, it is unclear how the courts will interpret the obligation of employers—whether they will follow the early decision of *Burton* or the more limited test of *Pearce*, considering that more recent judgments have also made further amendments to the early test of *Burton*. For example, in *Conteh v. Parking Partners Ltd.*,¹⁵³ the EAT said that an establishment providing car parking services was not responsible for the racial harassment of its employee by a third party (where the parking service was provided) because the employer itself did not create a hostile environment, nor did it treat the employee differently than it would have treated an employee of a different

148. Age, disability, gender re-assignment, race, religion or belief, sex, and sexual orientation. Under the Equality Act of 2010, sexual harassment is a form of unlawful discrimination; Section 39 of the Act states, “[a]n employer must not discriminate against a person,” with Section 40 noting that “[a]n employer (A) must not, in relation to employment by A, harass a person (B), (a) who is an employee of A’s; (b) who has applied to A for employment.” *Id.*

149. HM TREASURY DEP’T FOR BUSINESS INNOVATION & SKILLS, THE PLAN FOR GROWTH, 2013, at 53 (UK); Enterprise and Regulatory Reform Act.

150. *Id.* at 7.

151. *Id.* at 53.

152. Hand, *supra* note 144, at 78–79.

153. *Conteh v. Parking Partners Ltd.*, [2011] ICR 341.

race or ethnic or national origin. The court said when harassment occurs, the Race Relations Act of 1976 requires a tribunal to look at the motivation of the employer and to question whether its conduct—which, according to the EAT in that decision, also includes inaction—is what led to discrimination against an employee by a third party.¹⁵⁴ In this way, the court presented two possible situations of employer responsibility: either the employer creates a hostile environment himself, or there is employer motivation and causation.

In *Sheffield City Council v. Norouzi*,¹⁵⁵ the court limited the decision in *Pearce*, noting that the decision should not necessarily apply to environments, such as prison and homes, where employees are subjected to “a level of harassment on a proscribed ground which cannot be easily prevented or eradicated.”¹⁵⁶ In *Sheffield City Council*, a child in a care home assaulted a social worker employed in the home on the basis of his Iranian origin, leading the worker to eventually take sick leave and not return.¹⁵⁷ “In such cases,” said the EAT, “the employer should indeed not too readily be held liable for conduct by third parties which is in truth a hazard of the job.”¹⁵⁸ However, it found no ground in the particular case to reverse the employment tribunal’s decision that the employer had not done enough to protect the employee from harassment and discrimination by one of the children.¹⁵⁹ As a result, the employer was held liable for racial harassment and racial discrimination.

To conclude, even though both British and U.S. law see sexual harassment as an issue of discrimination, and see employers as liable in cases of third-party harassment, such liability in Britain is even more limited than in the U.S. Moreover, in Britain, the intention not to place a burden on businesses was central in deciding to de-regulate legal obligations when these were previously more heavily applied through legislation.

III. UNDERSTANDING THE PREVAILING PARADIGM

A. Strengths and Shortcomings

That employers are faced with liability in cases of third-party harassment has been an important step towards dealing with the phenomenon of sexual harassment of employees by customers. This is particularly true when

154. *Conteh v. Parking Partners Ltd*, *supra* note 153, at para. 28–30.

155. *Sheffield City Council v. Norouzi*, [2011] IRLR 897.

156. *Sheffield City Council v. Norouzi*, *supra* note 155, at para. 25.

157. *Sheffield City Council v. Norouzi*, *supra* note 155, at para. 3.

158. *Sheffield City Council v. Norouzi*, *supra* note 155, at para. 25.

159. *Sheffield City Council v. Norouzi*, *supra* note 155, at para. 25–26.

considering that third-party harassment has not yet been recognized in some countries.¹⁶⁰ Also, the development of tests and the provision of guidance by U.S. courts and the EEOC to address this situation, such as the various informational guidelines offered to the public to raise awareness of the phenomenon and of the attendant legal liability, have been crucial to further the protection of employees from this type of harassment.¹⁶¹ However, this paradigm has limitations. Emerging from the discussion above, including the comparison of the U.S. to Germany and Britain, is the limited liability of employers and the weaker protection given to employees suffering from customer harassment in comparison to other situations of workplace sexual harassment. This results from a number of causes to which the discussion has pointed.

First, employers are conceived, within the legal regimes, as generally having less control over third parties, including customers, than they do over employees, and this has been used to differentiate cases of third-party harassment from those of co-worker harassment.¹⁶² Such reasoning explains the legal approaches in the U.S. and Germany where employers fulfill their legal obligations in cases of customer harassment by adopting a company-wide protocol, training employees, or providing reasonable accommodations to the victim of sexual harassment. I agree with Zatz that the U.S. courts' inclusion of reasonable accommodation within Title VII is important.¹⁶³ Yet, I argue that the test of "reasonable accommodation," and particularly its application by the courts, is insufficient to deal adequately with the sexual harassment of employees by customers.

Second, it seems that in all three legal regimes, employers are not expected to revoke their business relations with the customer as a response to the sexual harassment of one of their employees, or even to necessarily raise their concerns before valued customers. In Britain, it was the desire to avoid placing burdens on businesses that led to the abolition of Section 40, subsection 2, which specifically placed liability on employers for third-party harassment.¹⁶⁴ Third, in single or infrequent incidents of harassment by customers, employers are generally not found liable. In the U.S., this is due to the test of reasonableness and the severity of the harassment.¹⁶⁵ In Britain,

160. This is the current situation in Croatia, Israel, and Italy, for example. See EUROPEAN COMMISSION, *supra* note 69, at 56–61, 154; see generally Prevention of Sexual Harassment Law, 5758–1998, as amended (Isr.).

161. See Part I *supra*.

162. Sarah L. Ream, *When Service with a Smile Invites More Than Satisfied Customers: Third-Party Sexual Harassment and the Implications of Charges Against Safeway*, 11 HASTINGS WOMEN'S L.J. 107, 115 (2000).

163. Zatz, *supra* note 22, at 1361.

164. Equality Act 2010, *supra* note 147, at c.3, § 40(2).

165. See Ream, *supra* note 162, at 111 (discussing the test of reasonableness).

the abolished Section 40, subsection 2 required that the harassment had occurred by the same party on at least two other occasions. Seeing the weak protection the law provides to employees suffering from harassment, I question its concentration on the employer-employee binary and the leaving of customers aside.

B. Why Focus on the Employer-Employee Binary?

The most obvious explanation for the legal concentration on an employer-employee binary relationship and consequently on the employer's limited liability is that, in most Western countries, the U.S. included, the structure of employment relations is built upon the Fordist employment model of the industrial era.¹⁶⁶ That model has two cornerstones: it looks solely to the employer-employee production process found in large factories of the late nineteenth century and early twentieth century, which the notion of "Fordism" represents; and, it is based on a conception of the male breadwinner, engaged in full-time, long-term, personal, and bilateral employment. As I have written elsewhere, "it is a work model that ignores consumption," and also ignores customers.¹⁶⁷ This is true of Title VII, which places responsibility on employers, and not on customers, to act in non-discriminatory ways. Additionally, according to Section 2000e-2, only an employer can commit unlawful employment practices.¹⁶⁸ The German AGG applies to employers, similarly to Section 39 and Section 40 of the Equality Act, which establish British employers' liability for discrimination and harassment. These obligations, which apply to the employer alone, leave customers aside.

Employment studies have strongly criticized the bounding of the discussion to the employer-employee binary, focusing on the need to go beyond it and apply legal responsibility to third parties. But these discussions focused primarily on situations of agency and subcontractor employment.¹⁶⁹ Court decisions have also placed liability on third parties beyond the employer in cases of agency and subcontractor employment.¹⁷⁰ However, the courts have not gone beyond those parties to look into customers.¹⁷¹

166. See KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE NEW WORKPLACE* 48–49 (Cambridge Univ. Press 2004).

167. Albin, *supra* note 20, at 967.

168. 42 U.S.C. § 2000e-2 (Westlaw through Pub. L. No. 115–45).

169. M.R. FREEDLAND, *THE PERSONAL EMPLOYMENT CONTRACT* 40 (Oxford Univ. Press 2003); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 *BERKELEY J. EMP. & LAB. L.* 1 (2010).

170. See *infra* Part V (discussing the development of the joint employment doctrine).

171. My view is that agencies and subcontractors should be seen as customers as well, and that placing responsibilities on them is an important first step toward recognizing the

The main reason for this is that employers are seen as the actor in the best position to eliminate harassment in the workplace.¹⁷² Employers have the economic means to cover damages caused by sexual harassment; they have responsibilities towards their employees that are more comprehensive than protection from sexual harassment alone. Also, it is much easier to enforce obligations on employers than on third parties. Lastly, the employer has the ability to externalize the costs of such liabilities on to the customers themselves. Although these are sound reasons for employer liability, they do not deny, I believe, recognizing customers' domination and their integration in employment.

This exposes another explanation for the lack of focus on customer domination, which is the law's assumption that the customer is a vulnerable subject. During the second half of the previous century, the consumer protection movement began to develop, leading to the adoption of consumer protection laws. These laws sought to correct injustices that customers had suffered, viewing the consumer as the weaker party in the customer-seller relationship.¹⁷³ Consumer protection justifies regulation to remedy market distortions and to correct misimpressions that products or services possess or yield greater value than they actually do. Hence, such regulation—perceived to be a public interest—aims to protect consumers from externalities, inadequate competition, price gouging, asymmetric information, unequal bargaining power, and various other market failures.¹⁷⁴ This led U.S. agencies to adopt various tools to address the problem, with some arguing that these tools are not sufficient.¹⁷⁵

Theoretical discussions and the law, however, view customers as powerful entities in limited situations. One of these areas is labor and employment. For example, the labor literature has called on customers to boycott companies whose products were made in violation of employees' rights in

third party of customers beyond agency and subcontractor situations. Albin, *supra* note 20.

172. Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 312 (1991).

173. LAUREN KROHN, CONSUMER PROTECTION AND THE LAW: A DICTIONARY 8–13 (1995); Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 663–69 (1977).

174. *Id.*; DAVID L. KASERMAN, GOVERNMENT AND BUSINESS: THE ECONOMICS OF ANTITRUST AND REGULATION 9–15 (1994).

175. See David Adam Friedman, *Reinventing Consumer Protection*, 57 DEPAUL L. REV. 45 (2007); Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENT. & L. 529, 530 (2015); Jane K. Winn, *Is Consumer Protection an Anachronism in the Information Economy?*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 1 (Jane K. Winn ed., 2006).

the Global South.¹⁷⁶ Additionally, in cases of end-users (customers of subcontractor and employment agencies), courts see these end-user customers as liable for the employment rights of the subcontractor and employment agency employees.¹⁷⁷ These situations, however, are marginal in comparison to the consumer protection paradigm. For the sake of clarity, I should emphasize that it is not that customers *cannot* be found liable under current laws. Rather, it is that this path is not typically taken, nor has it been the focus of academic studies. More importantly, there has been insufficient recognition of dominating customers and the impact they can have over employees. This is highly evident in the *Dunn v Wash. County Hospital* court decision, which compares the harassing third party to a Macaw, missing the potential social and economic power of these third parties.¹⁷⁸

C. Emerging Legal Problems

In addition to the weaker protection given to employees under the current legal paradigm that focuses on the employer-employee binary, there are two fundamental legal problems with that paradigm. The first problem is that under the current paradigm, placing responsibility for third-party harassment on employers, without assessing the integration of customers within the work relationship, diverges from the two legal doctrines applicable in sexual harassment cases—those of disparate treatment and disparate impact. As mentioned above, in cases of third-party harassment, including customer harassment, legal responsibility is placed on employers if they knew or should have known about the harassment and failed to take reasonable corrective or preventive action.¹⁷⁹ The courts do not necessarily require a finding that discrimination occurred within the decision-making process of the employer himself; rather, the discrimination can be due to actions taken by the customer.¹⁸⁰ This is, as Zatz argued, a distortion of the disparate treatment doctrine that addresses treatment of a person in a manner, which, but for that person's sex [or other protected class membership], would be different. In third-party cases, courts do not demand that the employer's disparate treatment be established at all; instead, they analyze

176. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

177. This has happened more often when both were in the same country, see discussion *infra* Part V. However, it has also been discussed in regard to the global setting, see Rogers, *supra* note 169.

178. *Dunn v. Washington Cty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

179. See *supra* Part I.

180. Zatz, *supra* note 22, at 1377. However, as discussed above, such requirements have begun to appear in more recent British court decisions. See *supra* pp. 22–26.

whether the third-party harasser acted with discriminatory intent.¹⁸¹ Thus, the customer's behavior is the basis for determining the sexual harassment liability of employers.

The liability of employers for third-party harassment is not the first instance of divergence from the disparate treatment doctrine in relation to harassment. The hostile environment claim and the responsibility of employers for co-worker harassment have been seen as diverging from this theory as well.¹⁸² The legal tests applied in these situations differed from those of cases that have been termed in early feminist literature as *quid pro quo*. However, in comparison to hostile environment or co-worker harassment, under the current paradigm, in third-party harassment employers do not seem to have a link to the harassing customers, because the latter are considered as external to the organization. Zatz has called this "external causation," meaning "a causal connection between an employee's protected class membership and workplace injury, one in which class membership enters the causal chain outside the employer's decisionmaking process."¹⁸³

Yet, as I will discuss below, I believe that once customer domination at work is exposed within the employer-employee-customer triangular, Zatz's theory is open to criticism and the current law becomes clearer. This is because the triangular relationship shows that the causation is internal, meaning that customers are linked to the employer and are integral to the organization. Recognized as such, placing liability on employers in cases of customer harassment is similar to employer liability in situations of co-worker harassment. This makes the *Dunn* case, and particularly its statement that it makes no difference whether the harassment occurs by a human or a non-human¹⁸⁴—on which Zatz rests many of his arguments—

181. Zatz, *supra* note 22, at 1378–79.

182. Aalberts & Seidman, *supra* note 7, at 453–57; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1714–16 (1998); Zatz, *supra* note 22, at 1411. Highly relevant for this discussion is what Zatz writes in note 211, where he says the following:

Whether to characterize harassing supervisory conduct as part of the employer's decisionmaking process is sometimes ambiguous for the reasons so thoughtfully discussed in Justice Souter's *Faragher* opinion. *Faragher v. City of Boca Raton*, 524 U.S. 775, 793–804 (1998). As the doctrine has developed subsequently, however, many lower courts have made the *Faragher/ Ellerth* defense available even when supervisory harassment takes the form of adverse conduct clearly within the scope of supervisors' duties, such as decisions about suspensions, task assignment, and transfers. *See, e.g., Roebuck v. Washington*, 408 F.3d 790, 793–94 (D.C. Cir. 2005).

Zatz, *supra* note 22, at n. 211.

183. Zatz, *supra* note 22, at 1389.

184. *Dunn v. Washington Cty. Hospital*, 429 F.3d 689, 691 (7th Cir. 2005).

problematic. If one recognizes customer domination, then the question of whether harassment occurs by a human or a non-human makes a significant difference for determining if this is internal or external causation. Also, in recognizing the employer-employee-customer triangular, the internalization of customers becomes more evident. Once internal, the analysis regarding the employer's legal liability changes, as does the analysis regarding customer responsibility. In other words, seeing the causation as internal might justify requiring the employer to take more significant steps than he is currently expected to under the reasonable accommodation test to address customer harassment. It also justifies placing specific and rigid liability on the customer himself.

The second fundamental problem with the prevailing paradigm is that the focus on the employer-employee binary obstructs a clear understanding of the domination of third parties in work relationships in today's societies, especially when the third party is a customer or client. In other words, the focus on the employer obstructs our understanding of *customer domination*. Although the facts in the case law describe customer domination, these facts serve as background to assessing employer causality and thus liability. In this way, the dominating customer is being marginalized within the legal discourse. For example, in *Llewellyn v. Celanese Corp.*, a woman truck driver was harassed by her co-workers, as well as by a male supervisor in the customer's plant who touched the truck driver's breasts.¹⁸⁵ When the truck driver reported this to her own supervisor, his answer was that the "customer is always right."¹⁸⁶ The court focused on the acts of the truck driver's co-workers and supervisors with minimal attention to the harassment incident itself and the behavior of the customer. It also did not address the way in which the statement that "the customer is always right" builds customer domination. Further, in EEOC Decision No. 84-3,¹⁸⁷ four male customers in a restaurant sexually harassed a waitress, making vulgar comments and trying to touch her. The waitress reported the incident to the restaurant owner. The entire discussion by the EEOC centered on whether the employer knew or should have known about the conduct and whether he took immediate and appropriate corrective action. The EEOC also considered the extent of the employer's control and any other legal responsibility that the employer might have towards the harassing customers.¹⁸⁸ However, the customers' conduct served only as a background to assess the employer's behavior. Additionally, in the case of *Little* discussed above, the focus of the court was on the employer's lack of action, without seriously addressing the

185. *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 371-72 (W.D.N.C. 1988).

186. *Llewellyn*, 693 F. Supp. at 372.

187. EEOC Decision No. 84-3, 34 Fair Empl. Prac. Cas. (BNA) 1887 (1984).

188. *Id.* at 4-6.

customer's actions. In all these cases, the domination of customers is highly evident but only marginally discussed, and the role of employers in shaping the power of customers through various practices is ignored as well. It is time, I believe, to place both at the center of our attention.

IV. CUSTOMER DOMINATION AT WORK

It is of extreme interest that literature in the field of sexual harassment by third parties adopted, almost without any hesitation, the prevailing paradigm of the employer-employee binary. Even though some recognition has been made of the role of employers in shaping customers' power, this was not based on a full appreciation of how customer domination is built. Vaughn wrote in 2002 that more should be demanded from employers because they "are not the helpless entities that courts seem to make them out to be."¹⁸⁹ Additionally, McGinley, who has acknowledged some aspects of what I include in the notion of customer domination (*i.e.*, masculinity), argued that more severe liability should apply to employers in sexualized industries.¹⁹⁰ This has been the approach of others as well.¹⁹¹ Although I agree that employers should bear stricter liability in some cases of customer harassment, I argue that this is not bound only to sexualized industries, and that such liability should be applied alongside the placing of liability on customers under an alternative paradigm that I propose. This alternative paradigm is what I term *customer domination at work*.

The notion of *customer domination at work* acknowledges that customers have become key players within the work domain and have integrated into the employment relationship. Moreover, it stresses that their domination does *work*, *i.e.* it is effective and not theoretical, with numerous employees reporting sexual harassment by customers. At times, customer domination is shaped by employers, but it is maintained by both parties while customers exploit their power in harassing employees. The discussion points to three aspects of customer domination: masculinity, authority, and service-market power.

189. Vaughn, *supra* note 5, at 85.

190. McGinley, *Sex(y) Workers*, *supra* note 43, at 90–92.

191. See Schoenbaum, *supra* note 20, at 1237–40; Jamie C. Chanin, *What Is It Good For? Absolutely Nothing: Eliminating Disparate Treatment of Third Party Sexual Harassment and All Other Forms of Third Party Harassment*, 33 PEPP. L. REV. 385, 417–20 (2006) (supporting the view that employers should be liable for third-party harassment, arguing that it should extend beyond sexual harassment to other forms of harassment).

A. Masculinity

The legal development that eventually led to the placement of liability on employers regarding sexual harassment in the workplace was based on a view of sexual harassment as a form of sex discrimination. Such a position resulted from years of feminist activism that, at some point, began focusing quite intensively on sexualized actions against women.¹⁹² Around the mid-1970s and the 1980s, feminists were unified in holding men accountable for intimate violations that, until that point, had been seen as part of private sphere activity. They argued, instead, that sexual harassment was a public issue and a discriminatory action against women.¹⁹³ In her work *Sexual Harassment of Working Women*, Catharine MacKinnon grounded this perception of sexual harassment within legal thought, arguing that harassment is problematic because sexual relations are the primary mechanism of preserving male domination and women's subordination at work.¹⁹⁴ MacKinnon established how the intimate violation of women by men is "contained by internalized and structural forms of power,"¹⁹⁵ stressing the interconnection among sexual harassment, workplace discrimination, and the economic rights of women, and also showing how this interrelationship often results in degrading working conditions for women.¹⁹⁶ She showed how the use of power that is gained in one social sphere is applied to another, creating a dynamic that enables the harasser to receive benefits.¹⁹⁷ The major dynamic she refers to derives from two inequalities: male sexual domination and the employment relationship.¹⁹⁸ In this way, the demand for sexual favors can be a condition for hiring, promotion, other economic advantages, and keeping one's job. On the basis of MacKinnon's study, courts have recognized

192. Schultz discusses the history of the sexuality paradigm regarding harassment, stressing that the focus on sexuality was preceded by a debate within radical feminist thought on sexuality (some claiming it was "redeemable" while "others argued it was intrinsically dominated by men") and on men's motivations (some claimed men "defend[ed] their power in order to obtain services [including sex] from women," while others argued that the services required were intended "to affirm their sense of power"). Schultz, *supra* note 182, at 1698 (quoting Ellen Willis, *Radical Feminism and Feminist Radicalism*, in *NO MORE NICE GIRLS: COUNTERCULTURAL ESSAYS* 117, 133 (1992)).

193. See JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 255–56 (1985); Schultz, *supra* note 182, at 1700–01.

194. See generally CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (Yale Univ. Press 1979), Introduction.

195. *Id.* at 1.

196. *Id.* at 40–47.

197. *Id.*

198. *Id.* at 2.

sexual harassment as a form of discrimination in both *quid pro quo* and hostile environment situations.¹⁹⁹

The theory of *why* there is sexual harassment has developed over years of study, turning away from MacKinnon's earlier work, which conceptualized the wrong of sexual harassment as the institutionalization of women's subordination, to other theories.²⁰⁰ However, the argument that there is also a sex-based dynamic within the workplace continues to be dominant within research.²⁰¹ This dynamic is highly prominent in service occupations, where women are required to be sexually pleasing for male customers, a situation that McGinley has called "sexualized environments."²⁰² In her study, McGinley argued that these environments work to sustain the masculinity of customers. "Masculinity comprises both a structure that reinforces the superiority of men over women and a series of practices, associated with masculine behavior, performed by men or women that maintain men's superior position over women at work."²⁰³ Employees' bodies and behaviors serve to further this goal. Studies have also shown that waitresses see sex as part of

199. MacKinnon defines *quid pro quo* as conduct where sexual compliance is exchanged or proposed to be exchanged for an employment opportunity, and a hostile environment as a situation in which sexual harassment "simply makes the work environment unbearable." *Id.* at 32, 40. In her earlier work MacKinnon did not use the term hostile environment, but rather the term "condition of work" harassment. The EEOC adopted in its 1980 definition of sexual harassment both these concepts as a violation of Title VII. Section 1604.11(a) of the Code of Federal Regulations codified it later as well. See *supra* discussion, at 7.

200. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1169–70 (1997). Abrams discusses in that article the works of Anita Bernstein, *Treating Sexual Harassment with Respect*, III HARV. L. REV. 446 (1997); and Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691–772 (1997). Bernstein argued in her work that the reasonableness standard used for assessing sexual harassment in the workplace should be replaced with the term respect, which leads to seeing all human beings as having "respect warranting traits." These traits impose three duties on others, to refrain from: (1) treating another person only as means of achieving one's ends; (2) humiliating another person; and (3) denying the personhood and self-conception of another person. Bernstein, *supra*, at 482–92. Franke argues that sexual harassment is a form of sex discrimination because it embodies fundamental gendered stereotypes of men and women, inscribing, enforcing and policing the identities of both harasser and victim according to a system of gendered norms. In this way it is an act of subordination. According to Franke, the arguments at that time on sexual harassment failed because they explained why sexual harassment differentiates women without explaining why sexual harassment discriminates against women. She therefore argues for a theory that focuses on the creation of gendered bodies—feminine women and masculine men—turning women into objects. Franke, *supra*, at 693, 762.

201. Abrams, *supra* note 200, at 1205.

202. McGinley *Harassing Girls*, *supra* note 43, at 1229–30.

203. *Id.* at 1230 (footnote omitted).

their jobs, or as linked to “the territory of being a waitress[,]”²⁰⁴ as do room attendants and others. Sexualized work environments harm, therefore, not only the individual woman but also women generally, for these environments reflect and perpetuate gendered norms.²⁰⁵ Customer masculinity is shaped in these sexualized work environments backed by employers, who organize their businesses in this way, justifying employer liability. But, alongside such backing, it is customers themselves who use their masculinity to harass the employees, maintaining the superiority of men over women.

It is not only within sexualized environments that customer masculinity is present and enforced through sexual harassment of employees. Masculinity is found in many other occupations as well, including in white-collar occupations, as we have learned from the studies of customers harassing lawyers and accountants.²⁰⁶ Male customers believe that women employees should smile and dress in a feminine manner, creating what has been termed in the literature as “institutionalized sexism,” which is based on presumed gender roles and therefore re-inscribes masculinity and femininity. Institutionalized sexism, present in sexualized work environments, contributes to gender inequality in the workplace, and in society more generally.²⁰⁷

Customer harassment of employees is broader than sexual behavior alone, and includes, as McGinley argued, practices that enforce masculine behavior.²⁰⁸ Customer behavior in encounters with female employees works to maintain the customers’ superiority within the business, service, or society at large. This is particularly true given the two aspects of their superiority that will be discussed further below: authority and service market power. As Vicki Schultz argued, the most prevalent forms of harassment at work are activities “that are designed to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority,” which go beyond male-female sexuality.²⁰⁹ This is what she calls the competence-centered paradigm, which understands harassment “as a means to reclaim favored lines of work and work competence as masculine-identified turf—in the face of a threat posed by the presence of women (or lesser

204. Lisa Huebner, *It Is Part of the Job: Waitresses and Nurses Define Sexual Harassment*, 24 SOC. VIEWPOINTS 75, 80 (2008). Similarly, Matulewicz’s article begins with the following quote from an interview she held with “Amanda,” a server and bartender in one of the restaurants: “When you go into this industry you generally know that it is definitely going to be part of your job description, that you’re gonna get hit on.” Matulewicz, *supra* note 12, at 402.

205. This allies with Franke’s theory. See Franke, *supra* note 200.

206. See *supra* notes 10 and 14.

207. ZIPPEL, *supra* note 24, at 15.

208. McGinley *Harassing Girls*, *supra* note 43, at 1230.

209. Schultz, *supra* note 182, at 1686–87.

men) who seek to claim these prerogatives as their own.”²¹⁰ Instead of sexuality, this paradigm focuses on the link between a hostile work environment and job segregation by sex. It has been shown that the segregation of women at work is not only maintained by employers and co-workers but also by male customers.²¹¹ Employers, co-workers, and customers jointly create a hostile work environment, maintaining job segregation by sex simultaneously undermining women’s competence at work.

B. Authority

Authoritative theories have also been proposed to explain the liability placed on employers regarding sex in the workplace. These theories posit the abuse of authority as a more sound explanation for employer liability than masculinity alone. Galia Schneebaum explains that criminal sex offenses in authoritative relations “share a common element: they all proscribe sexual contact within a certain type of social relationship in which one side holds a position of power over the other. . . .”²¹² According to Schneebaum, it is not liberal conceptions of sexual autonomy²¹³ or feminist domination theories²¹⁴ that explain the decision to see such a behavior as an offense; rather, it is the recognition that the abuse of authority is at the core of this behavior. The abuse of authority is achieved when bureaucratic power extends into personal relationships.²¹⁵ Title VII can also be read as recognizing the abuse of authority by employers. Employer liability for sexual harassment in hostile environment situations, as well as co-worker harassment and third-party harassment, reflects a focus on the authority employers have over their em-

210. *Id.* at 1755.

211. This is particularly true in regard to occupations that build on women’s sexuality, but also in other workplaces where the effects of sexual harassment by customers are similar to those of employer and co-worker harassment. *See Vaughn, supra* note 5, at 5–20.

212. Galia Schneebaum, *What is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345, 347 (2016).

213. According to the liberal conception, sexual autonomy is the underlying value, and thus consent is needed in sexual relations. Non-consent thus becomes the focus of legal sexual doctrines. The liberal development enabled the detachment of sexual offenses from the application of physical force and coercion. According to this theory, because the balance of power in authority relations may be the reason that subordinates agree to unwanted sexual acts made by a superior, autonomy is infringed upon. *See id.*

214. Gender theories see the existence of masculinity as raising doubts as to whether there was true consent to sex, even when physical force or threats were not used. The relationship is explained by terms such as “power dependency relations” or “disparate power relations,” leading to a focus on one party’s power over another, with the relationship having, as Schneebaum notes, “a hierarchical nature.” *Id.* at 364–65.

215. *Id.* at 349.

ployees. While the law has indeed recognized a few situations of authoritative domination, as in medical treatment and therapy and in education,²¹⁶ it has yet to do so in the context of relations with customers. In this section, I argue that customers deploy such authority and that their authoritative power is similar to the authoritative power of employers.

Authority, as the literature on the subject teaches us, is a social power that can be used to direct, instruct, and guide others on the basis of perceived legitimacy.²¹⁷ Authoritative power not only operates within social relations but also is created by society and gains its validity and acceptance through social norms.²¹⁸ Hence, it relies on “a hierarchical order of command and obedience and on a common belief in the legitimacy of that order. . . .”²¹⁹ Hugh Collins wrote that the legitimate authority of employers over employees is not only built through an employment contract but is also established by organizational norms that create a workplace hierarchy.²²⁰ An employee joins a bureaucratic organization and is then allocated to a particular role, which is defined by the rules of the institution. “These bureaucratic rules create a hierarchy of ranks rising from the manual worker on the shop floor to the highest echelons of management. Having been assigned his role, the employee then finds himself in a relation of subordination with those above him in the system of ranks. . . .”²²¹ Mark Freedland and Paul Davies have described these authoritative relations within employment, where the elementary phenomenon of social power includes “command and obedience, rule making, decision making, and subordination. . . .”²²²

As noted above, most employment law literature has focused on the social norms that provide an employer with authority. Yet, social science studies teach us that current social norms of services and consumerism have led to the integration of customers within the business, providing them with authority over the employees of that business.²²³ The authoritative power of customers is embedded in the legitimacy of the hierarchical order that places them in a position of power, with customers’ authoritative power also grounded in the characteristics and culture of our current consumer-led service economy.

216. *Id.* at 350–51, 353–54.

217. See ANTHONY KRONMAN, *MAX WEBER* 38–39 (William Twining, ed. 1983).

218. Schneebaum, *supra* note 212, at 368.

219. *Id.* at 369.

220. Hugh Collins, *Market Power, Bureaucratic Power and the Contract of Employment*, 15 *INDUS. L. J.* 1, 1–2 (1986).

221. *Id.* at 1.

222. PAUL DAVIES & MARK FREEDLAND, *KAHN-FREUND’S LABOR AND THE LAW* 14 (1983).

223. Fuller and Smith, *supra* note 3, at 10–11.

Indeed, in the past few centuries, services have become central in the economies of most Western countries.²²⁴ According to Bryson, Daniels, and Warf, in services there is “a direct, even dialectical, relationship between service production and consumption[,]”²²⁵ and these activities continually take place simultaneously.²²⁶ Hence, any attempt to isolate production and consumption in today’s world is pointless, or in their words, “it is too much of an over-simplification of the economic.”²²⁷ They coined the term “Service Worlds” in “an attempt to highlight the importance of service activities as an integral part of the production process, tangible or intangible. . . .”²²⁸ In these economies, customers become integrated within the organization, creating what has been termed in the literature as “a worker-employer-customer triangle,” consisting of employers, employees and customers.²²⁹ The mixed interests of the three parties shape power relations in a variety of work relationships, providing power to customers.²³⁰ The authoritative power of customers is based on the perception that the customer is always right and that service should be given with a smile. This power extends further, however, when customers perform employment functions, such as determining the salary of employees (through the provision of tips or other types of benefits), affecting hiring and firing decisions when deciding to compliment or complain about an employee, and affecting the organization of work by creating specific requirements, like the quality of work expected from lawyers, accountants and others, or the specific service the customer expects to receive. These actions conform to the definition of authoritative power described above.

Many cases have shown that customer’s authoritative power has affected women’s careers. Consider, as an example, the case of *Reynolds v. Atlantic City Convention Center*.²³¹ The case included allegations of various actions constituting a hostile environment, including the removal of female electricians from the floor of the convention center during the Miss America Pageant—due to customers’ complaints—and replacing them with men.²³² The day after the pageant, the female employees were fired.²³³ Another example of customer control of a work environment is found in *Magnuson v.*

224. See ORG. FOR ECON. COOP. & DEV., *supra* note 1 and accompanying text.

225. BRYSON ET AL., *supra* note 20, at 4.

226. *Id.*

227. *Id.*

228. *Id.* at 3.

229. LEIDNER, *supra* note 2, at 174; Albin, *supra* note 2, at 3.

230. LEIDNER, *supra* note 2, at 127–28.

231. *Reynolds v. Atl. City Convention Ctr.*, Civ. A. No. 88-4232, 1990 WL 267417 (D.N.J. May 26, 1990), *aff’d* 925 F.2d 419 (3d Cir. 1991).

232. *Id.* at *5.

233. *Id.*

Peak Technical Services, Inc.,²³⁴ where a customer responded to an employee's refusal of his sexual advances by threatening her career, saying that he "could make or break [her] career" based on his reports to her employer.²³⁵ As this Article has shown, employers have repeatedly asked women to tolerate harassment as part of the business, or because complaining could lead to the loss of an important customer.²³⁶ This reflects the integration of customers into the hierarchy of organizations, which gives customers the authoritative power to manage the work done within those organizations.

The authoritative power of customers makes it easier for them to sexually harass employees. In their work on the harassment of attorneys by customers, Honigsberg, Tham, and Alexander noted that the power imbalance between customers and workers is no less significant than the imbalance of power between employers and employees, or co-workers and employees. In their words, "[w]hen a client actually possesses or appears to possess the power to influence the terms of an attorney's employment, the client wields similar power [to an employer]. . . ."²³⁷ In that study, the authors mention that in cases of customer harassment, the employee may fear complaints against her by the harassers, which could affect her status or job; she may fear that failure to comply with the sexual demands of the customer might result in revenge against the employer, which could be used against the employee herself; and finally, she may fear that her employer will not take action against the harasser.²³⁸ Additionally, in a study on female workers in the sales sector, women noted they feel that sexual harassment is more about power than sex, with men communicating to them "[y]ou're lower than I am and I can do this to you. . . ."²³⁹ Companies that rely on customer sales may emphasize the demands of customer service as reason for sexual harassment, but this also depends on the specific policies, practices, and procedures of the organization, some of which require more tolerance of customers from their workers, and others less. Gender exacerbates authority, as do race and class differences, with studies showing that women from racial minorities experience more incidents of sexual harassment in

234. *Magnuson v. Peak Tech. Servs. Inc.*, 808 F. Supp. 500 (E.D. Va. 1992). For the facts and decision of this case, see *infra* at 155.

235. *Magnuson*, 808 F. Supp. at 505.

236. See *Magnuson*, 808 F. Supp. at 506; *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968–69 (9th Cir. 2002); *Go Kidz Go Ltd. v. Bourdouane*, EAT/1110/95 (1996). See also *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998).

237. Honigsberg et al., *supra* note 10, at 728–29.

238. *Id.* at 732.

239. Loraine Anderson, *Abuse From Another Corner*, DETROIT FREE PRESS, May 26, 1982, at 1E-2E, in Vaughn, *supra* note 5, at 13.

comparison to white women,²⁴⁰ and that women in low-wage occupations, such as hotel maids and waitresses, experience extensive sexual harassment.²⁴¹

C. Service Market Power

The authoritative power of customers stemming from bureaucratic power cannot be understood in isolation from service market power. When Collins pointed to bureaucratic power as relevant to an understanding of employee subordination, he noted that this power is parallel to market power, which has been cited by Marx as the engine that subordinates the working class.²⁴² “Market power is the product of ownership of resources, the potential transaction costs of utilising those resources, the costs of inaction, and constraints established by prior commitments.”²⁴³ An employee’s subordination is therefore understood on the basis of both market and authoritative power, and both are highly relevant for understanding the legal liability placed on employers regarding sexual harassment. In this sub-section, I discuss the service market power of customers, which is a fundamental part of their domination.

Both consumption and production play key roles in service economies. Bryson, Daniels and Warf stress this point, arguing that consumption and production cannot be separated.²⁴⁴ Seen in this way, customers’ consumption becomes highly entwined within the process of work. This entwinement, in turn, opens up a fuller understanding of the service market power of customers, which is based on their consumption. A fundamental aspect of the ability to consume—and the market’s reliance on such consumption—is customers’ ownership of resources. Similar to the centrality of market power in the understanding of employment relationships,²⁴⁵ and to the theory of sexual harassment at work,²⁴⁶ customers’ service market power,

240. Gettman & Gelfand, *supra* note 8, at 763, 766. See also *supra* note 17 and accompanying text.

241. Gettman & Gelfand, *supra* note 8, at 763. See also *supra* notes 12 and 16.

242. Collins, *supra* note 220, at 2.

243. *Id.*

244. See discussion *supra* p. 145.

245. See generally GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW, 34–54 (Oxford Univ. Press 2016); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L. J. 357, 364 (2002).

246. Many feminist theories focus on forms of market power to discuss the placing of liability on employers regarding sexual harassment at work. A central example is MacKinnon’s work where she stresses that the major dynamic explaining sexual harassment at work includes the reciprocal enforcement of two inequalities: male sexual domination and the employer’s control over workers. See *supra* discussion at 140–41.

understood through their role as consumers, is crucially relevant for understanding customer domination. As owners of capital (whether small capital, as when purchasing burgers at McDonalds, or huge capital), customers can buy services and are thus perceived as assets to the employer and to the business. Statistics show that service businesses lose approximately 10% of their annual business volume because of inadequate service;²⁴⁷ this gives customers immense power, and businesses will do almost anything to maintain their relations with customers. Stories have been reported in which employees' complaints against customers led those customers to take their business elsewhere,²⁴⁸ while employers sought ways to avoid losing them.

Since service businesses are dependent on customers, employees must toil to serve them. Countless stories tell of employees dismissed for failing to serve their customers well. Carol Powell was dismissed for being rude to a customer, even though her rudeness was a response to sexual harassment and happened after three previous incidents of harassment had been reported to her supervisors.²⁴⁹ The case of *Little* had the same outcome,²⁵⁰ as did that of *Go Kidz Go*.²⁵¹ McGinley noted in her research that employees perceive Hard Rock's attitude towards the sexual harassment of their employees to be "[i]f the employee can't take it, there are applicants waiting in line to deal at the Hard Rock."²⁵² Hard Rock's former employees "perceive[d] that the Hard Rock places its customer's comfort over that of its employees."²⁵³ In the study of attorney harassment by customers, it was found that "the attorney who is an employee may, when sexually harassed, be more concerned about losing her job than the third-party client is concerned about losing representation by the firm."²⁵⁴

Acceptance of the centrality of customers to business—due to their market power—is, I believe, one of the reasons why the law does not require employers to revoke business relations with customers who have harassed employees, or even to reprimand valued customers. Reliance on these cus-

247. Cliff Barbee & Valerie Bott, *Customer Treatment as a Mirror of Employee Treatment*, 56 S.A.M. ADVANCED MGMT. J. 27, 27 (1991).

248. See, e.g., Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 292 (2003) (describing a story of garment workers in the New York area who turned to two workers' centers to recover wages owed to them by their employer). The manufacturer, here the customer, responded harshly and took his business to another factory. *Id.* The plant closed, leaving seventy workers unemployed. See *id.*

249. Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1025 (D. Nev. 1992).

250. Little v. Windermere Relocation, Inc., 301 F.3d 958, 968 (9th Cir. 2002).

251. Go Kidz Go Ltd. v. Bourdouane, EAT/1110/95 (1996).

252. McGinley, *Harassing Girls*, *supra* note 43, at 1236.

253. *Id.*

254. Honigsberg, *supra* note 10, at 728.

tomers shapes service practices and norms, such as the requirement that employees provide service with a smile and fulfill customers' demands, as discussed above. Another case of the service market domination of customers appears in *Lockard v. Pizza Hut, Inc.*,²⁵⁵ where returning customers, who later sexually harassed an employee named Rena Lockard, entered the restaurant. None of the servers wanted to wait on them due to their previous bad behavior.²⁵⁶ Rena was asked to serve the customers.²⁵⁷ One of the customers commented that she smelled good and asked what type of perfume she was wearing.²⁵⁸ She responded that it was none of his business, and the customer grabbed her by the hair.²⁵⁹ Rena reported this to her supervisor, who replied "You wait on them. You were hired to be a waitress."²⁶⁰ When she continued serving, the customer grabbed her breasts and put his mouth on them.²⁶¹ Rena's experiences emphasize the service market power of customers.

A central service practice that reveals the service market power of customers is the provision of tips. Tips are capital that customers control, and employees need these tips for income, which leads them to act in ways that preserve the service market power of customers, including their masculinity and authority. In her study of restaurant workers, Kaitlyn Matulewicz demonstrates how tip policy fuels a relationship of unequal power that leaves workers vulnerable to sexual harassment and sexualized interactions with customers "as the price to be paid for a tip,"²⁶² something that constitutes, in her words, "a form of institutionalized quid pro quo."²⁶³ Amanda, one of Matulewicz's interviewees, is quoted as follows: "it doesn't necessarily mean that you're okay with it. I'm okay with it, to a degree. I allow it to happen because I—because of the money. It'd be nice to make that much money without being treated like that. No one wants to be treated like that."²⁶⁴ Such reliance on tips is also part of the general precariousness of the service sector, which includes shift durations, employee schedules, and income insecurity.²⁶⁵ Hence, Matulewicz shows how work is organized "in a way that constrains worker resistance to unwanted sexual attention and sexual harassment, shaping an environment in which, over time, sexual conduct can

255. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998).

256. *Lockard*, 162 F. 3d at 1067.

257. *Lockard*, 162 F. 3d at 1067.

258. *Lockard*, 162 F.3d at 1067.

259. *Lockard*, 162 F.3d at 1067.

260. *Lockard*, 162 F.3d at 1067.

261. *Lockard*, 162 F.3d at 1067.

262. Matulewicz, *supra* note 12, at 403.

263. *Id.*

264. *Id.* at 402.

265. *Id.* at 403.

come to be thought of by women workers as a ‘normal’ and sometimes an accepted feature of the work.”²⁶⁶

Elsewhere I have written:

Tip provision has two aspects. It is an act of generosity on the part of the customer, but at the same time it constitutes a distribution of employing functions to the customer. The clearest employing function is the payment for the work performed, but tip provision impacts work relations in more subtle ways. As soon as customers contribute to the worker’s earnings, they become involved in the management of the employment relationship. Workers adopt specific behaviors to please customers and fulfil their wishes, not only for the benefit of the establishment owner but also in the hope that, by responding to customer wishes, their earnings will rise, a good word will be said to the employer, etc. Once a worker is more dependent on a third party for earnings, she becomes less loyal to her employer and more biased towards the paying customer.²⁶⁷

Certainly, tipping is a source of customer power, which has been discussed at length in relation to other occupations apart from workers in restaurants. In the lap-dance sector, for example, tips have been shown to be a reason that dancers perform certain acts.

Acts such as approaching clients, humoring them and making them feel special have been documented as an essential part of the work that keeps the money flowing. The method of payment in the clubs also motivates dancers to increase their interaction with clients in order to raise their pay. Once they have been remunerated by one client they turn to another in the hope of fulfilling his fantasy and opening his pocket.²⁶⁸

Because of their role in customers’ consumption, employees become part of the service. The height, weight, looks, and attitudes of employees have become part of the exchange, “as well as part of the reason why some of them get hired and others do not. . . .”²⁶⁹ These decisions are made on

266. *Id.* at 403–04.

267. Albin, *supra* note 2, at 183–84.

268. Einat Albin, *The Case of Quashie: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work*, 42 *INDUS. L.J.* 180, 185 (2013).

269. LINDA MCDOWELL, *WORKING BODIES: INTERACTIVE SERVICE EMPLOYMENT AND WORKPLACE IDENTITIES* 9 (2009).

the basis of customers' service market power and the wish to fulfill their demands, which are based on stereotypes of what the employee should look like and provide, as well as on expectations of the particular service. Obviously, efforts to appeal to customers increase the probability of customer sexual harassment. As the preceding analysis has shown, in cases of sexual harassment by customers where dress codes and behaviors were sexualized, employers were found to have constructed a hostile environment and were held liable. However, the customers—who are fundamental elements of this service market economy—are ignored. Their dominating power is not acknowledged.

D. A Triangular Relationship

In all three aspects of customer domination at work, the internalized and structural forms are intertwined and cannot be understood without each other or without understanding the relationship as triangular. Masculinity, authority and service-market power affect and exacerbate each other, providing customers with significant power over employees. Additionally, the power of customers, which parallels that of the employer, cannot be understood outside of what has been termed in the literature as the employer-employee-customer triangular relationship. This triangular relationship shapes the power dynamic among the three parties. In some circumstances, it points to the employer's construction of the work environment in a way that provides power to the customer. An excellent example of this is McGinley's study, which showed that by promoting a business on the basis of a sexual image, employees are more exposed to sexual harassment by customers;²⁷⁰ the image of the business is something that can be controlled by the employer. Indeed, when determining and controlling the structure of the workplace in a way that constructs customer domination, employers should be required to provide more protection to their women employees, as McGinley argued.²⁷¹ But this is not only in sexualized industries. As the discussion above reveals, such power can be constructed by employers' transfer of their employer functions to customers, like hiring and firing decisions and the payment of tips. Employers provide customers with power through this payment method. In these circumstances, as well, employers should be seen as more responsible to their women employees.

As the discussion above has also shown, customers benefit from the power within the triangular relationship and exploit it. It provides them with a sense of control over employees. Also, it seems as if the customer allows himself to harass the employee because she is within a subordinated

270. McGinley *Harassing Girls*, *supra* note 43, at 1233.

271. McGinley, *Sex(y) Workers*, *supra* note 43, at 90–92.

employment relationship with her employer, a situation that provides him with an even greater dominating power over her. In contrast, when a worker is self-employed, she can decide to end a relationship with a customer without considering what her employer might think or do. Therefore, it is the triangular relationship that increases customer domination at work, and through it such domination can be better understood.

If one accepts the argument of the triangular relationship, then the view of the customer as an external party is blurred. He is indeed external according to the prevailing conception of the employment relationship, but, in fact, his customer domination is built upon a triangular relationship that brings him within the internal circle of the organization, albeit in a different manner than supervisors or co-workers. It is important to recognize this internal position of the customer if we want to think about a more appropriate approach to liability when customer domination is found—both with respect to the employer and to the customer.

V. THE WAY FORWARD

Current legal frameworks do not comprehend customer domination at work. This is not only problematic for the various reasons discussed above, it also sustains the continuation of harm. From a feminist perspective, it maintains stereotypes of women as sexual objects, enables the preservation and even strengthening of structures leading to women's economic disadvantages, permits physical and psychological personal injury to women, supports sexual segregation in the workplace,²⁷² and causes other related harms as described in feminist literature. Moreover, the prevailing paradigm, which places liability on the employer for third-party harassment, does not fit the true and actual experience of sexual harassment into a legal framework, resulting in the perpetuation and escalation of silence and harm. This is particularly true of the way the "reasonable accommodation" test is applied by the courts, through the accommodation of the victim (the employee) and not the harasser, thus intensifying stereotypes and economic disadvantages, and even legitimizing the act of harassment because no similar harm is expected to affect the customer.

One way to address the situation discussed above is to require employers to be more responsible towards their women employees. When considering the role of employers in shaping customer domination at work, employers should be required to shape their business in a way that limits customer domination, and to take stricter steps against their customers in

272. Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1169–70, 1967–80 (1995).

retaliation for harassment, including ceasing business with them. Ending business with the customer is more in line with the purpose of Title VII as well as the doctrine of anti-discrimination. In some circumstances, ending business is highly justified. Further, customer domination at work justifies, I believe, broadening the scope of application to customers alongside employer liability. In this part of the Article, I offer two ways in which steps can be taken to assign specific and rigid liability to customers. The first is by placing specific responsibilities on dominating customers. The second is by adopting a broad definition of “employer” that includes customers, using the doctrine of joint employment.²⁷³

Title VII places liability on entities other than the employer for promoting equality at work. These include employment agencies and labor organizations.²⁷⁴ Amending Title VII to include customers is desirable, I believe, for dealing with customer domination at work. An additional way of placing specific responsibilities on dominating customers is through state law. Under some state laws, customers can be found to have tort or criminal liability for the consequences of their sexual harassment. However, thus far, there has been no recognition of customer domination at the state level, because most state laws follow Title VII, which does not currently include customers as potential liable entities. Once amendments are made as proposed above, state laws might adopt a similar approach.

Placing specific obligations on dominating customers has various advantages. First, the main advantage is the recognition of the customer-employee relationship and of the possibility of customer domination over employees within that relationship. Second, by placing liability under Title VII and under state laws in parallel to employer liability, the employer is not removed from the situation, and the responsibility of the customer can be assessed in relation to that of the employer, thereby not distancing the analysis from the triangular relationship. This will enable recognition of the triangular relationship within which two parties create a setting that enables the sexual harassment of employees. Jointly, and in a dynamic way, the two parties shape a setting in which the employee becomes more vulnerable to sexual harassment, and they also preserve their domination over her. Under this proposal, both employer and customer are viewed as liable for workplace harassment, and the courts can assess the power of both within the

273. This was previously suggested by David S. Warner, who offered this direction in situations that he called “client-control,” *i.e.* when the employee was not working on the grounds of the employer but rather on those of the customer, very much like the case of *Magnuson*. See David S. Warner, *Third Party Sexual Harassment in the Workplace: An Examination of Client Control*, 12 HOFSTRA LAB. L. J. 361, 371–73 (1995).

274. 42 U.S.C. § 2000e-2(b), (c) (Westlaw through Pub. L. No. 115-45).

triangular relationship in any particular case. In some instances it might lead to placing more severe liability on employers, in other cases, on customers, and at times on both, depending on the circumstances.

Third, placing obligations on dominating customers within a framework that considers all three parties will enable the courts, the legislatures, the EEOC, and others to deal with the shortcomings of the prevailing paradigm. These shortcomings include the placing of limited liability on employers, and the resulting legal problems—distortion from the theory of equality, and the clearer understanding needed of the domination of customers in work relationships. By seeing customers as integral to the work relationship, employer liability will be viewed through a lens of “internal causation” and will be stricter. In the same way, customer liability will be assessed. Fourth, as opposed to the option of joint employment discussed below, acknowledging customer domination enables the placing of responsibility on individual customers who harass employees; it also places responsibility on large firms, which can be seen as having vicarious liability when their employees commit harassment.

In some circumstances, however, it might be useful to see customers as employers under Title VII, when the legal tests point to them as such. This is mainly applicable when there is close proximity between the customer and the employee, and the customer is indeed very much like an employer and therefore should not necessarily be distinguished. This is what happened in the case of *Magnuson v. Peak Technical Services, Inc.*,²⁷⁵ where the Virginia District Court argued that the term “employer” in Title VII should be interpreted broadly to also include situations of joint employment. In the case, Rebecca Magnuson worked as a sales trainer for Lexus Motorcars and as a consultant for Mercedes-Benz. She was hired and trained by Volkswagen, but her salary came from a company called Peak. Peak provided employees to client corporations pursuant to service contracts.²⁷⁶ At some point, Rebecca began working at a new assigned dealership, Fairfax Volkswagen. After a period of time, the general manager at Fairfax began sexually harassing her—meeting her in his office with the door closed, putting his hand on her legs, and trying to pull her towards him, while also commenting on her body.²⁷⁷ He also asked her several times to leave work early and check into a hotel room with him.²⁷⁸ Upon her refusal, he aimed to sabotage her career, saying that he could provide either a favorable or a bad report to her employer.²⁷⁹ Rebecca complained to her supervisors at Peak

275. *Magnuson v. Peak Tech. Servs., Inc.*, 808 F. Supp. 500, 509 (E.D. Va. 1992).

276. *Magnuson*, 808 F. Supp. at 504.

277. *Magnuson*, 808 F. Supp. at 505.

278. *Magnuson*, 808 F. Supp. at 505.

279. *Magnuson*, 808 F. Supp. at 505.

and at Volkswagen, asking to be assigned to another dealership. Her supervisor told her she should “put up with it for the sake of Volkswagen.”²⁸⁰ She was also told that this kind of harassment was normal given the male-dominated nature of the auto industry. The harassment continued, and after another refusal, Rebecca was called to her supervisor’s office who told her that she no longer fit Volkswagen’s profile.²⁸¹

Upon discussion, the District Court said that in drafting the legislation, “Congress left open the possibility that Title VII might apply beyond the conventional single employer situation.”²⁸² “[T]he term ‘employer’ under Title VII should be constructed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspects of an individual’s compensation, terms, conditions or privileges of employment.”²⁸³ Moreover, the court’s “conclusion finds support in the broad, remedial purpose of Title VII which militates against the adoption of a rigid rule strictly limiting ‘employer’ status under Title VII to an individual’s direct or single employer.”²⁸⁴ This is indeed a very suitable case for seeing the customer as a joint employer.

One limitation of the proposal to view the customer and employer as joint employers is the definition of “employer” in Title VII, which is as follows: “a person engaged in industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person.”²⁸⁵ Hence, only a customer who is working in an organization with fifteen or more employees can be included within this definition. Another limitation is that it misses the essence of the triangular relationship discussed above, which sees the customer as different from the employer.

Despite such limitations, in cases where there is close proximity, the joint employment doctrine is justified. Joint employment has been used quite widely in the U.S. in relation to the Fair Labor Standards Act and

280. *Magnuson*, 808 F. Supp. at 506.

281. *Magnuson*, 808 F. Supp. at 506.

282. *Magnuson*, 808 F. Supp. at 507.

283. *Magnuson*, 808 F. Supp. at 507–08 (quoting *Bostick v. Rappleyea*, 628 F. Supp. 1328, 1334 (N.D.N.Y. 1985)).

284. *Magnuson*, 808 F. Supp. at 508.

285. 42 U.S.C. § 2000e(b) (West).

other protective regulation²⁸⁶ and in cases of sexual harassment.²⁸⁷ The doctrine of joint employment is intended to cover situations where separate entities “share or co-determine those matters governing the essential terms and conditions of employment.”²⁸⁸ Shared employment has developed centrally in situations of subcontracting under the idea that “manufacturers ultimately determine the wages and conditions of . . . workers through control of the production process and economic domination of marginal contractors.”²⁸⁹ Key to determining the existence of joint employment is the economic realities test, which “consists of a multi-factor balancing analysis that is based on the totality of the circumstances in which no single factor is dispositive.”²⁹⁰ The courts, however, proclaim economic dependency as the touchstone of that test.²⁹¹ Nevertheless, as the *Magnuson* case discussed above reveals, and as revealed by other recent cases where joint employment has been recognized not on the basis of economic dependency but on other control-related practices of customers,²⁹² this does not seem to be a definitive requirement.

Following both the proposal to adopt specific liability on customers under Title VII or applying the joint employment doctrine suits the goal of Title VII, which, as Vaughn has noted, has been—from the beginning—to make victims whole and to eradicate discrimination in order to “eliminate

286. Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. REL. 727, 734–35 (2004); H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labour Law Problems*, 28 GA. L. REV. 683 (1994); Robert B. Moberly & Robert J. Grammig, *The United States*, 36 BULL. COMP. LAB. REL. 391 (1999).

287. See generally *Magnuson*, 808 F. Supp. at 509 (finding that manufacturer may be considered a joint employer of a Volkswagen representative for purposes of Title VII).

288. *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123 (3rd Cir. 1982) (emphasis omitted).

289. Lung, *supra* note 248, at 313.

290. *Id.* at 316.

291. *Id.*

292. One such example is the U.S. Supreme Court decision of *Harris v. Quinn*, where the Court questioned whether an Illinois Act declaring that “personal assistants”—workers funded by the state to provide in-home services to individuals whose conditions would otherwise require institutionalization—are public employees solely for the purpose of coverage under the Illinois Public Labor Relations Act infringes on the First Amendment. 134 U.S. 2618, 2644 (2014). There, the Illinois policy was structured in a way that the Public Labor Relations Act applied to the workers and that the State was paying their salaries, while the care recipients (the customers), determined the identity of the worker, the service plan, the course of training, and other matters. *Id.* The majority opinion of the Court was that, due to their work pattern, personal assistants were not, as the Court said, “full-fledged public employees” but rather partial public employees, employed jointly by the State and the customers. *Id.* at 2621.

barriers” to equal employment opportunity.²⁹³ I argue that this can only be achieved through the paradigm of *customer domination at work*.

VI. CONCLUSION

The Article challenged the prevailing legal paradigm regarding sexual harassment of employees by third parties, which places liability on the employer following a binary view of the employment relationship. It showed how the form of liability placed on employers is weaker in these situations than in other instances where employers are liable for the sexual harassment of their employees, not only in the U.S., but also in other legal systems (Germany and Britain). Employers’ reliance on the customers’ business, and employers’ legal obligations towards customers, preclude solutions such as revoking the business relationship with the customer or even riling valued customers. In some cases, this leads to an awkward legal approach in applying such liability. The Article thus offers a novel paradigm of *customer domination at work*, which is, I believe, not only more accurate in capturing the reality of today’s work domain, but also deals more effectively with the problems emerging from the prevailing paradigm. Customer domination at work has three aspects: masculinity, authority, and service-market power, all of which are interconnected and impose domination within an employer-employee-customer triangular relationship. Customer domination is shaped and reinforced within this triangular relationship and should lead to the placing of stricter legal liability on employers, in addition to customers bearing legal liability. While the first suggestion—stricter responsibilities on employers—can be based on prevailing laws, the second is more problematic. Two ways of achieving it have thus been proposed. The first is by acknowledging a distinctive responsibility for customer domination in cases of sexual harassment under Title VII, similar to acknowledgements that have been made for employment agencies and labor organizations. This step would also help place responsibility for customer domination under state criminal and tort laws. The second is applying the *joint employer doctrine* when there is close proximity between customers and employees. Only in this way will we achieve the third wave of the sexual harassment revolution, and the vision pushed by the drafters of Title VII—which aims to eliminate barriers to equal employment opportunity. ✿

293. Vaughn, *supra* note 5, at 80 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).