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VIEWING *NORTH COUNTRY*: SEXUAL HARASSMENT GOES TO THE MOVIES

Rebecca Korzec†

I. INTRODUCTION

When I saw *North Country*,¹ the movie theatre audience cheered. The filmgoers may have been moved by the performances, the script, and the music. Most of all, the audience applauded the triumph of good over evil. The protagonist, Josey Aimes, enters the mines to earn a decent living for herself and her two children.² She suffers horrendous sexual harassment, finds a heroic local lawyer, goes to trial, and wins.³ In just over two hours, *North Country* happily resolves complex personal and legal problems. No wonder the audience cheered.

I was forced to remind myself that no matter how moving or inspiring, the film did not, and could not be expected to mirror reality. The film, we are told, is “inspired by true events” and by the book, *Class Action*.⁴ Before the film and the book came the actual litigation, comprised of three trials over almost a decade.⁵ By the time the actual case was settled, the real life protagonist, Lois Jenson, had endured almost twenty-five years of sexual harassment and sexual harassment litigation which harmed her physical and mental health.

As moving as *North Country* is, the film cannot be expected to convey the immensity of Lois Jenson’s suffering and loss in her quest for justice. And yet the film is extremely important because it reaches audiences who might have never read *Class Action* nor grappled with the issues of sexual harassment in any other context. The cheering filmgoers may begin important conversations about significant legal issues: workplace sexual harassment, gender inequality and litigation. This Article will examine *North Country*, the film, in the context of the book, which “inspired” it and the actual litigation. This examination reveals Hollywood’s perception of what audiences want when viewing films about important social

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1. *NORTH COUNTRY* (Warner Brothers Pictures 2005).

2. *Id.*

3. *Id.*

4. CLARA BINGHAM & LAURA LEEDY GANSLER, *CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW* (2002) [hereinafter *CLASS ACTION*].

5. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991), *judgment entered by*, 824 F. Supp. 847 (D. Minn. 1993), *rev'd*, 130 F.3d 1287 (8th Cir. 1997).

and legal issues. Focusing on differences between the film, the book, and the actual case demonstrates how Hollywood creates admirable protagonists rather than depicting all-too-human plaintiffs with real faults and foibles. Two examples stand out. First, the film's protagonist, Josey Aimes, is depicted as a victim of statutory rape while the adult Lois Jenson suffered an acquaintance rape.⁶ Second, *North Country* ends with a dramatic winning trial.⁷ The Jenson plaintiffs reached an unglamorous confidential settlement after almost a decade of litigation.⁸

North Country has much to teach its audience about the sexual harassment of women in the workplace. The Oscar-nominated film was based on the first class action establishing sexual harassment, *Jenson v. Eveleth Taconite Co.*,⁹ in which the United States Court of Appeals for the Eighth Circuit affirmed the District Court finding that the mining company employer was liable for hostile work environment sexual harassment in favor of an entire class of women.¹⁰ The women demonstrated that the male-dominated mine was pervasively sexualized through highly offensive verbal and visual anti-women references which portrayed women as sexual objects.¹¹ Although the District Court determined that a reasonable woman would have found that the workplace constituted a hostile environment, the court held that to obtain individual relief, each woman in the class would have to demonstrate that she, individually, was affected as a reasonable woman.¹²

North Country has four significant lessons to teach the audience through its depiction of the female protagonist in somewhat formulaic terms. First, it demonstrates that sexual harassment of women is commonplace and pervasive in the workplace.¹³ Second, it underscores the fact that sexual harassment is about power—the exertion of power by men over women in the workplace and the home.¹⁴ Third, it depicts the devastating effects on individual litigants in pursuing discrimination claims. *North Country* demonstrates that there may be “safety in numbers” in that class action litigation may be more effective in a practical sense than litigation by an individual.¹⁵ Nevertheless, the litigation itself often re-traumatizes the sexual harassment victim. Finally, *North*

6. NORTH COUNTRY, *supra* note 1; CLASS ACTION, *supra* note 4, at 9.

7. NORTH COUNTRY, *supra* note 1.

8. CLASS ACTION, *supra* note 4, at 372-75.

9. 130 F.3d 1287 (8th Cir. 1997).

10. *Id.* at 1289-92.

11. *Id.*

12. *Id.*

13. See *infra* Part II(A).

14. See *infra* Part II(B)-(C).

15. See *infra* Part III.

Country indicates the importance of film in both depicting and redefining societal views of significant legal issues.¹⁶

II. SEXUAL HARASSMENT IN THE WORKPLACE

A. *What's Love Got to Do With It?*

North Country underscores that, although sexual harassment of women in the workplace is pervasive, it is not about romance or love or sex, but rather about male power over women.¹⁷ The film depicts the pernicious effect of this male power and control over women as a central issue of discrimination.¹⁸ As depicted in the film, today most women work because they must work to support themselves and their families.¹⁹ Given the widespread contemporary coverage of the “Mommy Wars,”²⁰ debating whether elite professional women should “opt out” of the workplace to be stay-at-home mothers,²¹ *North Country* reminds the audience that employment discrimination is first and foremost a “right to work” issue.²² Sexual harassment often involves the physical threatening and abuse of blue-collar workers in male-

16. See *infra* Part III(B)-(C).

17. Half of all women experience workplace sexual harassment. Heather Antecol & Deborah Cobb-Clark, *The Changing Nature of Employment-Related Sexual Harassment: Evidence from the U.S. Federal Government 1978-1994*, 57 INDUS. LAB. REL. REV. 443, (2004); see CATHARINE A. MACKINNON, DIFFERENCE AND DOMINANCE, IN FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 40-41 (1987).

18. Catharine MacKinnon has argued that sexual harassment is both a form of sex-based discrimination and a strategy for sex-based subordination permitting men to ridicule and demean women as sexual objects. CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEXUAL DISCRIMINATION 4, 7 (1979) [hereinafter SEXUAL HARASSMENT]; see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 3 (1989). MacKinnon argues that not much has changed for victims of sexual harassment. She suggests that “men sexually harass women as often as they did before sexual harassment became illegal.” CATHARINE A. MACKINNON, *Afterword*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, 673 (Catharine A. MacKinnon and Reva B. Siegel eds., 2004).

19. See Susan McGee Bailey & Patricia B. Campbell, *Gender Equity: The Unexamined Basics of School Reform*, 4 STAN. L. & POL’Y REV. 73, 75 (1993) (demonstrating that wives contribute 35% of white family income, 40% of Hispanic family income and 50% of African-American family income). However, in 2004 women were paid 76 cents for each dollar paid to men. AFLCIO.org, Working Women: Fast Facts, <http://www.aflcio.org/issues/factsstats/upload/women.pdf> (last visited March 5, 2007).

20. See, e.g., Ruth Franklin, *The Missing Joy*, THE NEW REPUBLIC, July 4, 2005, at 34.

21. *Id.*

22. See, e.g., Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1441 (2005).

dominated workplaces.²³ The audience is forced to recognize that sexual harassment is not about sex, but rather about male power—the power of patriarchy—which is used to exclude women from traditionally male dominated workplaces.²⁴ Ultimately, this workplace exclusion keeps women from supporting themselves and their children, relegating them to lesser paying “women’s work.”²⁵ This concept of workplace sexual harassment as sex discrimination under Title VII of the Civil Rights Act of 1964²⁶ developed slowly. Following some early litigation, the Equal Employment Opportunity Commission (EEOC) issued guidelines on sexual harassment in the late 1970s.²⁷

Fundamentally, there are two types of sexual harassment: (1) quid pro quo and (2) hostile work environment.²⁸ Quid pro quo harassment involves an explicit exchange of sexual compliance for work benefits.²⁹ On the other hand, “hostile work environment”

23. See, e.g., *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987). *Lynch v. Freeman* involved a female carpenter apprentice working in the construction service branch of the Tennessee Valley Authority who was fired for the unauthorized use of an indoor restroom rather than portable toilets which were dirty, had only soiled or no toilet paper, lacked running water and were not equipped with sanitary napkins. See *id.* at 381-82. Plaintiff Lynch demonstrated that these conditions had a disparate impact on women workers by subjecting them to health hazards, such as urinary tract infection, not experienced by men. *Id.* at 389.
24. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 179-82 (1994).
25. Women earn less than men. In 2003, women on average earned 80 percent (\$552) of the median weekly earnings of men (\$695). By the end of 2005, this number had only risen to 81 percent. See U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2003 (2004); U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2005 (2006); see Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1208 (1998) (arguing that sexual harassment preserves male control in the workplace and ensures that women will only occupy “subordinate roles”).
26. 42 U.S.C. §§ 2000e–2000e-17 (1972) (amended 1991). See Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457 n.24 (1981). Title VII makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .” 42 U.S.C. § 2000e-2(a)(1). The prohibition against sex discrimination was added at the last minute on the floor of the House of Representatives. 110 CONG. REC. 2577, 2582-84 (1964).
27. Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.1-1604.11 (1980). See David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment*, 81 CORNELL L. REV. 66, 110-11 (1995).
28. Catharine MacKinnon is credited with developing this framework. SEXUAL HARASSMENT, *supra* note 18, at 40. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Ogden v. Wax Works*, 214 F.3d 999 (8th Cir. 2000).
29. See SEXUAL HARASSMENT, *supra* note 18, at 40; see *Meritor Sav. Bank*, 477 U.S. at 65.

situations are not explicit. Rather, they involve situations in which the woman worker “may be constantly felt or pinched, visually undressed . . . surreptitiously kissed, commented upon, . . . and generally taken advantage of at work”³⁰

Sexual harassment is about power. It underscores the workplace reality that men and women are unequal. A woman struggling to establish herself at work can be swept off balance by a reminder that she can be raped, fondled, or subjected to repeated sexual demands.³¹ Her employment setting, already precarious, can be transformed instantly into an unwanted sexual encounter in which she is likely to feel even less control, a transformation that can cast shadows even when demands are not being made.³² The feelings of anxiety, fear, or vulnerability produced by the spectre of sexual coercion prevent women from feeling, or being viewed, as the equals of their male counterparts in the workplace.³³

Women who report suffering from sexual harassment also suffer from economic vulnerability.³⁴ These women are often extremely dependent on their jobs. At the same time, women in low-status and low-skilled jobs are more likely to be victims of sexual harassment.³⁵ Sexual harassment is not about the sexual desire of the harasser or the sexual attractiveness or availability of the victim.³⁶ Rather, it is about “the desire of men to ensure continued economic dominance over women in the workplace by discouraging women from entering jobs in which they would compete with men.”³⁷ Louise Fitzgerald argues that:

When the EEOC wrote unwelcomeness into sex harassment law and the Supreme Court gave it their imprimatur, they were apparently thinking of sex as well, *sex*—sexual attraction, sexual desire, sexual pursuit. But sexual harassment often has little to do with attraction . . . and everything to do with power, misogyny, and the crudest sort of abuse.³⁸

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30. See SEXUAL HARASSMENT, *supra* note 18, at 40; see *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998) (“The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.”).
31. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1207 n.104 (1989).
32. *Id.*
33. *Id.*
34. L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 KAN. J.L. & PUB. POL’Y 41, 46-50 (1994).
35. *Id.* at 48-49.
36. *Id.* at 49.
37. *Id.*
38. Louise F. Fitzgerald, *Who Says? Legal and Psychological Construction of Women’s Resistance to Sexual Harassment*, in DIRECTIONS IN SEXUAL

B. Sexual Harassment and Relational Thinking

Carol Gilligan has noted that because of the “elaborate network of relationships, the fact that someone is hurt affects everyone who is involved, complicating the morality of any decision and removing the possibility of a clear or simple solution.”³⁹ Moral and ethical considerations are further complicated by the fact that the adversarial legal system requires that some litigants lose, while others win.⁴⁰ Gilligan identified two distinct approaches to moral problem solving.⁴¹ The first approach, relational reasoning, emphasizes responsibilities and relationships. The second approach, rights-based reasoning, focuses on prioritizing rights and rules.⁴² Gilligan argues that women tend to use relationship reasoning, the “ethic of care” rather than rights-based reasoning, the “ethic of rights.”⁴³ As a result, women using an ethic of care will make important life decisions by focusing on their relationships rather than any hierarchy of rights.⁴⁴

The current law may inadvertently penalize women who employ such relationship-based reasoning to make decisions about their workplace sexual harassment claims. In particular, these women may not conform to the law’s view of how women act in the workplace.⁴⁵ The duty to report harassment and the unwelcomeness requirement in sexual harassment litigation are especially problematic.⁴⁶ In fact, they may reveal a structural bias in the law which serves to disadvantage women plaintiffs in sexual harassment litigation.⁴⁷ Case law often considers the formal reporting of sexual harassment incidents as evidence of unwelcomeness, though studies reveal that women are unlikely to formally report harassment.⁴⁸ Because the requirements of formal

HARASSMENT LAW 94, 102 (Catharine A. MacKinnon & Reva B. Siegel, eds., 2004).

39. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 147 (1982) [hereinafter *DIFFERENT VOICE*]. More recently, Professor Gilligan has noted that “[d]emocracy rests on an ideal of equality in which everyone has a voice.” CAROL GILLIGAN, *THE BIRTH OF PLEASURE* 4 (2000).

40. *DIFFERENT VOICE*, *supra* note 39, at 147.

41. *Id.* at 146-50.

42. *Id.* at 105.

43. *Id.* at 160-65.

44. See Robin L. West, *The Differences in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN’S L.J.* 81, 83-89 (1987); Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 4 (1988).

45. See *infra* notes 51-53 and accompanying text.

46. See *supra* note 38 and accompanying text.

47. See MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 2, 15 (1999) (arguing that structural bias in the law can be discovered by analyzing facially neutral rules and laws which in fact disadvantage women).

48. Fitzgerald, *supra* note 38, at 100-01.

reporting and proving unwelcomeness are inconsistent with the actual conduct of women, they may actually thwart the purpose of equal employment law.⁴⁹ The very fact that women may try to gain acceptance in the workplace by adhering to stereotypical gender roles of what is feminine, and therefore acceptable, may harm them in bringing sexual harassment claims.⁵⁰

A woman might be perceived to welcome, excuse, or even participate in creating the hostile work environment simply because she tried to be accepted at work or to avoid potentially more difficult situations.⁵¹ She might even try to befriend her harassing co-workers or supervisors in an attempt to survive in a difficult male-dominated workplace.⁵² As a result, the woman is faced with an unworkable choice: if she complains early, she risks being considered a hypersensitive troublemaker, whereas, if she waits, she risks being found to have accepted or even welcomed the harassing conduct.⁵³

At first, the Jenson plaintiffs only wanted the mine to implement a sexual harassment policy.⁵⁴ Some scholars argue that relieving the employer of legal liability by mere implementation of a workplace policy elevates form over substance.⁵⁵ In effect, the employer is simply avoiding legal liability rather than reforming the workplace.⁵⁶ It is ironic that Jenson placed so much trust in the employer anti-discrimination policy.⁵⁷ Some scholars conclude that under the current law, an employer who has an anti-harassment policy, coupled with an internal grievance procedure, is basically liability-proof.⁵⁸

Moreover, typical employer internal complaint procedures may actually discourage victims from filing complaints since employers often do not or cannot promise confidentiality.⁵⁹ Current sexual harassment law fails to address the systemic problems within the

49. See Margaret Moore Jackson, *A Different Voicing of Unwelcomeness: Relational Reasoning and Sexual Harassment*, 81 N.D.L. REV. 739, 739-42 (2005).

50. *Id.* at 760-64.

51. Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1179-81 (2000).

52. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 72 (1990).

53. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 830-31, 845-46 (1991).

54. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 666 (D. Minn. 1991).

55. Joanna Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 71, 73-74 (2003).

56. *Id.*

57. See *supra* note 54 and accompanying text.

58. See, e.g., Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004).

59. Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 494-96 (2002).

workplace.⁶⁰ By focusing on harassment as an isolated problem between the harasser and the victim, the law fails to redesign the workplace to eradicate gender discrimination.⁶¹ Viewing sexual harassment claims as separate incidents⁶² underestimates their cumulative effects on the victims.⁶³

C. *Anita Hill and North Country*

In *North Country*, Josey Aimes watches the Anita Hill-Clarence Thomas hearings on television and seems very moved by them.⁶⁴ The Senate Judiciary Committee held nationally televised hearings on the confirmation of Clarence Thomas as an Associate Justice on the Supreme Court of the United States in 1991.⁶⁵ Professor Anita Hill, who had worked for Thomas at the Department of Education and at the EEOC, was called to testify.⁶⁶ She testified that Thomas had sexually harassed her by making sexual overtures to her, discussing his sexual exploits in detail, and describing pornographic movies.⁶⁷ In 1991, most Americans did not believe Professor Anita Hill.⁶⁸ However, by 1992, more Americans believed Professor Hill than Justice Thomas.⁶⁹ In 1994, two Wall Street Journal Reporters concluded that Justice Thomas had lied under oath in denying Hill's sexual harassment claims.⁷⁰ Moreover, in 2001, David Brock, author of a best-seller attacking Professor Hill,⁷¹ acknowledged that he had lied to protect Justice Thomas.⁷²

60. Lawton, *supra* note 58, at 228-31.

61. West, *supra* note 59, at 449.

62. See e.g., *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995) (Judge Posner analyzed nine incidents separately, noting that none included an invitation to have sex).

63. See e.g., THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 20-24 (2005).

64. *NORTH COUNTRY*, *supra* note 1.

65. See, e.g., Kim Lane Scheppele, *Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 128 (1992).

66. See generally RACE, GENDER, AND POWER IN AMERICA xxvi-xxvii (Anita Frye Hill & Emma Coleman Jordan eds., 1995).

67. *Id.* at xxi-xxii.

68. Elizabeth Kolbert, *Most in National Survey Say Judge Is the More Believable*, N.Y. TIMES, Oct. 15, 1991, at A1.

69. Jill Abramson, *Reversal of Fortune: Image of Anita Hill, Brighter in Hindsight, Galvanizes Campaigns*, WALL ST. J., Oct. 5, 1992, at A1.

70. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 7-8 (1994).

71. DAVID BROCK, *BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE* 104, 108, 116 (2002). In fact, Brock had accused Professor Hill of being "a bit slutty." David Brock, *The Real Anita Hill*, AMERICAN SPECTATOR, March 1992, at 18. See *infra* Section III(B) ("nuts and sluts" litigation).

72. BROCK, *supra* note 71, at 98-99.

The Hill-Thomas hearings galvanized women as a political and legal force. Women almost doubled their representation in Congress and tripled it in the Senate.⁷³ In 1992, sexual harassment complaints to the EEOC increased by over fifty percent.⁷⁴

III. LITIGATION ISSUES

A. *Safety in Numbers: Class Action Litigation*

Class action lawsuits have become critical in employment discrimination litigation.⁷⁵ Thousands of employees have recovered millions of dollars in such suits. These include multi-million dollar verdicts against major corporations including Boeing, Coca-Cola, Home Depot, Publix, and Texaco.⁷⁶ The first such sexual harassment class action case is depicted in *North Country*.⁷⁷

North Country was based on a book about the actual litigation called *Class Action*.⁷⁸ Paul Sprenger, the lawyer who represented the plaintiffs in *Jenson v. Eveleth*,⁷⁹ did not initially view the case as a class action.⁸⁰ Then he realized,

[b]y bundling multiple claims together, the damages would be much higher, which would put more pressure on the company to take the case seriously. From a strategic point of view, a class action was more likely than an individual case to get the attention of the senior management of the sued company. In Sprenger's experience, lower-level managers tended to have a more personal view of employment cases—they often felt they needed to vindicate themselves or their subordinates at all costs.⁸¹

73. *Female Ranks In Elected Jobs Get a Big Boost*, N.Y. TIMES, Nov. 8, 1992, at A28.

74. Abramson, *supra* note 69, at A1.

75. See generally, Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo's Predominance Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. OF EMP. & LAB. L. 405 (2005).

76. *Id.* at 406 n.1. See Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847-48 n.3 (2000).

77. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997).

78. CLASS ACTION, *supra* note 4.

79. *Jenson*, 130 F.3d at 1289.

80. CLASS ACTION, *supra* note 4, at 151.

81. *Id.* at 156.

This attitude resulted in a stronger willingness to pursue a case to trial when a reasonable settlement could have easily been reached at the outset of the case.⁸² Senior management, however, tend to take a more dispassionate approach and view a case in purely economic terms.⁸³ Consequently, settlement is much more likely when the board of directors evaluates the case.⁸⁴

Because class actions result in larger settlements, more attorneys' fees are generated. It became clear to Sprenger that he could not afford to expend the significant investment of time and money involved in a sexual harassment action unless the *Jenson* case was a class action in federal court.⁸⁵ When Lois Jenson and Pat Kosmach⁸⁶ went to see Sprenger, there had never been a sexual harassment class action in federal court.⁸⁷ By its very nature, quid pro quo harassment only tends to result in individual claims.⁸⁸ After all, "[o]nly the rare megalomaniac would demand the same sexual favors from multiple women at the same time and promise them all the same rewards."⁸⁹ Lloyd Zimmerman, head of the federal EEOC in Minnesota, considers *Jenson v. Eveleth Mines* "the seminal sexual harassment case."⁹⁰ He explains that the case "was the first to be certified as a class, the first class action to go to trial on the issue of emotional distress, the first to win on liability, the first to be affirmed on appeal."⁹¹

At the same time, the litigation costs were tremendous. Sprenger's law firm expenses were \$960,352, and the firm had expended 24,790 billable hours for lawyers and support staff for \$5,597,956.⁹² Sprenger and his firm had worked for about ten years without earning a penny.⁹³

The plaintiffs' results were mixed. They received monetary settlements, but the settlements were confidential.⁹⁴ The result was bittersweet since Pat had died during the litigation.⁹⁵ Under Minnesota law, her children received nothing.⁹⁶ Moreover, many

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Pat worked with Lois in the *Eveleth Mines*, and is portrayed in the movie *North Country* by actress Frances McDormand.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 377.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 378.

95. *Id.* at 300.

96. *Id.* at 378-79.

of the women's neighbors erroneously believed the women were now millionaires at the expense of their co-workers and union.⁹⁷

The workplace must be changed and reformed. This process must start at the union level with proper training, reformation of the workplace culture, and support for sexual harassment victims.⁹⁸ Employers have an economic interest in eradicating sexual harassment because it reduces worker productivity.⁹⁹

Sexual harassment against women typically occurs in male-dominated workplaces when women try to integrate these workplaces.¹⁰⁰ The men may want to protect their jobs and their sense of masculinity, power, and control.¹⁰¹ This was clearly true in the Eveleth Mines.

B. The Ethical Implications of Sexual Harassment Litigation: "Nuts and Sluts" Litigation

North Country demonstrates that sexual harassment litigation presents significant threats to the victim's privacy and dignity. Complainants may be questioned about such sensitive, private matters as marital problems, birth control practices, closeted lesbian experiences, childhood sexual abuse, and medical and mental health history and treatment.¹⁰²

Paul Sprenger and the *Jenson* plaintiffs realized during the discovery stage that the defendants' lawyers were

going full guns with the tried-and-true nuts-and-sluts defense. The not-so-subtle message was that if the women did not want their lives examined under a microscope, perhaps they should rethink bringing a claim for damages in a sexual harassment case. At least one of the plaintiffs took this message to heart. Jan Friend, who had a son who had been convicted of murder dropped out of the case during

97. *Id.*

98. See Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183 (2006).

99. Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 287-88 (1996).

100. Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 504 (2004).

101. Abrams, *supra* note 25, at 1219.

102. See Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559, 580-81 (2002); cf. Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 295, 313 (2002) (noting that in Paula Jones's litigation against President Clinton for alleged sexual harassment when Clinton was Governor of Arkansas, the plaintiff's lawyers sought information about Clinton's past from more than 150 individuals, but made little efforts to investigate their client's history).

this period, partly because it was too painful to answer questions about her family.¹⁰³

Clearly, the fear of the defendant's exposing their most private and sensitive personal information can deter sexual harassment victims from pursuing legitimate claims. As a result, the litigation may actually retraumatize sexual harassment victims. Whose responsibility is it to prevent such victimization of sexual harassment claimants from the litigation itself?

Under Rule 11 of the Federal Rules of Civil Procedure, lawyers may request not only evidence relevant to the client's case, but also information which might reasonably lead to such evidence.¹⁰⁴ Rule 11 also authorizes sanctions for a lawsuit pursued for "any improper purpose, such as to harass," including claims lacking evidentiary support.¹⁰⁵ Rule 412(b)(2) of the Federal Rules of Evidence provides: "In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if . . . its probative value substantially outweighs the danger of harm to any victim . . ." ¹⁰⁶ "Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim."¹⁰⁷

Relying on judges to act as gatekeepers by exercising their discretion under Rules 26(c) and 45(c) of the Federal Rules of Civil Procedure to prevent "embarrassment" and "undue burden" leads to mixed results.¹⁰⁸ Courts can conclude that the plaintiff's privacy rights should outweigh the defendant's need for sexual information.¹⁰⁹ On the other hand, a court might permit evidence of the plaintiff's childhood abuse as probative on damages, yet exclude evidence that the defendant had harassed a different employee.¹¹⁰

Scholars have suggested that once the plaintiff demonstrates that she has a good-faith claim, the defendant's need for intrusive or embarrassing personal information should be demonstrated by clear and convincing evidence.¹¹¹ On the issue of damages and causation, the sexual harassment defendant could be required to

103. CLASS ACTION, *supra* note 4, at 286. See Miranda Oshige, *What's Sex Got to Do with It?*, 47 STAN. L. REV. 565, 581 (1995).

104. FED. R. CIV. P. 26(b)(1).

105. FED. R. CIV. P. 11(b)(1)-(3).

106. FED. R. EVID. 412(b)(2).

107. *Id.*

108. FED. R. CIV. P. 26(c), 45(c).

109. See, e.g., *Barrenda L. v. Superior Court*, 76 Cal Rptr. 2d 727, 732 (Cal. Ct. App. 1998).

110. *McClelland v. Montgomery Ward & Co.*, No. 95 C 237, 1995 WL 571324 (N.D. Ill. Sept. 25, 1995).

111. Rhode, *supra* note 102, at 305 (discussing defendants in the context of impeachment proceedings).

make an *in camera* showing that prior sexual conduct was the cause of her harm rather than the sexual harassment.¹¹²

Another possibility is that lawyers will exercise an independent duty to police such professional conduct. Rule 4.4 of the Model Rules of Professional Conduct states, “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person”¹¹³ Moreover, Rule 1.2 permits lawyers to refrain from conduct they deem “repugnant or imprudent.”¹¹⁴

C. *Effects of Litigation on Claimants*

Scholars have recognized that litigation itself may exacerbate psychological and emotional distress for plaintiffs such as Lois Jenson, who suffer from post-traumatic stress.¹¹⁵ Retraumatization of claimants suffering post-traumatic stress disorder (PTSD) symptoms results from reconfronting the traumatic event through attorney interviews, depositions, and court testimony.¹¹⁶ The adversarial system contributes to litigants’ viewing themselves as victims, increasing their feelings of vulnerability.¹¹⁷ Finally, the litigation process itself produces feelings of anxiety and economic risk.¹¹⁸

The gap between the litigant’s perception of justice and the reality afforded by the legal system may lead to feelings of ambivalence, frustration, and anger.¹¹⁹ Litigants who settle their claims may be disappointed that they failed to have their day in court or receive an apology.¹²⁰ Moreover, a client understandably may become overly dependent on her attorney, not only for legal advice but also for psychological and emotional support.¹²¹ Her lawyer’s unreturned telephone call or perceived lack of attention to the case can hurt the sexual harassment victim who already feels humiliated by the litigation process.

Clearly, Lois Jenson was retraumatized by litigating her case. She was diagnosed as suffering from post-traumatic stress

112. Aiken, *supra* note 102, at 582.

113. MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2002).

114. *Id.* at R. 1.2.

115. Edward J. Hickling, Edward B. Blanchard & Matthew T. Hickling, *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAS* 55 DEPAUL L. REV. 617, 630-31 (2006) (in the context of motor vehicle accident litigation).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 631.

120. *Id.*

121. *Id.* at 632.

disorder.¹²² Previously outgoing, she retreated to her home, and only went out to purchase basic necessities.¹²³ She became obsessed with the case, suffered from insomnia, gained weight, and neglected her appearance.¹²⁴ Her relationships with family, friends, and even the other plaintiffs became strained.¹²⁵ Jenson referred to the year 1995 as her “year of the couch potato,” the time in her life that was “rock bottom.”¹²⁶ The plaintiff’s expert psychiatrist wrote in her report that

Ms. Jenson has and is suffering from a large number of severe psychiatric symptoms as a result of the sexual harassment and retaliation experienced at Eveleth Mines. She spent extended periods of time fearing for her personal safety as well as persistent humiliation and ostracism, and she suffers from intrusive and distressing recollections of both the assaults and betrayal by trusted coworkers. At times she has suffered from extreme insomnia and nightmares. She has been jumpy and hypervigilant about her surroundings. She has experienced largely diminished interest in her previous activities and is greatly estranged from other people. She has experienced irritability and had panic attacks when exposed to reminders of the trauma.¹²⁷

The psychiatrist concluded that Jenson “has suffered a permanent impairment in her ability to trust and build effective or close relationships with people, especially men, on a vocational or personal and social level.”¹²⁸

IV. FILM AND LAW

A. *The Importance of Film*

Film both reflects and shapes societal images of the law. Some scholars have noted that film may affect societal change more effectively than the legal system.¹²⁹ *The Burning Bed*¹³⁰ brought

122. CLASS ACTION, *supra* note 4, at 345.

123. *Id.* at 307.

124. *Id.* at 307, 325, 329, 345.

125. *Id.* at 307-08, 345.

126. *Id.* at 345.

127. *Id.* at 288.

128. *Id.*

129. Professor Martha Fineman famously suggested that students who wish to change the world skip law school in favor of film school.

130. THE BURNING BED (Tish/Avnet Prods. Inc. 1984).

the horrors of domestic violence to public awareness.¹³¹ *Norma Rae* taught audiences about women and labor unions,¹³² while *The Accused* taught audiences about women prosecutors and gang rape victims.¹³³

North Country depicts the work and personal autonomy of its female protagonist in formulaic terms. Charlize Theron stars as Josey Aimes, a female mine worker in Minnesota who brings a successful class action lawsuit against the mine and union for sexual harassment.¹³⁴ Josey is not a feminist—she simply wants a job that will support her children.¹³⁵ She is subjected to vile harassment from her male co-workers and supervisors.¹³⁶ But she ultimately wins: good defeats evil.¹³⁷ The film is moving but simplistic in its depiction of sexual harassment litigation. The actual case took three trials and caused tremendous physical, emotional, and mental suffering to the real-life Josey, Lois Jenson, who developed physical illness and post-traumatic stress syndrome.

As depicted in the film, the harassed workers are women and the harassers are men. More than ninety percent of reported cases concern men harassing women.¹³⁸ The current sexual harassment law is problematic for women. Instead of asking whether the harasser's conduct is appropriate workplace conduct,¹³⁹ it focuses on the woman's conduct.¹⁴⁰ Examining the woman's conduct for indications that she provoked or enjoyed the harassment provides

131. However, the films might not reflect reality. Unlike *The Burning Bed*, only a small minority of battered women will kill their abusers and the killing is usually during a physical confrontation between abuser and victim, not while the abuser sleeps in his bed as depicted in *The Burning Bed*. See, e.g., Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1993); Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11 (1986). For critiques of the *Accused*, see, e.g., Louise Everett Graham & Gerald Maschio, *A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film*, 84 KY. L.J. 1027, 1040-46 (1995); Paul Bergman, *The Movie Lawyers' Guide to Redemptive Legal Practice*, 48 UCLA L. REV. 1391, 1391-1400 (2001).

132. *NORMA RAE* (20th Century Fox 1979).

133. *THE ACCUSED* (Paramount 1988).

134. *NORTH COUNTRY*, *supra* note 1.

135. *Id.*

136. *Id.*

137. *Id.*

138. DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 97 (1997). See Ann Lawton, *The Emperor's New Clothes: How The Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 76 n.6 (1999).

139. See, e.g., Estrich, *supra* note 53, at 831 (arguing that "there is no such thing as truly 'welcome' sex between a male boss and a female employee who needs her job").

140. Fitzgerald, *supra* note 38, at 95.

women with a painful reminder of the law's historical treatment of rape victims.¹⁴¹

Work is central to people's lives. It represents not only a way to earn income, but also a way to earn autonomy, friendship,¹⁴² and self-worth.¹⁴³ Workplace sexual harassment threatens a woman's ability to achieve all these personal goals.¹⁴⁴ *North Country* reminds the audience that a woman's decision to report and litigate sexual harassment claims affects not only her job security, but also her social and family relationships, her reputation, and her status. Her private life can become the subject of public, courtroom inquiry.¹⁴⁵

Requiring sexual harassment victims to establish that the harassing conduct was unwelcome creates unfair burdens for them.¹⁴⁶ The unwelcomeness requirement was developed through administrative guidelines and case law interpreting Title VII.¹⁴⁷ Apparently, the drafters of Title VII failed to even consider the issue of workplace sexual harassment.¹⁴⁸ As a result, sexual harassment workplace discrimination was one of the last kinds of discrimination to be recognized.¹⁴⁹

B. Equality and Feminism for All

Feminism and equality are issues for men as well as women. Men must be involved to transform the world—both workplace and home. In this respect, *North Country's* view of men is more nuanced and complex than many films. The men are not merely stick figures of good and evil. The lawyer, *a man*, promotes both his interests and those of his female clients.¹⁵⁰ Frances McDormand's significant other is empathetic and thoughtful.¹⁵¹

141. Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 763, 784 (1986).

142. Cf. Ramit Mizrahi, *Hostility to the Presence of Women: Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 1579 (2004). Hostility may be shown by women to other women as part of the "queen bee" syndrome, a personality type explained by Graham Staines, Carol Tavris, and Toby Epstein Jayaratne in *Psychology Today* (1974) cited in ELIZABETH PERLE MCKENNA, WHEN WORK DOESN'T WORK ANYMORE (1997) at 227. [hereinafter WORK].

143. See, e.g., WORK, *supra* note 142, at 3.

144. See generally, RHODE *supra* note 138, at 100.

145. See Fitzgerald, *supra* note 38, at 96. Sexual harassment has financial, psychological, and sociological costs for both workers and employers. See, e.g., RHODE *supra* note 138 at 101.

146. See Fitzgerald, *supra* note 38, at 104.

147. 42 U.S.C. §§ 2000e-2000e-4 (2000).

148. See, e.g., Oppenheimer, *supra* note 27, at 99.

149. Apparently, disability harassment came even later. See *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1106 (S.D. Ga. 1995).

150. See NORTH COUNTRY, *supra* note 1.

151. See *id.*

He remains steadfast when his partner tragically contracts ALS, commonly called “Lou Gehrig’s disease.”¹⁵² He becomes her caretaker, performing physically demanding and disagreeable tasks.¹⁵³ He supports the women workers.¹⁵⁴

Josey’s father is more complex than most of the males in the film. At the beginning, he seems unsupportive of his daughter.¹⁵⁵ However, he finally literally “stands up” for his daughter at the union meeting, risking rejection, ostracism, and workplace excommunication.¹⁵⁶ The male coworkers are depicted in somewhat unnuanced terms: either criminals or saints. Similarly, the high school teacher is, at best, a sexual harasser, at worst, a rapist.¹⁵⁷

C. Differences Between the Film, the Book, and the Case

North Country was crafted to be entertaining and to earn money for the studio. It was based in large measure on a book about the actual litigation, *Class Action*.¹⁵⁸ Nevertheless, there are stunning differences between the film, the book, and the actual litigation, which reveal societal expectations about the law. In turn, film depictions of important litigated cases both reflect and reshape the law.

Judge Lay began the Eighth Circuit opinion by noting that “[t]his case has a long, tortured, and unfortunate history.”¹⁵⁹ At the time the Eighth Circuit issued its opinion on December 5, 1997, the case had been litigated for almost ten years.¹⁶⁰ In all, it took the named plaintiff, Lois Jenson, about twenty-five years, three trials, and the loss of much of her physical and mental health to prevail.¹⁶¹

Jenson began working at the mine on Monday, March 25, 1975, following an April 1974 “consent decree” between nine of the country’s largest steel companies and the EEOC, in which the companies agreed to hire women and minorities for 20 percent of new jobs.¹⁶² Jenson entered the mine as a way to earn a good living rather than relying on welfare.¹⁶³ In 1975, the mine

152. See *id.*

153. See *id.*

154. See *id.*

155. See *id.*

156. See *id.*

157. See *id.*

158. CLASS ACTION, *supra* note 4.

159. *Jenson v. Eveleth Taconite Co.*, 130 F. 3d 1287, 1290 (8th Cir. 1997).

160. See *id.*

161. CLASS ACTION, *supra* note 4, at 375.

162. *Id.* at 3, 8.

163. *Id.* at 12.

provided high-paying blue-collar employment. Eveleth wages started at \$5 an hour plus good benefits at a time when the minimum wage was \$1.80 an hour.¹⁶⁴ At the same time, the miners suffered from job insecurity making them "hostile to any force that might displace them."¹⁶⁵

Lois Jenson was different than the other women working at Eveleth. She was more feminine, ladylike, and petite at five feet two inches and 105 lbs.¹⁶⁶ She "took pride in her appearance . . . manicured her nails, wore perfume, and was known for her trademark scarves artfully tied and color-coordinated with outfits."¹⁶⁷ On the other hand, the film's main protagonist, Josey, is played by actress Charlize Theron, who at five feet ten inches strikes a more imposing figure than Lois Jenson.

Jenson grew up near the mines since her father worked as a truck driver at Reserve Mine.¹⁶⁸ After high school, she moved to Minneapolis.¹⁶⁹ While there, in 1967, she was the victim of an acquaintance rape, which she did not report.¹⁷⁰ She became pregnant as a result of this rape and in January 1968 gave birth to a son.¹⁷¹ In 1969, she briefly reunited with her former high school boyfriend, became pregnant, and gave birth to a daughter.¹⁷² As a result, at 23, she found herself alone, the single mother of a two-year-old son and a newborn baby.¹⁷³ She moved back home to Virginia, Minnesota.¹⁷⁴ Unable to support both children, in 1971, she gave her daughter up for adoption.¹⁷⁵ In contrast, the film depicts Josey as the devoted, understandably overstressed, and angry mother of Karen and Sammy.¹⁷⁶ Apparently, Hollywood expects audiences to empathize with "good" mothers and reject "bad mothers."

The good mother is the primary and often the sole caretaker of her children; selflessly attending to the physical and emotional

164. *Id.* at 8.

165. *Id.*

166. *Id.*

167. *Id.* The film producers might have chosen the beautiful Academy Award winner Theron to ensure box office success. They were not concerned with having the actresses resemble their real-life counterparts. Naomi Wolf argues that societal preoccupation with feminine beauty diverts women from paying attention to work and political concerns. NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1991).

168. CLASS ACTION, *supra* note 4, at 12-13.

169. *Id.* at 9.

170. *Id.*

171. *Id.*

172. *Id.* at 9-10.

173. *Id.* at 10.

174. *Id.*

175. *Id.* at 11.

176. See NORTH COUNTRY, *supra* note 1.

work of childrearing.¹⁷⁷ Certainly she is not promiscuous,¹⁷⁸ lesbian,¹⁷⁹ or in any way a transgressor of societal norms and expectations. Moreover, the good mother never challenges traditional expectations about the division between men's work and women's work. She respects and observes the necessary separation between the male-controlled public sphere and the private sphere to which women are relegated.¹⁸⁰ *North Country* requires Josey Aimes to become a good mother. Clearly, she would not place her child for adoption¹⁸¹ nor permit her family to receive public assistance.¹⁸²

Unlike the movie depiction, Lois Jenson's father, Joseph, did not object to his daughter working at the mine, but her mother was opposed (also a direct opposite of the film depiction).¹⁸³ Forced to hire four women, the mine chose women who were heads of households: two single mothers, a divorced mother of one child, and a widowed mother of four children.¹⁸⁴ The mine supervisor of safety and training told the women that "[t]he fact that you are all heads of households will make it less traumatic for the men."¹⁸⁵

The women faced brutal, continuous sexual harassment from the very beginning of employment.¹⁸⁶ As early as October 23, 1980, an arbitration board issued a report finding that one of the women employed at the mine had a sexual harassment claim.¹⁸⁷ This report would become important later as "the first official piece of evidence that sexual harassment had occurred at Eveleth Mines."¹⁸⁸ Although the sexual harassment was ubiquitous, pervasive and intolerable, the women were embarrassed to discuss it. As Jenson explained, "we all talked in vague terms. The

177. See, e.g., Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

178. See, e.g., *Jarret v. Jarret*, 400 N.E.2d 421 (Ill. 1980), cert. denied, 449 U.S. 927 (1980).

179. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 894 (1997).

180. See generally D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark's Double Bind*, 6 HASTINGS WOMEN'S L.J. 295 (1995).

181. See, e.g., Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 371 n.434 (1992) (indicating that in 1982 only six percent of children of married women were placed for adoption).

182. See generally Benjamin L. Weiss, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform,"* 15 LAW & INEQ. 215, 215-17 (1997); Lucy Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992).

183. CLASS ACTION, *supra* note 4, at 13.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 69.

188. *Id.*

problem was, there was no name for it.”¹⁸⁹ Lois Jenson filed a sexual harassment complaint against her supervisor with the most senior union officer in the electrical office.¹⁹⁰ Management’s response was unsatisfactory since its style was not to “air your dirty laundry, you bury it.”¹⁹¹

As a result of the harassment, and the union’s and management’s lack of response, Jenson suffered from “severe stress” as diagnosed by a therapist she consulted.¹⁹² A week after she filed her union grievance with the Minnesota Department of Human Rights on October 5, 1984,¹⁹³ Lois Jenson discovered that all four of her tires had been slashed when she went to the parking lot at the end of her shift.¹⁹⁴

The Minnesota Attorney General’s Office assigned Helen Rubenstein, age 38 and three years out of law school, to represent Jenson, also age 38.¹⁹⁵ The litigation was so frustrating and stressful that after ten months, Rubenstein requested a reassignment to the antitrust division.¹⁹⁶ In December 1987, Jenson began attempts to hire a private lawyer to represent her.¹⁹⁷ Fifty lawyers refused to take her case.¹⁹⁸ Finally, through Rubenstein, she found Paul Sprenger.¹⁹⁹

On February 23, 1988, Jenson and Kosmach made the 190-mile drive to Minneapolis to meet with Sprenger.²⁰⁰ They did not realize that, at age 47, he was one of the most successful employment discrimination lawyers in the country.²⁰¹ At this first meeting, the women focused on getting their employer to adopt a sexual harassment policy rather than obtaining monetary damages.²⁰² Sprenger later commented:

[A]ll along I saw this as being about getting a good sexual harassment policy in place. I actually did not think, at the time, that it was worth a lot of money. I definitely did not see it as a multi-million dollar

189. *Id.* at 70.

190. *Id.* at 100.

191. *Id.* at 103-04.

192. *Id.* at 105.

193. *Id.* at 110.

194. *Id.* at 111.

195. *Id.* at 112-13.

196. *Id.* at 134.

197. *Id.* at 140.

198. *Id.*

199. *Id.*

200. *Id.* at 141.

201. *Id.*

202. *Id.* at 152.

case, because at that point the women still had their jobs.²⁰³

Perhaps to add dramatic tension, *North Country* has Josey yell: “I quit.”²⁰⁴ Apparently, as a jobless victim of discrimination, she becomes more sympathetic to the audience.

D. *North Country: Turning Lois Jenson into Josey Aimes*

North Country softens and sanitizes the facts of the Jenson case to make Josey Aimes, the main character in the movie, more sympathetic to audiences than Lois Jenson, the plaintiff in the actual trial. First, it rewrites history by making Josey a victim of domestic violence at the hands of her husband.²⁰⁵ Her return home to her parents is depicted as a retreat from this violence.²⁰⁶ In fact, Lois Jenson was the unmarried mother of two children by two different fathers.²⁰⁷ However, she had permitted her daughter to be adopted, leaving only her son, Greg, at home.²⁰⁸ *North Country*’s decision to rewrite Jenson’s life reveals societal expectations of the “good” mother. The good mother is married to the father of her children unless there is an acceptable excuse for the lack of family stability, such as domestic violence.

The film also indicates the willingness of family and friends to find fault with the woman if a marriage ends. Josie’s father asks her “Did he catch you with another man?”²⁰⁹ Josie is presumed to be promiscuous because she has already given birth to a child without being married to the father. Her father considers her to be promiscuous; her mother’s friends consider her to be a source of heartache to her mother.²¹⁰

Working in a male-dominated workplace ensures that Josey will be ostracized both as promiscuous and as a lesbian. Both the male co-workers and their wives call her a whore; her father asks if she now wants to be considered a lesbian.²¹¹ Calling a woman a lesbian has been a technique employed to attack her, thereby summarily dismissing the significant political and economic issues she raises.²¹² In the case of Lois Jenson and the other women at

203. *Id.* at 152-53.

204. *NORTH COUNTRY*, *supra* note 1.

205. *See id.*

206. *See id.*

207. *CLASS ACTION*, *supra* note 4, at 9-10.

208. *Id.* at 9-11.

209. *NORTH COUNTRY*, *supra* note 1.

210. *See id.*

211. *Id.*

212. *See, e.g.* MARCIA COHEN, *THE SISTERHOOD: THE TRUE STORY OF THE WOMEN WHO CHANGED THE WORLD* 232-254 (1988) (discussing attacks on the feminist movement based on sexual politics, including Kate Millet’s lesbianism).

the mines, the attacks on their sexuality were particularly hurtful and insulting. The purpose of the name-calling was to further isolate, demean, and exclude the women in their workplace.

Of the first women hired to work at Eveleth, only Lois Jenson lacked personal ties at the mine and misunderstood its culture.²¹³ She had not even visited her father at his work as a truck driver at Reserve Mine.²¹⁴ However, she got her first glimpse of the anti-woman culture at orientation for the first four women, when Milan Lolich, the supervisor of safety and training, told Jenson “You’re too tiny, you’re too feminine The work is too hard, it’s too dirty, it’s too noisy.”²¹⁵ Jenson realized that although she had the job, the supervisor was “trying to tell me not to take it.”²¹⁶ On her second day at the mine, one of the male workers said: “You f...ing women don’t belong here. If you knew what was good for you, you’d go home where you belong.”²¹⁷ Jenson was disgusted by the men’s coarse, vile language and embarrassed by their dirty jokes and stunts.²¹⁸ She learned that the men were placing bets that the women would not last at the mines.²¹⁹ Nevertheless, Jenson persevered because her paycheck permitted her to “buy food with cash instead of food stamps. She could attend church without having to hear people snicker about her behind her back. She could hold her head high.”²²⁰

Movie viewers interact with films such as *North Country* on both visual and narrative levels.²²¹ As a narrative, *North Country* tells a story—a story that is familiar as social myth or tale, yet unfamiliar in its specific setting. The mine is depicted as an enormous beast, frightening, foreign, and unforgiving. It is cold, dirty, and brutal. In contrast, the women miners, especially Josey, seem familiar in their femininity and domesticity. Away from the mine, they focus on their men and their children. The film shows them dancing and socializing, all the while searching for “Mr. Right.”

213. CLASS ACTION, *supra* note 4, at 12-13.

214. *Id.* at 13.

215. *Id.* at 12.

216. *Id.*

217. *Id.* at 14.

218. *Id.* at 16. The word f...ing was a constant in their vocabulary. Their gags included a plastic penis, placed on a man’s face. *Id.*

219. *Id.*

220. *Id.*

221. See, e.g., MARJORIE ROSEN, POPCORN VENUS: WOMEN, MOVIES, & THE AMERICAN DREAM 32-35 (1973) (noting that the rise of the movie industry as widespread entertainment coincided with the rise of the women’s suffrage movement); MOLLY HASKELL, FROM REVERENCE TO RAPE: THE TREATMENT OF WOMEN IN THE MOVIES 1-3 (2d ed. 1987) (arguing that movies depict women as socially inferior to men).

At the same time, the story of Josey versus the mine and the legal system has a mythical, fairy tale quality. *North Country* turns the diminutive Lois Jenson into the tall, dazzling Josey Aimes. The film creates a woman who is both of the audience's every day experience, yet larger than that experience, both visually and symbolically. Her work at the mine, her suffering vile sexual harassment, and her dramatic courtroom victory are events beyond the experience of the audience. Yet, on a more basic level, the audience is familiar with the fairy tale quality of the story. *North Country* becomes, for the audience, a variant of the familiar "good finally triumphs over evil" myth. Just as *Beauty and the Beast*²²² is a fairy tale,²²³ so is *North Country*. And so the audience cheers.

As previously discussed, Carol Gilligan argues that women speak in a "different" voice, a voice stressing "more advanced, more affiliative ways of living."²²⁴ An equally important, but often ignored, message argues that traditional notions of masculinity and femininity both undermine human potential: traditional masculinity neglects care of others, whereas, traditional femininity neglects care of self.²²⁵

In *North Country*, no single character has it all: career, success, and personal happiness. The male workers assiduously guard workforce supremacy, neglecting family life and leaving the care of the family to the women in their lives. The women are simply trying to earn a decent wage. They do not view work as a source of self-fulfillment or personal growth. They are working in a dirt-filled environment, performing backbreaking, often dangerous physical tasks to earn a paycheck above the minimum-wage level. At the same time, being subjected to vile sexual harassment followed by lengthy, intimidating litigation traumatized and re-traumatized the women. The courtroom win "saves" these women. There is something to cheer.

On the other hand, *Class Action* makes it clear that Lois Jenson was not "saved" by defeating the mine. Nor did she find love with a prince who rode in on his white steed to save her. Even the confidential settlement and monetary award did not save her. Jenson finally and ultimately was saved by becoming a

222. See Lisa A. Binder, *With More Than Admiration He Admired: Images of Beauty and Defilement in Judicial Narratives of Rape*, 18 HARV. WOMEN'S L.J. 265, 266 (1995) (arguing that the story of *Beauty and the Beast* is the basis of images employed in appellate decisions of rape prosecutions).

223. See BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 66-67 (1977) (arguing that grandmother is both grandmother and wolf, both loving and threatening).

224. DIFFERENT VOICE, *supra* note 39, at 49.

225. *Id.* at 168-74.

grandmother.²²⁶ Jenson's son became a father in 1997.²²⁷ Caring for her grandson "brought Lois back to life."²²⁸ Of her grandson, Jenson says: "He helped me feel again."²²⁹ Nevertheless, the post-traumatic stress disorder had caused irreparable damage, leaving Jenson to function "at a level that is a fraction of what it used to be."²³⁰ Reading the book and court decisions causes more weeping than cheering.

Judge Lay in the Eighth Circuit opinion expressed "concern about the inordinate delay encountered by the parties."²³¹ Specifically, he noted that the case had already been litigated for almost ten years without being resolved.²³² Judge Lay concluded that: "No one can expect that justice will be rendered to any of the parties when a final opinion is issued more than ten years after this litigation commenced. Even worse, the judiciary must now try to provide reparation for harm dating back to 1983."²³³

Significantly, the judge criticized the lawyers for delaying the case "by exercising senseless and irrelevant discovery, and by making endless objections at trial."²³⁴ More than "senseless and irrelevant," the "nuts and sluts" style of litigation employed by the defense lawyers was devastating for the female plaintiffs.²³⁵ The purpose of such litigation tactics can only be to bully, intimidate and frighten plaintiffs, especially unsophisticated litigants faced with public disclosure of the most private aspects of their personal lives.²³⁶ Moreover, these tactics needlessly increase the costs of litigation and lengthen the span between injury and resolution. The *Jenson* litigation is a powerful indictment of the civil litigation system, especially as it harms sexual harassment victims.

226. CLASS ACTION, *supra* note 4, at 384.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1304 (8th Cir. 1997).

232. *Id.*

233. *Id.*

234. *Id.* Interestingly, all the judges were male. A recent study analyzing 556 sexual harassment cases, amounting to 1,666 individual judicial votes and controlling for age, race, federal appellate experience, prior employment and ideology found women judges were eighty-six percent more likely to find in favor of sexual harassment plaintiffs. Jennifer L. Peresce, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1767-76 (2005). Significantly, having a female judge on the judicial panel more than doubled the probability that a male judge would find for the plaintiff in a sexual harassment case. *Id.* at 1778.

235. *See supra* Part III(B).

236. For Lois Jenson, this included information which forced her to reveal to her son that he was the product of a rape. CLASS ACTION, *supra* note 4, at 348.

Judge Lay, writing for the Eighth Circuit, criticized both the lawyers and the judges.²³⁷ In the final analysis, cases such as *Jenson* create disillusionment with the legal profession and the litigation process.²³⁸ Lawyers, such as the defense lawyers representing Eveleth Mines, view themselves more as instruments of their client's economic goals rather than guardians of the law and officers of the court.²³⁹ The process destroys the professionalism of the lawyers. In the extreme cases, they may even leave the profession.²⁴⁰ For example, Helen Rubenstein, the Assistant Attorney General, who first represented Lois Jenson, requested a transfer to avoid the case with its endless defense legal tactics.²⁴¹

One of the more devastating effects of the "nuts and sluts" litigation style deeply harmed Lois Jenson. Judge McNulty, as part of the discovery order, ordered that the mention of Lois Jenson's rape would be under seal.²⁴² This meant that when the rape came up in court, the courtroom was cleared and the testimony was marked confidential. The parties agreed that the rape information would not become public.²⁴³ One of Lois Jenson's greatest concerns was that she would have to tell her son about his conception.²⁴⁴ Nevertheless, Judge McNulty wrote in his opinion that "[i]n 1967, Jenson became pregnant by reason of what she now characterizes as rape."²⁴⁵ Sprenger later remarked that the judge's discussing Lois' rape in light of the confidentiality agreements was "the tackiest thing I ever saw a judge do."²⁴⁶

V. CHEERING

Professor Laura Cooper, commenting on the *Jenson* case, said "[t]he nature of social change is that we make martyrs out of pioneers. We have yet to figure out how to make social change without sacrificing people along the way."²⁴⁷ Clearly, the settlement brought a degree of peace to Lois Jenson.²⁴⁸ Sprenger's firm was awarded \$6.28 million in attorney's fees and costs, barely

237. *Jenson*, 130 F.3d at 1304.

238. *See id.*

239. *See, e.g.*, Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271 (1994).

240. *Id.*

241. CLASS ACTION, *supra* note 4, at 134.

242. *Id.* at 349.

243. *Id.*

244. *Id.* at 348.

245. *Id.* at 349.

246. *Id.* at 350.

247. *Id.* at 380 (quoting Laura J. Cooper, later law professor at the University of Minnesota, in the MINNEAPOLIS STAR TRIB.).

248. *Id.* at 385.

a break-even point for almost eleven years and 22,254 hours of work.²⁴⁹ Nevertheless, Sprenger felt satisfied to have made good law, to have won in the words of the head of the federal EEOC office in Minnesota, the “seminal sexual harassment case—the first to be certified as a class, to go to trial on the issue of emotional distress, the first to win.”²⁵⁰

If employers learn something from the case it might be to fix the problem of sexual harassment immediately through their own workplace policies. *Jenson v. Eveleth Mines*²⁵¹ cost Jenson’s employer and its insurers more than fifteen million dollars.²⁵² The litigation should convince employers that they cannot ignore sexual harassment complaints. Employers should consider the role of the workplace in creating and reinforcing patterns of discrimination rather than simply viewing the problem as one of individual abuser versus individual victim. An employer cannot simply operate as a neutral, objective mediator of employee complaints because the employer itself may create a hostile workplace and protect the harassers. Sexual harassment law must recognize that the employer who creates or accepts sexual harassment should not be insulated from liability by simply adopting a policy and a mechanism for internal review.²⁵³ The current law may simply encourage employers to limit their litigation exposure rather than ridding the workplace of sexual harassment and gender discrimination.

Perhaps the most important aspect of the *Jenson* litigation is the class action certification. Elevating sexual harassment from an individual claim by a single woman who might find it difficult to obtain counsel or to survive the trauma of litigating alone to class action status gives the doctrine significance. Powerless women joining together acquired the status to demand change which would improve the lives of women workers. Although the *Jenson* litigation did not eradicate workplace sexual harassment, it demonstrated that employers would pay dearly for their failure to take women’s complaints seriously. No wonder the *North Country* audience cheered.

249. *Id.* at 380.

250. *Id.* at 377.

251. 130 F.3d 1287 (8th Cir. 1997).

252. CLASS ACTION, *supra* note 4, at 381.

253. See generally, Ann Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 820-22 (2005).