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The Customer Is Always Right . . . Not!: Employer Liability for Third Party Sexual Harassment

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THE CUSTOMER IS ALWAYS RIGHT . . .
NOT! EMPLOYER LIABILITY FOR THIRD
PARTY SEXUAL HARASSMENT

*Lea B. Vaughn**

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I was standing in line at the local grocery store, waiting for my regular checker. In front of me were two guys, purchasing beer and snack items. Slightly bored, I listened absently to their conversation as I scanned the tabloid headlines. My boredom vanished, however, when I realized that they were "hitting on" Mary,¹ asking if she were available that evening after work to share beer, snacks and good times. I found myself staring open-mouthed since it was easy to see her wedding band, and I could discern no behavior of hers that would have invited these comments. Mary smiled tightly while ringing up the sale, and politely declined their offer. When my turn came, I incredulously asked her how often this kind of thing happens, and how she deals with it. She replied

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Editor's Note: It is normally the policy of the *Michigan Journal of Gender & Law* to provide a citation for all text appearing within quotation marks. This article does not adhere to that policy. Author Lea Vaughn provides citation at the end of a paragraph, containing multiple sentences with quoted material, where the cites would be identical throughout the paragraph. Such a format limits redundancy without sacrificing clarity, and reduces the number of footnotes in an overly cited profession.

1. Mary is a pseudonym to protect the privacy of the individual involved.

that it happened with some regularity, that the store would back her up for egregious cases, but that she was supposed to be polite to customers. Ending, she commented, "you get used to it."

"It" is sexual harassment. But the source of this harassment is not supervisors or coworkers, but customers, clients and other third parties not directly controlled by the employer. While the literature on supervisor and co-worker harassment is voluminous, very little has been written about third party sexual harassment² in the academic literature.³ Nor have there been many cases tried in the courts.⁴

Despite scarce legal documentation of this phenomenon, other sources suggest that third party harassment is common.⁵ Because it has not been addressed legally, there exists a gap between the experience of third party harassment and an ability to do much, be it legal or non-legal, about the results of the experience. In some sense, recognizing third party sexual harassment is a third wave of sexual harassment litiga-

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2. Throughout this paper the term "third party sexual harassment" will be used to refer to sexual harassment perpetrated by customers, clients, patrons, vendors, independent contractors, patients and others with whom the employees of a business or service have a contract or other relationship. This listing does not exhaust the possibilities of third party contacts, but is only to serve as an example of the types of parties implicated by this article.
 3. See Joseph G. Allegretti, *Sexual Harassment by Nonemployees: The Limits of Employer Liability*, 9 EMP. REL. L.J. 98 (1983); 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 (1994) [hereinafter Aalberts & Seidman, *Clients*]; Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994) [hereinafter Aalberts & Seidman, *Non-Employees*]; 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); Amy Mathews, *The Sexual Harassment Revolution: Employer Liability for Third Party Sexual Harassment*, 65 U.M.K.C. L. REV. 977 (1997). See also BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 248–53 (1992).
 4. See the text below accompanying the notes. While there have been few cases, it has been suggested that it might be the next tide of sexual harassment litigation. See, e.g., Mark Hansen, *The Next Litigation Frontier?: Claims Against Employers for Third-Party Harassment on the Rise*, 79 A.B.A. J. (Sept. 1993), at 26 (demonstrating that all of the people interviewed in the article noted a rise in claims or inquiries about third party harassment); Kathleen Murray, *Fighting Sexual Harassment Goes Beyond Co-Workers, to Clients*, WASH. POST, Feb. 28, 1993, at H2. *But cf.*, Amy Stevens, *Women Lawyers Harassed by Clients, Too*, WALL ST. J., Nov. 4, 1994, at B1 ("[A]bout a dozen legal experts said they know of no court decisions involving client sexual harassment, . . .").
 5. See *infra* Part I.

tion and scholarship.⁶ Additionally, recognizing third party sexual harassment, as well as developing a comprehensive theory of harassment that makes it unacceptable on any basis,⁷ is an important step in constructing workplaces imbued with dignity and respect for all workers.

This article will ask a series of questions. What is third party sexual harassment? Under what conditions does it occur? Does it differ in any significant respects from traditional notions of sexual harassment? Should those differences, if any, make a difference in the way that the legal system addresses third party harassment? And indeed, should the problem be addressed solely through the legal system? What might an employer do to alleviate sexual harassment of this type?

The thesis of this article is that third party sexual harassment is a prevalent form of harassment that the legal system does not currently nor energetically pursue. At a time of breathtaking workplace change, it is just one more destabilizing, and sometimes traumatizing, obstacle for

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6. In this analogy, the first wave of sexual harassment would be the recognition of sexual harassment as a form of sex discrimination. That the doctrine was even developed is due in large part to the efforts of Catharine A. MacKinnon. See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). Two early cases in which the doctrine was recognized are *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) and *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976). Early cases focused on what is now called quid pro quo harassment, that is, the direct and unwilling exchange of sexual favors for tangible job benefits. The second wave would be the recognition and development of the doctrine of hostile environment sexual harassment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) represents the latest definitive doctrinal pronouncement about this doctrine. Both the first and second wave have focused exclusively on sexual harassment perpetrated by supervisors and co-workers. Thus, the courts have grappled with a definition of actionable sexual harassment, and with the contours of employer liability for the acts of their employees. Here, however, the focus will be both on describing a third form of sexual harassment and on suggesting potential consequences for employers. In the last two or three years a "third wave" of scholarship has begun to emerge regarding even conventional sexual harassment. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257 (1998); Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231 (1998); Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245 (1998); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Richard L. Wiener & Barbara A. Gutek, *Advances in Sexual Harassment Research, Theory, and Policy*, 5 PSYCHOL. PUB. POL'Y & L. 507 (1999) (introducing a series of articles with new research findings).
 7. Traditional legal scholarship tends to divide off sexual harassment from harassment based on age, religion, race and national origin. It is not clear whether this has been a salutary development, but exploration of this notion is beyond the scope of this Article.

women and their advancement in the workplace. Exposing third party sexual harassment for what it is will act as a catalyst for more vigorous action, both of a legal and non-legal nature, to eradicate it from the workplace. To that end, the conclusion of this Article will pose some suggestions about remedies that affected victims could pursue.

Part I of this article will explore the prevalence of third party harassment, drawing on evidence from a number of different types of workplaces. The purpose of this section is to establish the reality and consequences of third party sexual harassment.⁸ In Part II, the response

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8. This part of the article will include both narrative stories of the type encouraged by feminist jurisprudence and critical race theory, and research from non-legal disciplines. The purpose of such an approach is to give a fuller account of the problem. Using purely legal analysis can obscure issues and their persistence despite traditional legal interventions. Consider the following analysis from a review of three books, two written by law professors, and the third by an interdisciplinary scholar:

Can they really be talking about America in 1996? Granted, crude "racism" and "sexism"—words that imply malicious intent—have abated since the 1960s and are now in many places taboo. But surely racial and sexual bias—institutional or unconscious attitudes and practices that nonetheless harm women and minorities—still exist everywhere about us. Eastland's and Kahlenberg's myopia on this point stems not, I believe, from their status as white men—that's too pat and deterministic an explanation for my tastes—but rather from their narrow method of inquiry. Both men are legal scholars, and both view affirmative action mainly in legal terms. With Jim Crow toppled and dozens of anti-discrimination statutes on the books, they (correctly) see most codified forms of discrimination as dead. End of story.

Bergmann, in contrast, draws on a wide range of disciplines to paint a much more nuanced and recognizable picture of, in the words of one chapter title, "How Exclusion Occurs." Where Eastland and Kahlenberg sound eerily aloof from the real world perdurability of discrimination, Bergmann is keenly sensitive to human psychology and the ways that prejudice, like a mutating virus that steels itself against new antibodies, endures even amid laws forbidding overt racism and sexism. She marshals an imposing slew of studies from labor economists, sociologists and psychologists to show that racial bias is not only alive but kicking, and that those brutal kicks are still crippling women and minorities.

David Greenberg, *Affirmative Action in the Positive and Negative*, WASH. POST NAT'L WEEKLY ED., July 8–14, 1996, at 32. To some extent, this article, as well as the just cited book review, raise the perennial law and morals/attitudes debate. To the extent that this issue is raised, the author believes that law can and does change attitudes and beliefs as it changes behaviors. This material is cited to illuminate that in certain cases, traditional doctrinal analysis alone is insufficient to describe and remedy social problems. Thus, it is not necessarily that critical race theory or traditional doc-

of the legal system to third party sexual harassment will be detailed, beginning with a brief overview of basic sexual harassment doctrine. Part III, on the other hand, will look at the assessment of third party harassment from the point of view of business, and the literature on the role of sexuality in the workplace which forms the basis of an interdisciplinary account of sexual harassment. Suggested directions for the legal doctrine in this area and options for eliminating this form of behavior in the workplace will be suggested. Last, this article will suggest that harassment in any form will not abate until a comprehensive approach to employee dignity is adopted, in which any form of harassment on any basis is deemed inappropriate and illegal.⁹

I. THE PREVALENCE OF THIRD PARTY SEXUAL HARASSMENT

Reports of sexual harassment are legion. The occurrence of sexual harassment is well documented, and it has become a part of our cultural landscape. Every gender study of the court system includes data and narrative about the incidence of sexual harassment. Although we know it occurs frequently, we do not always know what it is.

The definition of sexual harassment is drawn from two sources: the landmark Supreme Court case of *Meritor Savings Bank v. Vinson*¹⁰ and from the Equal Employment Opportunity Commission's (EEOC) guidelines on Sexual Harassment.¹¹ Summarized, these sources suggest the following hallmarks of sexual harassment:

1. Unwelcome conduct which
2. Either affects a tangible job benefit, or renders the work environment "hostile."

And, typically, the references assume that the sexual harassment has been committed by a co-worker or by a supervisor.

Third party harassment, in its constituent parts, parrots the standard definition of sexual harassment. What sets it apart from the typical scenario is the perpetrator. In these cases, the sexual harassment is committed by third parties not directly under the control of the victim's

trinal analysis is better, but that they are both valuable methodologies for inquiring into any number of social problems.

9. One author recently began this ambitious task. See, David C. Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO.L.J. 475 (2000).

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

11. EEOC Guidelines, 29 C.F.R. § 1604.11 (2001).

employer. The social questions in these cases center around the frequency of this conduct, and our changing social mores in its regard. Not surprisingly, the legal questions revolve around the ability of the victim to hold her employer liable for this conduct. It is one thing to hold an employer liable for those people whom it directly controls; it is quite another to suggest that employers should be roving enforcement officers for sexual behavior at the workplace. This view recognizes that third party sexual harassment, like any other form, is about power as well as sex.¹² The customer or client leverages the power implied in the phrase, "The customer is always right," to engage in harassing behavior that goes far beyond the acceptable customer/client interaction. This view also recognizes that heightening the legal duties of one's employer may empower potential victims as well as deter the behavior of perpetrators.¹³

The purpose of this section is to describe the types of third party sexual harassment that occur in a number of professions and jobs. Obviously, this survey cannot purport to be exhaustive. Nevertheless, the examples below should suffice to prove that third party sexual harassment does exist, and that it exists across a wide spectrum of occupations. Second, these examples will demonstrate the ways in which third party harassment is as damaging as supervisor or co-worker sexual harassment.

A. Lawyers

Neither the status nor assertive image of lawyers have protected women attorneys from client harassment. As early as 1989, female attorneys reported sexual harassment from clients.¹⁴ In a more recent

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12. Some argue that sexual harassment is only about power. *See, e.g.*, MACKINNON, *supra* note 6. On the other hand, some authorities argue that sexual harassment does have a sexual component. *See, e.g.*, BARBARA GUTEK, *SEX AND THE WORKPLACE* 13 (1985). In some ways this is a chicken and egg argument, and the bottom line still remains, under either theory, that sexual harassment is offensive and can profoundly interfere with the ability of its victims to work to their full potential.
 13. One could argue that the type of legal regime suggested here is paternalistic and a throw-back to women's protective legislation. The response is that this legal regime furthers the ability of women to work safely, and to the full extent of their abilities, rather than artificially hindering the development of talents and ambitions. In any event, the hostile environment approach to sexual harassment provides a solid analytical basis for asserting that an employer has certain legally enforceable duties concerning the quality of its employees' work environment.
 14. Alan Deutschman & Sara Hammes, *Dealing with Sexual Harassment*, *FORTUNE*, Nov. 4, 1991 at 145 (citing Thom Weidlich & Charise K. Lawrence, *Sex and the Firms: A*

survey, 61.5% of the 553 women litigators surveyed reported being sexually harassed by clients in the last five years.¹⁵ Although as a profession we have studied ourselves closely with regard to gender bias, most of the studies have focused on sexual harassment in its traditional sense or on other gender bias issues.¹⁶ Nonetheless, the incidents do occur.

In a recent article, a partner at a New York law firm reported being kissed and asked to accompany a client to his hotel room after a business dinner. Additionally, an associate described an incident in which a client, while looking her straight in the eye, said, "I think I'm in love."¹⁷

These incidents increasingly involve "virtual" encounters. A series of postings on the FEMJUR list serv included a discussion of electronic sexual harassment. Responding to an article in the Wall Street Journal, the first posting in this discussion described a very graphic and sexually explicit voice mail message that was apparently being passed among the phone systems of male lawyers and investment bankers. When becoming aware of this message, the writer commented:

[T]his . . . [sends] a message to the female attorneys that they do not belong in their boys' club. [T]he existence of this message leaves female attorneys at these firms, . . . in a catch-22. [T]hey either complain about the message, and be viewed as a

Progress Report, NAT'L LAW J., Dec. 20, 1993, at 1). In the "survey of 900 female attorneys, 10% said that clients exerted unwanted pressure for dates, 9% complained of touching, cornering, or pinching, and 4% cited pressure for sex, sometimes as a prerequisite for getting the client's business." *Id.* at 145, 148.

15. Stevens, *supra* note 4, at B1, B3. A recent article in the ABA Journal outlines the continuing prevalence of this behavior. Debra Baker, *Plague in the Profession*, 86 A.B.A. J. 40 (Sept., 2000).
16. For one of the most recent and publicly available reports, see *Report of the Special Committee on Gender to The D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1649 (1996) (including a forward by Justice Ruth Bader Ginsburg). The report states: "Nearly 17% of female respondents said that they had received unwanted sexual advances from clients." *Id.* at 1729. Court employees also reported some instances of sexual harassment from attorneys, jurors and other third parties. *Id.* at 1850-1851. See also, e.g., THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (July, 1993)[hereinafter NINTH CIRCUIT GENDER BIAS REPORT]; Massachusetts Supreme Judicial Court, *The Gender Bias Study of the Court System in Massachusetts*, reprinted in 24 NEW ENG. L. REV. 745 (1990); WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS (1989); MICHIGAN SUPREME COURT, FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS (Dec., 1989). Many of the reports detail how women and women's issues are treated in the courts, but do not focus exclusively on the treatment of women attorneys.
17. Stevens, *supra* note 4, at B3.

prude, or they laugh along with the men, and participate in their own degradation.¹⁸

Respondents to the message reported similar incidents. For example, a male prosecutor playing a tape of a rape victim's deposition for "entertainment" purposes.¹⁹ All involved in this discussion suggested that the best action was to confront the individuals involved in the electronic dissemination of harassing materials.²⁰

Regardless of the form of behavior, lawyers are reluctant to report it to their firms or employers.²¹ Individual lawyers vary in their response to harassing incidents: some shrug it off, while others report it to their firm. But this does not mean that the lawyers do not worry about being reassigned to a different client or case, or that they will lose out on business opportunities,²² or worse, be perceived as "weak" and unable to handle it.

Firm responses to this behavior vary. One article suggests that this matter is "touchy" because of the law firms' dependence on clients for its business, and the relationship of rainmaking to lawyer advance-

18. Posting of Rebecca Eisenberg, rebecca@netcom.com, to FEMJUR@Listserv.syr.edu (June 9, 1995) (on file with the author).

19. Posting of Liz, liz@gate.net, to FEMJUR@listserv.syr.edu (June 9, 1995) (on file with the author).

20. Posting of Cynthia Barnes, cbarnes@swan.admin.uiuc.edu, to FEMJUR@listserv.syr.edu (June 12, 1995) (on file with the author); Liz, *supra* note 19.

21. Often, and with good reasons, attorneys fear that they will be ostracized by the legal community. Consider the story of Rebecca Fisher. Her story involved employer/employee harassment (she alleged that Miami's Capital Banks's founder and chairman, Abel Holtz, harassed her when she was chief lawyer for the bank). After she quit her job, allegations about her employer's conduct became public. Since then, all of her job prospects have disappeared. Marilyn Adams, *Her Life on the Line*, SEA. TIMES, August 15, 1993, at L1, L5. The author of the articles goes on to note:

Professional women may have more to gain from a harassment charge than a waitress or a secretary, but they also have a lot more to lose: Powerful friends and social contacts. Lucrative business opportunities. Because they are considered more newsworthy, harassment charges by successful and affluent women are more likely to end up in the headlines, turning a private matter into a public free-for-all.

Id. at L5. And, of course, the specter of Anita Hill comes instantly to mind.

22. Stevens, *supra* note 4, at B3.

ment.²³ A member of another firm states “[w]e don’t use our associates as bait’ to get or keep a client.”²⁴

While the responses of individual firms have varied, the profession, through the American Bar Association Commission on Women in the Profession, has issued a report which includes detailed suggestions for drafting and implementing sexual harassment policies in law firms.²⁵ Unlike other issues presented in hearings before the ABA Commission on Women, the issue of harassment arose out of private communications and an article published in the ABA Journal.²⁶ In fact, the genesis of the topic through this irregular route “led one Commission member to describe sexual harassment as ‘the dirty little secret’ of our profession.”²⁷ The motive for developing this particular report was the assumption that as the profession grows to include more women, policies which encourage employee loyalty through an enlightened working environment will best attract female lawyers to practice.²⁸

23. *Id.* at B1.

24. Karen Sutherland, *Associates Are Not Bait: How to Avoid Sexual Harassment by Clients*, KING CO. BAR BULLETIN, Dec. 1995, at 10 (quoting Jim Haney, of Ogden Murphy Wallace, P.L.L.C.).

25. A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, *Lawyers And Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* (1990). Local bar newspapers are also addressing this issue and offering suggestions. *See, e.g.*, Sutherland, *supra* note 24.

26. A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, *supra* note 25, intro., at 2 (noting Nina Burleigh & Stephanie A. Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, A.B.A. J., Aug., 1989, at 46).

27. *Id.* intro., at 2.

28. *Id.* intro., at 3–5. Although beyond the scope of this article, two recent articles focus on the difficult situation of law students in the internship situation and in law firm interviews. Noting how interns fall between the categories of “student” (Title IX) and “employee” (Title VII), the first article discusses remedies and approaches to dealing with harassment occurring during internships. Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN’S L.J. 95 (2000). The second article suggests that one approach to regulating sexual harassment within the law firm would be to extend legal ethics rules to this behavior. Author DeVincentis proposes the following rule:

RESPONSIBILITIES OF FIRM LAWYERS FOR CIVILITY
IN RECRUITMENT AND PRACTICE

1. A lawyer is required to use general civility in:
 - (a) recruiting,
 - (b) hiring,
 - (c) interviewing, and
 - (d) in practice with law students and lawyers within a lawyer’s firm.

Two additional studies also establish the existence of client harassment. The first study documents harassment coming both from the firm and from the clients.²⁹ Although the focus of this study was on harassment within the firm, it reported that third party harassment does occur, but that because “more and more [attention is directed] to the bottom line there is caution about offending a client who engages in harassment against a woman attorney.”³⁰ They found that most women used interpersonal skills to handle client harassment rather than ask a male colleague to speak to the client.³¹ Regrettably, this part of the report did not link up observations about client harassment with a prior section on business development.³² At the outset of that section, the study authors noted that business development is considered “an area in which many women, but not all, experience difficulty.”³³ Although they ascribe this to a number of factors, they also note that many of the social settings in which business is sought raise questions of “propriety” for women attorneys.³⁴ This suggests that the client situation has multiple problems for the female attorney, and that client harassment can limit business opportunities which could lead to partnership.

These observations are corroborated in the second, more detailed study.³⁵ The purpose of this book was to examine and argue that sex discrimination in the legal profession is rarely overt, but rather is subtle and intangible, and that there is evidence that this “intangible” discrimination is “fact, not fiction.”³⁶ The authors use the 1984 and 1990 ABA National Survey of Career Satisfaction/Dissatisfaction to prove

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2. A lawyer should not engage in sexual or social misconduct with or toward another lawyer or law student.
 3. A lawyer should not act inappropriately toward another lawyer or law student.

Amanda DeVincentis, *Navigating the Borders: A Proposal for General Civility Legal Ethics on Sexual Harassment*, 13 GEO. J. LEGAL ETHICS 521, 543 (Spring 2000).

29. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995) (reporting empirical data provided by eight New York corporate firms that allowed their attorneys to be interviewed).
30. *Id.* at 377.
31. *Id.*
32. *Id.* at 331–43.
33. *Id.* at 331.
34. *Id.* at 335.
35. BERNARD F. LENTZ & DAVID N. LABAND, *SEX DISCRIMINATION IN THE LEGAL PROFESSION* (1995).
36. *Id.* at xvi–xvii.

their thesis.³⁷ The three middle chapters of the book analyze the data as it pertains to employer, coworker and client discrimination looking not only at sexual harassment, but also things such as work assignments and mentoring.³⁸ The 1990 survey included explicit questions about sexual harassment by clients, and reveals an observable incidence of attorney/client harassment.³⁹ In trying to determine which variables accounted for the harassment the authors looked at factors such as age, marital status, work setting, and salary. Finally, they concluded that client-based sexual harassment also occurs in solo practice. The author's data reveals the following pattern of sexual harassment by clients:

37. *Id.* at 4–5.

38. *Id.* at 75–153.

39. The authors present their findings, reported by percentage responses for each type of harassment, in Table 6.3 which is reproduced below:

TYPE OF HARASSMENT	PRIVATE PRACTICE		NON-PRIVATE PRACTICE	
	MALE	FEMALE	MALE	FEMALE
Unwanted sexual teasing, jokes, remarks, or questions	0.126 ^a	0.353	0.058 ^a	0.191
Unwanted pressure for dates	0.028 ^c	0.065	0.000	0.011
Unwanted sexual looks or gestures	0.049 ^a	0.190	0.032 ^c	0.096
Unwanted deliberate touching, leaning over, or cornering	0.016 ^a	0.072	0.011	0.021
Other types of sexual harassment	0.034 ^c	0.078	0.005 ^a	0.074
^a statistically significant difference at the 0.01 level ^c statistically significant difference at the 0.10 level				

Id. at 133.

PERCENT OF WOMEN REPORTING SEXUAL HARASSMENT OF ANY
TYPE CATEGORIZED BY TYPE OF PRACTICE⁴⁰

Private Practice	76%
Non-Private Practice	39%
Solo Practice	85%

The source of lawyers' deference to clients is not the aphorism that frames the title of this article; rather it is grounded in centuries of tradition⁴¹ and the ethics undergirding the lawyer-client relationship. This relationship transcends contract law and rests, instead, on fiduciary principles imbued with trust and confidentiality.⁴² While economic interests may make the choice between an individual lawyer and firm profits difficult and conflicting, there is no duty for American lawyers to represent a particular client.⁴³ Moreover, in the modern firm or corporate counsel office, a willingness to terminate the lawyer-client relationship because of inappropriate conduct is confounded by the status relationships between partners and associates, with male attorneys dominating the ranks of the former.⁴⁴

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40. This chart is based on data from Table 6.3, *Id.* at 133 and Table 6.9, *Id.* at 153. Similarly, the statistics for males are:

Private Practice	25%
Non-Private Practice	10%
Solo Practice	33%

Id. at 133, 153.

41. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 146 (1986).
 42. *Id.* at 146-47.
 43. *Id.* at 571-74. There is a limited duty to represent indigent clients or those otherwise unable to secure counsel, supported by the Model Rules of Professional Conduct (Rule 6.2) and the ethical codes of various states. *Id.* at 573-74.
 44. Stevens, *supra* note 4.

In a 1992 survey of the 250 largest firms by the National Law Journal reported that women accounted for 37% of associates and 11% of partners. The figures were up only slightly from 1989, the previous survey period. Men also dominate the ranks of corporate law departments—typically the key contact point for client companies.

Id. at B3. See also NINTH CIRCUIT GENDER BIAS REPORT, *supra* note 16, at 1193 (noting the paucity of women in federal practice as creating "two different worlds" for male and female practitioners).

B. Service Industries: Retail Sales and Restaurants

For women in the retail and service sectors, the “customer is always right” philosophy reigns the strongest.⁴⁵ Many women in the sales industry report that customer harassment seems to be part of the job. In one early account, women reported sexual harassment from customers, with several estimating that anywhere from 1 percent to 10 percent of male customers engaged in the behavior.⁴⁶ The women reported that the behavior made them angry, and sometimes it made them afraid. Moreover, none of them felt they engaged in behavior or wore clothing that could have made the harassment expected.⁴⁷ When questioned as to why the harassment occurs, most of the women said they thought it involved power rather than sex: “It says, ‘You’re lower than I am and I can do this to you’” “Men control the world. They control the airways and the sea lanes, but they can’t control themselves if a woman wears a tight sweater? I just don’t buy it.”⁴⁸

This behavior also surfaces in the local chain supermarket. A series of newspaper articles chronicled the results of a Safeway policy in which all employees were required to give customers “big smiles.” The company enforced this policy with undercover shoppers resulting in the remedial placement of about one hundred employees in a “smile school.” Employees report that customers have mistaken the enforced

45. Although this may be a peculiarly American phenomenon. Consider the following:

Since entering the market in Eastern Europe in 1992, Kmart has found some interesting problems it must find solutions to. In its initial entrance to the market, the discount retailer purchased 13 stores from the Czechoslovakian government’s Prior chain for \$120 million.

An experienced saleswoman employed by Kmart in Prague removed the familiar Kmart badge which says “I’m Here For You” because, she said it offended her and “People can interpret it any way they want; it looks like I’m here not just for business but for the amusement of certain customers.”

While such slogans in the West indicate a concern for the customer, many believe that particularly in the East, such statements open the door for sexual harassment of the employees by customers. Officials already report that turning around the concepts of the East into that of the West where the primary concern of the salespeople must be the customer—is already a difficult job.

Kmart Faces Problems in Europe, THE WEBB REPORT (A Newsletter of Sexual Harassment by Susan L. Webb), August 1994, at 7.

46. Loraine Anderson, *Abuse From Another Corner*, DETROIT FREE PRESS, May 26, 1982, at 1E–2E.

47. *Id.*

48. *Id.* at 2E.

friendliness for flirting, and one reported daily propositions. As a result, employees in the northern California stores filed grievances protesting this policy.⁴⁹

Regrettably, most business literature does not focus on the perceptions of employees to policies such as "The Customer is Always Right!" or "Wear a Smile."⁵⁰ In service encounters, the business goal is a completely satisfying experience from the customer's point of view, not the employee's. One study identified four classes of customer behaviors which caused them problems for employees: drunkenness, verbal and physical abuse, breaking company policies or laws, and uncooperativeness. The authors conclude that some unsatisfactory service encounters are due to customers rather than employees: "A primary contribution of this research effort is the empirically based finding that unsatisfactory service encounters may be due to inappropriate customer behaviors—the notion that sometimes customers are wrong."⁵¹ The contradiction between the reality of this finding and the business policies that assume the opposite causes stress for employees, especially considering that problem customers were identified as causing 22% of dissatisfactory incidents.⁵² The authors conclude that management must develop policies that recognize this reality, either giving employees appropriate training or putting in place policies that could control customer behavior.⁵³

C. Librarians

Female librarians are deplorably depicted as bookish, plain types whose last concern need be sexual harassment of even the mildest

49. This summary is created from the following articles: Kim Curtis, *Safeway Clerks Object to Smile Rule*, ASSO. PRESS, Sept. 2, 1998; Tony Kornheiser, *Unsafe Way?*, WASH. POST, Sept. 13, 1998, at F1; Adair Lara, *Smile, and the World Gets Peeved*, SAN FRAN. CHRONICLE, Sept. 8, 1998, at C12; *Smiles Overboard*, SEA. TIMES, Sept. 12, 1998, at A13.

50. As one article notes, "previous research correlating customer and employee views of service is sparse. . . ." Mary Jo Bitner et al., *Critical Service Encounters: The Employee's Viewpoint*, 58 J. OF MARKETING 95, 96 (Oct. 1994).

51. *Id.* at 101.

52. *Id.* at 101–02. The authors go on to note that this percentage may be larger "in industries in which the customer has greater input into the service delivery process (e.g., health care, education, legal services)." *Id.* at 102.

53. *Id.* at 102.

form.⁵⁴ The reports from the trenches, however, put this stereotype firmly to rest and illustrate the point that third party sexual harassment can and does happen anywhere. In 1992, Will Manley asked subscribers to *American Libraries* to respond to a questionnaire on sexual harassment in libraries.⁵⁵ He sent out this survey after an earlier "joke" survey on "Librarians and Sex"⁵⁶ revealed that 78% of the women responding

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54. Lamentably, this stereotype is perpetuated in the legal literature. See Aalberts & Seidman, *Non-Employees*, *supra* note 3, at 471-72. The authors characterize occupations as high-risk, mid-level risk, and low-risk vis-à-vis the likelihood that sexual harassment from third parties will occur. This is the authors' attempt to suggest when employers should be aware of the likelihood of harassment, and what a reasonable woman might expect in such a workplace. *Id.* at 464-70. Characterizing a "female employee in a conventional bookstore" as an employee who is at low risk of sexual harassment, the authors state:

Here, conservatively dressed in a relatively sophisticated setting, little or no risk of sexual harassment is expected. The employer in this workplace must be most protective and respond to even mild provocation. The average reasonable woman would expect nothing less. Indeed, a worker in this kind of environment should, in all probability, anticipate fewer sexually hostile acts from customers than what might be expected from a fellow employee in the workplace.

Id. at 471. The authors have characterized topless female dancers as engaged in a high risk occupation, and a cocktail waitress in a conventional lounge as a mid-level risk occupation. *Id.* at 470-71. My argument is quite the contrary: occupations need not, and should not, be categorized by levels of risk. Sexual harassment should not be tolerated in any occupation. To do otherwise leads, at best, to hair splitting, and at worst, to the perpetuation of demeaning and harmful stereotypes.

55. Will Manley, *Will's World: No Laughing Matter This Month*, 24 *AMERICAN LIBRARIES* 68 (1993). The questionnaire was as follows:

SEXUAL HARASSMENT BY LIBRARY PATRONS

1. In the past 12 months how often have you been sexually harassed by library patrons?

___ not at all ___ daily ___ weekly ___ monthly

2. Which of the following forms of sexual harassment have you experienced?

___ visual harassment (being stared at, leered at, flashed, etc.)

___ physical harassment (being touched, followed, etc.)

___ verbal harassment (being threatened, called demeaning names, exposed to sexually suggestive language, etc.)

3. Which sentence best describes how you feel about your vulnerability to acts of sexual assault or physical violence when you are working in your library?

___ I always feel safe and secure.

___ I generally feel safe, but sometimes I feel at risk.

___ I often feel at risk.

___ I am scared all the time.

56. Will Manley, *Facing the Public*, *WILSON LIBRARY BULLETIN*, June 1992, at 65-66.

had been sexually harassed. Many of their responses included unsolicited comments about the severity and pervasiveness of the conduct. Two other events also galvanized Manley's interest in the subject. First, there was virtually no information on the topic of sexual harassment and librarians.⁵⁷ And second, the November 1992 murder of a small-town Arizona librarian after she had been raped. His article concluded, "We need to begin looking at the issue of sexual harassment of library workers by library patrons as seriously as we look at the issue of the patron's right to access."⁵⁸

By the July/August 1993 issue, Manley had tabulated the 3,758 responses to his survey.⁵⁹ Seventy-three percent of the respondents reported that they had been sexually harassed by patrons,⁶⁰ and of those harassed, eighty-three percent reported both verbal and visual

The relevant questions were as follows:

6. Have you every been sexually harassed by a supervisor or coworker on your library job?

Yes No

7. Have you ever been sexually harassed by a library patron?

Yes No

Manley asserts that the entire questionnaire, entitled "Librarians and Sex," which was intended as a joke, resulted in his termination as a columnist in the *WILSON LIBRARY BULLETIN*. Manley, *supra*.

57. In fact, in some cases there may be outright disinformation. In a 1988 article on legal issues in libraries, the authors stated: "To be considered [actionable under Title VII of the 1964 Civil Rights Act], a sexual harassment case must include all these qualifications: the harassment must be of a sexual nature, it must be a condition of employment, and the harassing employee must be acting in a supervisory capacity." Joseph J. Mika & Bruce A. Shuman, *Legal Issues Affecting Libraries and Librarians*, 19 *AMERICAN LIBRARIES* 26, 31 (1988). This statement was later corrected by a reader who pointed out that sexual harassment can include (1) cases based on a hostile environment, and (2) cases in which the perpetrator is a co-worker or patron. Mary Whisner, *Reader Forum: Harassment Discussion Misleading*, 19 *AMERICAN LIBRARIES* 346 (1988).
58. Manley, *supra* note 55, at 68.
59. Will Manley, *Sexual harassment by patrons: Part two*, 24 *AMERICAN LIBRARIES* 652 (1993).
60. *Id.* When asked "In the past 12 months how often have you been sexually harassed by library patrons?" the responses break down as follows:

Daily	7%
Weekly	22%
Monthly	40%
Less than monthly	4%
Never	27%

harassment.⁶¹ Forty percent of those harassed reported incidents of physical harassment.⁶² By his admission, the author conceded that this was not a scientific survey, but he stated that the intensity of the issue was best measured by the written comments elicited by the survey which were included with the article, a sample of which include:

My director seems to care more about the rights of our patrons than the safety of our employees.

I resigned my last job because of constant sexual harassment by three patrons whom my director refused to confront.

Many of us have a latent sense of dread. People yell and threaten us over the smallest things and we cannot defend ourselves. Resist the slings and arrows of outrageous patrons and you will find your butt in a sling. I am angry at this attitude of "eat garbage and like it" public service and I am angry at funding authorities who never release enough money to secure adequate staffing or proper security.

I feel powerless in front of my patrons and have been given no choice by my administration than to endure the daily abuse.⁶³

Manley followed the survey with two more columns devoted to this topic. In the first follow-up column, he devoted his attention to administrative responses to employee complaints of patron sexual harassment.⁶⁴ By this time he had had time to collate the comments on the questionnaires, and realized that not only had he measured the prevalence of sexual harassment by patrons, but that he had also measured the attitudes that employees had towards their supervisors and administrators. The vast majority of responses indicated that many supervisors were not aware of their employees' harassment problems, and to the extent that employees reported patron harassment, the reports were met with hostility, engendering a fear of retaliation in the employees.⁶⁵ Manley went further than tallying responses and tried to discern reasons for the lack of administrative response on this issue. In

61. *Id.* at 652.

62. *Id.*

63. *Id.*

64. Will Manley, *Sexual Harassment by Patrons: Part Three*, 24 *AMERICAN LIBRARIES* 756 (1993).

65. *Id.*

this setting, he noted, the public relations issues, faced by commercial establishments are complicated by First Amendment values that favor access to libraries over an employee's right to safety.⁶⁶ In conclusion, Manley referred to a recent federal court case⁶⁷ suggesting that employers may be held accountable for the acts of non-employees.

In his final column on this issue,⁶⁸ Manley noted that in the intervening time, he had heard from a number of library administrators about this problem. He devoted the column to their suggestions for solutions to the problem as well as a few of his own. Many of the administrators stated that as a result of Manley's columns, they had surveyed their own staff to determine the extent of the problem, and then had worked with staff to develop solutions. The administrators commented that, "[a]s usual, some of the best ideas came from the staff."⁶⁹ Finally, Manley stressed that solutions and policies would have to be developed on a "library-by-library" basis that is responsive to local conditions.

Manley is not the only librarian who has addressed patron sexual harassment.⁷⁰ A 1991 article lists examples of patron harassment, and the way in which the Iowa State University Library attempted to address the issue.⁷¹ Noting that most libraries had addressed classic sexual harassment, the authors went on to note that most had been "strangely silent" about patron/employee harassment. Quite aptly, they defined the issue in these terms: "In an organization that is defined by a service phi-

66. *Id.*

67. *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D.Nev. 1992). In this case, the employee had complained about sexual harassment by casino customers, and in response she had been terminated. The court, relying on Equal Employment Opportunity Commission (EEOC) guidelines, held that the employer can be liable for acts of non-employees where they know of the conduct and fail to take remedial action. In this case, the court denied the employer's motion to dismiss. *See infra* notes 192-200 and accompanying text.

68. Will Manley, *Sexual harassment by patrons: Part four*, 24 *AMERICAN LIBRARIES* 828 (1993).

69. *Id.*

70. A recently published book, *Dealing with Difficult People in the Library*, recognizes some of these problems. This book describes problem situations and suggests both policies and practices to protect librarians. In an appendix, the author adds sample policies from several libraries. The issue of sexual harassment, however, is not dealt with directly but rather subsumed in a chapter entitled "Real Problem Cases." Clearly, library publications still have a way to go. MARK R. WILLIS, *DEALING WITH DIFFICULT PEOPLE IN THE LIBRARY* (1999).

71. Mary Lou Goodyear & William K. Black, *Combating sexual harassment: A public service perspective*, 22 *AMERICAN LIBRARIES* 134 (1991).

losophy, how far does one go in meeting patron needs without subjecting oneself to unwanted advances?"⁷² The Iowa State Library undertook three approaches to combating patron harassment: they developed a policy,⁷³ worked with other units in the university (e.g., security, student life), and held training sessions for affected staff.⁷⁴

Lastly, Sarah Watstein wrote a two-part series about library harassment, that began with the "principle that everyone deserves the right to work in an environment free from any type of harassment, an environment where respect for an individual is encouraged and safeguarded."⁷⁵ Agreeing that very little in the library literature has addressed sexual harassment,⁷⁶ in her first article she outlines the law on sexual harassment, suggests procedures to follow and reviews the library literature. She concluded by asking for personal accounts of sexual harassment in the library setting. Her second article⁷⁷ chronicles the responses. Although the majority of responses dealt with supervisor or co-worker harassment, she did note that several respondents had addressed patron harassment.⁷⁸ Finally, she concluded by noting that much sexual harassment is still under-reported, and an excerpt points out why this might be so:

What makes me nervous about bringing complaints to personnel departments or library directors is what those inquisitions of Anita Hill never seemed to consider: the career woman is supposed to be in control. If someone shows disrespect toward me, I fear that management will view me as lacking in assertiveness, strength, and authority—and not, therefore "administrative material": why couldn't I just handle the problem?

....

72. *Id.* at 135.

73. The Iowa State University Policy has three parts. First, it prohibits sexual harassment, including patron harassment: "Harassment can occur between . . . library staff and library patrons." Second, it defines harassment. Third, it describes the procedures for reporting and dealing with incidents of harassment. *Id.* at 134.

74. *Id.* at 135–36.

75. Sarah Barbara Watstein, *Disturbances in the Field: Sexual Harassment and Libraries*, WILSON LIBRARY BULLETIN, May 1993, at 31.

76. *Id.* at 33.

77. Sarah Barbara Watstein, *Disturbances in the Field: Sexual Harassment and Libraries: Stories from the Front*, WILSON LIBRARY BULLETIN, Nov. 1993, 43.

78. *Id.* at 45.

All this I did in a primarily female profession. My suspicion that reporting the incidents, which took place at several institutions, would not have gained anything, seemed confirmed when women administrators feigned ignorance of harassment ever occurring in our workplaces and when male administrators either joked about the problem or acted so extremely protective that they robbed women of our autonomy and right to decide for ourselves in these matters.⁷⁹

D. Summary of Findings

This section demonstrates that sexual harassment is not just a phenomenon that occurs among co-workers; customers and clients harass employees across a wide spectrum of businesses and occupations. No one is immune. This behavior, especially because it tends to be ignored in the interest of promoting sales or business revenue, means that employees endure yet another unnecessary stress at the workplace. "Clients and customers can also use the power of their position—go along or I'll give the sale to somebody else—as a license for licentiousness"⁸⁰

II. THE LEGAL RESPONSE TO THIRD PARTY HARASSMENT

As a marked contrast to the number of anecdotal reports of third party harassment, and growing empirical documentation, the legal world is basically as silent about this type of harassment as it was to sexual harassment generally in the 1970s. This section of the article sketches what law does exist on this subject, to prepare the reader for consideration of how it could be brought "up-to-date" to match the overall development of law in this field.

A. Basic Sexual Harassment Law

Although finally confirmed as a valid doctrine in *Meritor Savings Bank v. Vinson*,⁸¹ sexual harassment has one of the more interesting doc-

79. *Id.*

80. Deutschman & Hammes, *supra* note 14, at 145.

81. 477 U.S. 57 (1986).

trinal histories in Title VII law.⁸² Title VII protects employees against sex discrimination in the workplace, and it became effective in 1965.⁸³ However, it was not until 1976 that a federal court first recognized a cause of action for sexual harassment.⁸⁴ Another ten years passed before the Supreme Court recognized it.

*Meritor*⁸⁵ confirmed much of the activity of the lower courts, and set the pattern for future sexual harassment doctrine. In that case, a bank employee alleged that over her four-year tenure, her supervisor, the vice-president of the bank, had harassed her on numerous occasions, including forcibly raping her.⁸⁶ The Court, both in holdings and dicta, established a number of basic sexual harassment principles:

1. Sexual harassment violates Title VII.⁸⁷
2. Sexual harassment includes economic as well as intangible injury.⁸⁸
3. Employer liability will depend upon the type of harassment, and the harasser's status within the employing entity.⁸⁹
4. An employer may mitigate liability by implementing an appropriate harassment policy and grievance procedure.⁹⁰

In coming to these conclusions, it is significant that the Court deferred to the EEOC Guidelines which had previously recognized both forms of harassment and propounded theories of liability.⁹¹ The Court

82. For a review of this history see LINDEMANN & KADUE, *supra* note 3. Two noted early cases are *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) and *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976). Prior to *Meritor*, the lead (and still important) case for detailing both types of harassment was *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

83. 42 U.S.C. § 2000e-2(a) (1999). Title VII also forbids discrimination on the basis of race, national origin, color and religion. Separate statutes address discrimination on the basis of age and disability.

84. *Williams*, 413 F.Supp. 654 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom. Williams v. Williams*, 587 F.2d 1240 (D.C. Cir. 1978).

85. 477 U.S. 57.

86. *Id.* at 59–61.

87. *Id.* at 64. This is not as self-evident as it appears.

88. *Id.* at 64–65 (recognizing two types of sexual harassment: quid pro quo, in which the employer conditions employment on the proffering of sexual favors, and hostile environment harassment, in which the work conditions interfere with an individual's ability to work).

89. *Id.* at 69–73.

90. *Id.* at 72–73.

91. *Id.* at 65 (citing 29 C.F.R. § 1604.11(a) (1985), and noting that the EEOC had drawn on previous decisions of its own as well as those of the courts). The role of the

stated that for hostile environment harassment to be actionable, “it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁹² Elaborating on its holding, the Court stated that “(t)he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”⁹³ The Court’s holding, while welcome in confirming the illegality of sexual harassment, failed to develop sexual harassment doctrine in any level of detail, especially as it pertained to hostile environment harassment or the contours of employer liability.

Seven years later, in *Harris v. Forklift Sys., Inc.*,⁹⁴ the Court issued another early opinion concerning sexual harassment. In a situation where an employee had been subjected to numerous incidents of verbal sexual innuendos and insults, the Court clarified what treatment a sexual harassment victim must undergo to make a viable claim. The lower courts had split on the issue of whether the plaintiff needed to prove a serious injury to her psychological well-being.⁹⁵ Affirming the vitality of

EEOC in advancing the law of sexual harassment cannot be understated. It laid the foundation for later developments in the courts. The full text of the cited Guideline is as follows:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term of condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a). Additionally, at 29 C.F.R. § 1604.11(e), the Commission stated that “[a]n employer may also be responsible for the acts of non-employees, . . . , where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.” The EEOC has supplemented these guidelines with additional statements. See EEOC COMPLIANCE MANUAL § 615 (2002) (pertaining to charges of sexual harassment); *EEOC: Policy Guidance on Sexual Harassment*, in FAIR EMPLOYMENT PRACTICES MANUAL (1990).

Additional parts of the guidelines address employer liability, and do include provisions for third party harassment on a knew “or should have known” basis coupled with a duty “to take immediate and appropriate corrective action.” 29 C.F.R. § 1606.8(e) (2000).

92. *Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (1982)).

93. *Id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

94. 510 U.S. 17 (1993).

95. *Id.* at 20.

Meritor, the Court chose a “middle path,” and rejected both the idea that merely offensive remarks could constitute harassment or that the plaintiff must show the conduct caused a “tangible psychological injury.” Thus, a workplace that is “permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’” is actionable.⁹⁶ Additionally, the Court established that the plaintiff must show that the environment is objectively hostile or abusive, and that they perceived it to be so, i.e., the conduct affected the conditions of their employment.⁹⁷

Continuing in its brief opinion, the Court noted that this type of harassment can affect “job performance, discourage employees from remaining on the job, or keep them from advancing in their careers,” and thus undermine Title VII’s rule of “workplace equality.”⁹⁸ Acknowledging that this is not a “precise test,” and that the fact finder must look “at all the circumstances,” the Court suggested that the following factors be considered: “[T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁹⁹ Thus, while this case eliminates any type of bright line test for proving harassment, it appears to limit the doctrine to those cases in which the harassment is deemed objectively harassing, is perceived as harassing by the victim, and actually interferes with the victim’s ability to work.

96. *Id.* (citations omitted).

97. *Id.* Note that the Court did not resolve the question of whether the applicable standard is that of a reasonable person or a reasonable woman, a conflict that is brewing in the lower courts. While the court did phrase this part of the decision in terms of a “reasonable person,” it did not comment on why those words were chosen.

98. *Harris*, 510 U.S. at 22.

99. *Id.* at 22–23. Justices Scalia and Ginsburg prepared concurring opinions. Justice Scalia fretted about the vagueness of the majority’s standard and the lack of weights to be assigned to the factors, but he was unable to offer an alternative. *Id.* at 24–25. In comparing the majority’s standard to that used in negligence cases, he suggests that negligence is at least restrained by the idea of real harm whereas harassment cases are not. *Id.* at 24. Justice Ginsburg’s concurrence focused the majority opinion by stating that the critical inquiry would be “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which other members of one sex are not exposed.” *Id.* at 25. She elaborated by adding that the fact finder should determine whether the “discriminatory conduct has unreasonably interfered with the plaintiff’s work performance.” *Id.* at 25. In other words, making it “more difficult to do the job.” *Id.* (quoting *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).

Although the lower courts have continued to elaborate and develop the standards and factors announced by the Supreme Court,¹⁰⁰ most cases focus on the following five part *prima facie* case:

- 1) the basis: membership in a protected group;
- 2) the activity: unwelcome conduct of a sexual [sex-based] nature;
- 3) the issue: affecting a term and condition of employment;
- 4) the causal connection: on the basis of sex; and
- 5) employer responsibility.¹⁰¹

Obviously, there are some variations within the circuit courts,¹⁰² but the discussion in this article will work from this generally accepted framework.

Finally, in a blizzard of activity in mid-1998, the Court issued four sexual harassment decisions,¹⁰³ three of them pertaining to the workplace: *Oncala v. Sundowner Offshore Services, Inc.*,¹⁰⁴ *Faragher v. City of Boca Raton*,¹⁰⁵ and *Burlington Industries, Inc. v. Ellerth*.¹⁰⁶ While the first

100. See, e.g., Dawn B. Bennett-Alexander, *Lower Court Interpretation of the Meritor Decision: Putting Flesh on the Supreme Court's Sexual Harassment Skeleton*, 6 WIS. WOMEN'S L.J. 35 (1991) (reviewing later cases as she examines the prima facie elements of a sexual harassment case).

101. LINDEMANN & KADUE, *supra* note 3, at 168–69. The framework, the authors note, is adopted from *Henson v. City of Dundee*, 682 F.2d 897 (1982). Their major change is to replace the Henson court's term "respondeat superior" with "employer responsibility" because the courts have, in their opinion, actually gone beyond "respondeat superior" in these cases. LINDEMANN & KADUE, *supra* note 3, at 169 n.20.

102. LINDEMANN & KADUE, *supra* note 3, at 169 n.21 (cataloging the ways in which the second, third, fourth, ninth and federal circuit courts differ from this formulation). For example, the ninth circuit, in *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (1989), described the following *prima facie* case:

(1) subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) conduct was unwelcome; (3) conduct was sufficiently severe or pervasive to alter conditions of employment and create abusive working environment; and (4) employer failed to remedy or prevent hostile environment of which management level employees knew, or in the exercise of reasonable care should have known.

Id.

103. The case of *Gebser v. Lago Vista Indpt. School Dist.*, 524 U.S. 274 (1998) (involving the liability of a school district, under Title IX, for a teacher's sexual harassment of a student).

104. 523 U.S. 75 (1998).

105. 524 U.S. 775 (1998).

106. 524 U.S. 742 (1998).

of these three cases addressed the issue of same sex harassment, the last two jointly discussed the issue of employer liability that had been left hanging in *Meritor*. All three make contributions that will make bringing a case of third party harassment easier as well as spelling out what employers need to do to avoid liability for any form of sexual harassment.¹⁰⁷

In the first, *Oncale*, the Court addressed a situation in which a male employee had been repeatedly and crudely harassed by his male co-workers. While the case will generally be noted for its holding that same sex harassment is actionable under Title VII, Justice Scalia, author of the opinion, made other pronouncements about sexual harassment doctrine generally. First, in disavowing that sexual harassment erects a "general civility code," Justice Scalia noted that the linchpin of actionable sexual harassment is not necessarily sexualized conduct, but rather conduct which puts a member of one sex at a disadvantage compared to the other as it pertains to terms and conditions of employment.¹⁰⁸ Second, as it pertains to sexuality in the workplace, he stated that compliance with Title VII "requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." Reviewing courts must pay attention to the context of the behavior, employing common sense so that "ordinary socializing" does not become forbidden or actionable.¹⁰⁹ Thus, while this case involved highly sexualized facts, it nonetheless underscored that these cases address situations in which women are economically disadvantaged by a wide range of behaviors.

The companion cases of *Faragher* and *Ellerth* addressed important and previously unresolved questions of employer liability that had split the lower courts. In *Faragher*, two male supervisors repeatedly harassed a female lifeguard who did not report the harassment to the city.¹¹⁰ After reviewing the prior case law which outlines the contours of acceptable

107. It appears that not all lower courts understood the holdings of these cases. Schnapper argues that many judges in lower courts still do not follow the holdings of these cases, resulting in inconsistent holdings for cases involving similar or identical conduct. Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277. This finding suggests similar problems for the prosecution of third party sexual harassment claims.

108. *Oncale*, 523 U.S. at 80.

109. *Id.* Interestingly, the Court in *Faragher* makes this same point indirectly when referring to the racial harassment cases on which the sexual harassment cases are founded. 524 U.S. at 788 (citing LINDEMANN & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW*, 349 n.36 (3d ed. 1996), stating that "[d]iscourtesy or rudeness should not be confused with racial harassment."

110. *Faragher*, 524 U.S. at 780-82.

and unacceptable workplace behavior, the Court observed that it had “established few definite rules for determining” employer liability.¹¹¹ While *Meritor* had called for attention to common law agency principles,¹¹² these principles had never been developed. Not surprisingly, the lower court in *Faragher* considered three grounds for possible employer liability: the scope of employment, if the agency “aided” the harassment, and whether the employer had constructive knowledge of the harassment.

The first, the scope of employment, has not generally been successful in Title VII sexual harassment cases, but Justice Souter, writing for the majority, deftly pointed out that assignment of conduct within the scope of employment represents a policy judgment as to where the cost of employee misconduct should be placed. Even after considering that factor, Justice Souter rejected scope of employment as the basis of liability.¹¹³

Second, the Court considered whether the basis of vicarious liability in this case might rest on the Restatement of Agency § 219(2)(d) notion that imposes liability where the fact of the agency relationship aided the supervisor in pursuing actionable sexual harassment. This, the Court decided, would be “an appropriate starting point” for analyzing liability. The Court reasoned that the agency relationship places the employee in proximity to a supervisor, thereby making the employee reluctant to report the supervisor. At the same time, the court suggested that employers generally make great efforts in selecting, training, and monitoring supervisory behavior, possibly in the hope that it would be easier for employees to confide in well-trained supervisors.¹¹⁴ But the Court conditioned this basis for liability on the creation of a two part affirmative defense in which the employer could avoid liability by showing that it created a mechanism to avoid and/or eliminate harassment, and that the employee had failed to make reasonable use of the safeguards.¹¹⁵ As to the third possible ground, imputing liability, the Court

111. *Id.* at 788.

112. *Meritor*, 477 U.S. 57, 72 (1986). The Court pointed to the Restatement of Agency §§ 219–237, although it cautioned that “common-law principles may not be transferable in all their particulars to Title VII.” *Id.*

113. *Faragher*, 524 U.S. at 798–800.

114. *Id.* at 803.

115. *Id.* at 805. The Court formally holding that:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible em-

was constrained by the *Meritor* holding that an employer not be held “automatically” liable because of the acts of its supervisors.¹¹⁶ The lower courts had approached this in two ways: (1) requiring proof of an affirmative action invocation of supervisory authority before imputing liability, or (2) recognizing an affirmative defense even where the supervisor had created an actionable environment.¹¹⁷ The first alternative was rejected as a grounds for imputing liability because it is often difficult to determine when supervisory authority, as opposed to personal inclination, for an act has been invoked. This difficulty, in the Court’s view, would “poorly serve[]” parties and create more litigation.¹¹⁸ Focusing on Title VII’s goal of prevention, and adding their previous observations about vicarious liability (option two), the Court created the two part affirmative defense discussed in the previous paragraph.¹¹⁹

In *Ellerth*, the Court continued its analysis of employer liability.¹²⁰ In this seven to two decision, plaintiff Ellerth alleged that she was constantly harassed by her supervisor.¹²¹ Although her employer, Burlington Industries, had a sexual harassment policy, Ellerth did not

ployment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense. No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Id. at 807–08.

116. *Id.* at 804.

117. *Id.*

118. *Id.* at 805.

119. *Id.* at 807–08.

120. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

121. *Id.* at 747–48. The case was originally decided as a motion for summary judgment, granted in favor of the employer, so the facts alleged by employee Ellerth had to be taken as true. *Id.* at 747.

inform anyone of the harassment, nor did she suffer any tangible economic detriment.¹²² Given the confusion in the lower courts after *Meritor*, it was not surprising that the Seventh Circuit judges reviewing this case produced “eight separate opinions and no consensus for a controlling rationale.”¹²³

In the first part of its analysis of this case, Justice Kennedy, writing for the majority of the Court, considered the utility of the phrases “quid pro quo” and “hostile work environment,” noting that these terms developed in the academic literature rather than from any statutory language. Further, although the Court in *Meritor* had not attached significance to these terms as it pertained to employer liability, lower courts had done so, suggesting that the standard of responsibility turned upon the “type” of harassment. But in this case, Justice Kennedy writes, the issue is not the type of harassment, for under a theory of vicarious liability the only determinative issue is whether discrimination occurred.¹²⁴

Thus framed, the issue in *Ellerth* was again the exact contours of employer liability under the agency principles that inform, although do not control, interpretations of Title VII. Using Restatement Section 219(1),¹²⁵ Justice Kennedy reiterated the *Faragher* observation that a supervisor’s sexual harassment is “not conduct within the scope of employment,” in part because of the supervisor’s personal motives for pursuing this behavior.¹²⁶ Thus, the appropriate frame of analysis is supplied by Section 219(2) of the Restatement of Torts which discusses grounds of liability such as apparent authority. But, like *Faragher*, the Court rejected apparent authority, and relied instead upon the “aided in the agency relation rule” as the basis of developing a coherent theory of liability.¹²⁷

Having decided upon “aided in agency” as the basis of liability, the decision then proceeds to map out the contours of the doctrine. While acknowledging that this theory assumes the proximity that would make

122. *Id.* at 748, 750.

123. *Id.* at 749.

124. *Id.* at 753.

125. That section states: “A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

126. *Ellerth*, 524 U.S. at 757.

127. *Id.* at 760. Before concluding this analysis, the Court notes that negligence, in a knew or should have known sense, is the minimum standard of liability for the employer under Title VII. *Id.* at 759.

harassment possible, the employment relationship is not sufficient to impose liability. There must be some type of “plus” factor. In what would have been called the “quid pro quo” cases, this is easily supplied by the supervisor’s interference with tangible conditions of employment. The interference “proves” the agency relationship in the sense that it could not have occurred but for the agency.¹²⁸ When it came to defining what the bounds of aided in agency would be for non-tangible behaviors, e.g., unfilled threats, the Court ducked the issue. While noting that many acts in this category may indeed be aided by agency, others will look like those of co-workers. This being the case, the Court leaves this area of the law to further development.¹²⁹

The Court concluded, however, by noting that other factors in addition to agency principles shape employer liability in these cases, most specifically the Title VII policy of preventing liability in the first place through the design of anti-discrimination employment policies. These policies also help further the Title VII goals of deterrence, as well as the borrowed tort doctrine of “avoidable consequences.” The Court ended its decision, therefore, by adopting the holding in *Faragher* as being applicable in this case as well. The Court states that holding as follows:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first

128. *Id.* at 760–62.

129. *Id.* at 763. The failure of the Court to provide any guidelines here is a notable lapse since most cases of sexual harassment involve what we might now call either hostile environment or non-tangible outcome harassment.

element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.¹³⁰

Ellerth's case was remanded so that she could attempt to prove liability without the labels "quid pro quo" or "hostile environment" being controlling in subsequent litigation.¹³¹

B. Third Party Harassment: Cases and Articles

1. *The Costume Cases*: To date, sexual harassment by third parties has been legally recognized only where the employer has required the employee to wear a uniform or costume, as a condition of employment, that subjected them to harassment from members of the public, including customers and clients. Although it is well recognized that employers may generally impose dress codes that differentiate between the two sexes,¹³² these cases establish the proposition that an employer may not impose dress codes that invite harassment from co-workers or from customers, clients or other third parties. Typically, the employer has

130. *Id.* at 765. This tracks, word for word, the holding in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998).

131. In addition to the issues raised by Schnapper's article, *supra* note 107, Medina raises concerns about judicial use of the summary judgment motion in these cases. Following the passage of the 1991 Civil Rights Act, plaintiffs have a right to a jury in these cases; consequently, many lower court judges are taking away factual determinations from the jury. This means that citizens are not being allowed to contribute to the development of doctrine. M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 4 REV. OF L. AND WOMEN'S STUD. 311 (1999). I would hypothesize that juries might be more sympathetic than judges to claims of customer harassment.

132. See, e.g., LINDEMANN & KADUE, *supra* note 3, at 249 (citing BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW*, 410–17 (2d ed. 1983), FIVE-YEAR SUPPLEMENT 144 (1989)).

required that women wear “provocative” attire, or in some other, non-job related way, draw attention to the women as sexual objects.¹³³

The leading and earliest case on this point is *EEOC v. Sage Realty Corp.*¹³⁴ In this case, plaintiff Margaret Hassleman was employed as a lobby attendant in a New York office building. Her duties included security, safety, maintenance and information functions. Her employer, Sage, furnished uniforms to all lobby attendants on a seasonal basis. Her instructions for employment made it absolutely clear that she must be in her employer supplied uniform at all times, and that no excuse would be acceptable. Although she had complaints about earlier outfits, the lawsuit revolved around the design and fit of the 1976 Bicentennial uniform. This “uniform was constructed in the shape of a red-white-and-blue octagon with an opening in the center for the lobby attendant’s head.”¹³⁵ It was designed to be worn as a poncho with minimal tacking at the sides, leaving the lobby attendants’, all female,¹³⁶ sides exposed. Other than “blue dancer pants” they were not permitted to wear any other garments, such as a shirt or leotard, under this outfit. Hasselman, the tallest of the attendants, protested that the one size fits all outfit was revealing and poorly made, exposing her sides, thighs and buttocks. Numerous attempts at alterations did not leave this outfit any less revealing, and after being ordered to wear it she was subjected to repeated harassment and felt unable to perform her job duties. Although her employer was aware of her situation,¹³⁷ it did nothing to remedy it. When Hassleman refused to wear the uniform, she was ordered off the floor and given a lay-off letter.¹³⁸

The court found that requiring Hasselman to wear this “revealing and sexually provocative” outfit violated Title VII. Moreover, the court noted that it “could reasonably be expected that were such an outfit to be worn . . . , she would be subjected to sexual harassment.”¹³⁹ Additionally, the court soundly rejected the following employer arguments:

133. The EEOC, in its compliance manual, states that “in some cases the mere requirement that females wear sexually provocative uniforms may itself be evidence of sexual harassment.” EEOC COMPLIANCE MANUAL § 619.4 (2000) (grooming standards).

134. 507 F. Supp. 599 (S.D.N.Y. 1981).

135. *Id.* at 604.

136. In the fall of 1975, when the ownership of the building changed hands, the cleaning contractor, who hired the lobby attendants, no longer hired males. *Id.* at 604 n.8.

137. Hasselman sent her employer a letter in which she stated that none of the duties or responsibilities of the job “requires me to be a sex symbol in skimpy costume.” *Id.* at 606 n.12.

138. *Id.* at 601–07.

139. *Id.* at 607.

1. That an employer has an unfettered prerogative to impose reasonable dress and grooming requirements;¹⁴⁰
2. That the uniform was a form of artistic expression protected by the First Amendment;¹⁴¹ and
3. That wearing the uniform was a bona fide occupational qualification.¹⁴²

In discussion, the court made it clear that it saw little difference between this form of harassment and that made illegal in cases where supervisors harassed employees. Analogizing to these cases, the court stated that the employer here knew that Hasselman had been subjected to harassment, and thus had made her acceptance of sexual harassment, by members of the public and building tenants, a condition of employment.¹⁴³ To end any doubts, the court stated in a footnote: "Employers may once have been able to engage with impunity in the type of conduct that unquestioningly allowed women to be treated as sex objects. But this is no longer the case."¹⁴⁴

In similar cases after the *Sage* decision, federal courts rejected the idea that employers could unilaterally impose dress codes that subjected female employees to harassment from the public. For example, in *Marentette v. Michigan Host*,¹⁴⁵ the plaintiff cocktail waitresses were required to wear provocative uniforms which led to harassment by customers. Despite knowledge of the harassment, the employer had failed to remedy this situation, which the court noted could be in violation of Title VII.¹⁴⁶ Six years later, a federal court found that where cocktail waitresses were required to wear revealing outfits as well as flirt with customers, the resulting sexual harassment and the employer's knowledge of it were in violation of Title VII.¹⁴⁷

Although there are now fewer reported cases involving employer dress policies, the case of *Schonauer v. DCR Entertainment, Inc.*¹⁴⁸ demonstrates that employers still make these illegal demands, in this case

140. *Id.* at 608–09.

141. *Id.* at 610.

142. *Id.* at 611.

143. *Id.* at 609–10.

144. *Id.* at 610 n.16.

145. 506 F. Supp. 909 (E.D. Mich. 1980).

146. *Id.* at 912.

147. EEOC v. Newtown Inn Assoc., 647 F. Supp. 957 (E.D. Va. 1986).

148. 905 P.2d 392 (Wash.Ct.App. 1995).

attempting to insist on partial nudity for a female employee.¹⁴⁹ There, plaintiff was employed as a waitress at a topless nightclub. Her place of employment distinguished between waitresses (clothed) and dancers (partially nude). The dress code for waitresses did not include provocative attire; rather, the posted dress code dryly stated "No T-shirt, no shorts, no sweater." Her employer repeatedly pressed her to take part in nude waitress contests, but she refused and was eventually fired. After her termination, she filed a charge for sexual harassment and other claims.¹⁵⁰

Before the trial court, the defendant successfully moved for summary judgment. Drawing heavily on Title VII precedent, the court of appeals, however, noted that sexual harassment is actionable under Washington law. Observing that she was hired as a waitress, not a dancer, the appeals court also noted that a jury could infer that this created a hostile and offensive work environment. Reversing the trial court, the court stated that the employer's attempt to require plaintiff to dance in the nude, against her wishes, "arguably created a hostile working environment for someone hired to wait tables"¹⁵¹

Taken as a group, these cases establish two principles. First, that an employer cannot use a dress code defense to legitimate a policy that requires an employee to dress in a sexually provocative manner. The *Schonauer* case, although not discussed as a costume case by the court, suggests also that an employer's purported business needs cannot justify the imposition of sexually provocative dress or behavior on a non-consenting employee. Second, these cases also establish that in situations, where job requirements place employees in positions where they are likely to be harassed, courts are willing to deem the harassment foreseeable and a violation of Title VII.

2. *Third Party Cases*: Despite the data presented in the first part of this article, there are only about a dozen cases that can legitimately be described as third party sexual harassment cases. In about half of those

149. One author argues that even where women voluntarily take jobs involving nudity, the protections of Title VII sexual harassment doctrine should still be available. Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support A Hostile Work Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. REV. OF L. & SOC. CHANGE 271 (1998).

150. *Schonauer*, 905 P.2d at 397-401.

151. *Id.* at 401. This case does not directly discuss the issue of harassment by customers. One presumes, however, that concern was a basis for plaintiff's refusal to take part in the nude waitress contest. Additionally, the court declined to rule whether these facts created a "hostile working environment for someone hired to dance nude on a stage."
Id.

cases, the third party harassment is incidental to co-worker harassment or is not discussed usefully by the court. An early case, however, is *Dornhecker v. Malibu Grand Prix Corp.*¹⁵² In that case, a contract consultant hired by her employer to aid in marketing is initially described as a “co-worker.”¹⁵³ On several different occasions, Robert Rockefeller, the contract consultant, touched plaintiff Dornhecker and finally “playfully” choked her at a business dinner after she complained about his behavior. Her supervisor tried to console Dornhecker and reported this behavior to the company president. Rockefeller’s contract was not renewed nor did he attend any more of the sales meetings. Dornhecker had resigned after being told that Rockefeller would be present for the remaining day-and-a-half duration of the sales meetings, deeming company management unresponsive.¹⁵⁴

Rather than focusing on the third party issue, apparently because the court mistakenly characterized Rockefeller as a co-employee, the court focused on whether the company took the “prompt remedial action” that can forestall Title VII liability in sexual harassment cases. Finding that the behavior was not that severe and the company’s response prompt, the court noted that in assessing the promptness of any remediation, the court should consider “[a] company’s lines of command, organizational format and immediate business demands.”¹⁵⁵ Additionally, based on the facts of this case, i.e., this incident arose in a two day time span, the court found that the employer’s actions were decisive. Thus, although helpful on the duty to remedy an offensive work environment, the case adds nothing to a third party corpus.

In several of these peripheral third party cases, the third party incidents are mentioned only in passing or pale in comparison to the acts of co-workers. In one case, for example, co-workers repeatedly harassed a female long-haul truck driver.¹⁵⁶ The court notes in its finding of facts that while making a delivery, a male supervisor at the customer’s plant touched her breast. When she reported this incident, her own supervisor told her “that ‘the customer is always right’ and that she should stay away from that person in the future.”¹⁵⁷ In its conclusions of law, however, the

152. 828 F.2d 307 (5th Cir. 1987).

153. Judge Edith Jones writes: “The behavior of a co-worker at the Malibu Grand Prix Corporation proved too racy for Marvelle Dornhecker.” *Id.* at 308. This gratuitous comment offers one example of judicial attitudes towards sexual harassment.

154. *Id.* at 308–09.

155. *Id.* at 309.

156. *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369 (W.D.N.C. 1988).

157. *Id.* at 371–72.

court focuses exclusively on the acts of her co-workers and supervisors; the incident with the customer is never fruitfully discussed.¹⁵⁸

In another case, most of plaintiff's complaints were about her supervisors and co-workers.¹⁵⁹ As part of her claim of a hostile sexual environment against her employer, New York Telephone Company, she described graffiti directed at her, written on the walls of the JFK Airport.¹⁶⁰ Although the bulk of the conclusions of law in the opinion deal with other sex discrimination issues, the court notes that even if her employer did not have the authority to remove the graffiti on its own, at the very least, it could have contacted airport management to see what it could have done.¹⁶¹ The court concluded that not having attempted this minimal effort was a breach of New York Telephone's duty to plaintiff.¹⁶²

Some cases do not discuss the third party issues because of threshold procedural errors that prevent a discussion on the merits. In *Massarella v. Quality Inn, Inc.*, although the plaintiff alleged a direct case of third party harassment—a guest at the hotel made advances—plaintiff's claim failed to survive a motion to dismiss and a motion for partial summary judgment because of numerous pleading errors and errors of procedure under Title VII.¹⁶³ Specifically, plaintiff failed to allege facts that would demonstrate that the defendants knew or should have known of the guest's conduct, and that the employer failed to take appropriate remedial action.¹⁶⁴ At the very least, this case serves as a warning to plaintiff's counsel that pleading employer knowledge is essential to the success of all third party claims.

Similarly, in *Waltman v. International Paper Co.*, plaintiff Susan Waltman brought an action against her employer for sexual harassment.¹⁶⁵ Along with numerous incidents of co-worker harassment, she alleged that employees of another company, who were present at her workplace, also harassed her.¹⁶⁶ Although her employer did not discipline her co-workers for the alleged harassment, it did contact the third party employer and

158. *Id.* at 377–81. Most of the discussion focuses on the tolling period for Title VII claims, and the hostile environment harassment caused by her co-workers and supervisors. The only mention of the third party claim is as follows: "There is no dispute that appropriate Celanese employees knew about the July 20 incident at the Celco facility." *Id.* at 380.

159. *Danna v. N.Y. Telephone Co.*, 752 F. Supp. 594 (S.D.N.Y. 1990).

160. *Id.* at 608.

161. *Id.* at 611.

162. *Id.*

163. No. 89 C 1507, 1989 U.S. Dist. LEXIS 7736 at *5 (N.D. Ill. June 26, 1989).

164. *Id.*

165. 875 F.2d 468 (5th Cir. 1989).

166. *Id.* at 471.

those employees were disciplined by their own employer.¹⁶⁷ In the district court, the defendants were granted partial summary judgment based on their argument that Waltman's claims were time barred and that Waltman had not informed them of the harassment. The court of appeals overturned the district court's entry of partial summary judgment, without any discussion of the third party issue. The decision of the appeals court focused on procedural errors, co-worker harassment, and on whether the plaintiff had established a continuing violation of Title VII.¹⁶⁸

A final example is *Churchman v. Pinkerton's Inc.*, in which plaintiff, a security guard, alleged that she had been harassed by employees of one of the companies to which she had been assigned.¹⁶⁹ She had reported the harassment both to her employer and to the company for which she provided security.¹⁷⁰ In response to her complaint, the defendants (both her employer and the company at which the harassment took place) filed motions for summary judgment on the grounds that plaintiff had falsified her employment application, and that this barred her Title VII claims.¹⁷¹ The court, in granting these motions,¹⁷² was thus not compelled to comment on the merits of plaintiff's allegations.

Luckily, there are a few cases in which the courts grapple with the merits of allegations of third party harassment. In almost all of these cases, the courts comment that these are cases of the first impression in their jurisdiction. These cases are reviewed below in chronological order.

The Equal Employment Opportunity Commission (EEOC) issued the earliest reported case.¹⁷³ In that case, the charging party was a waitress at a restaurant. One evening, four male customers entered the restaurant and proceeded to make lewd comments directed at the waitress. In addition, they attempted to grab her and one customer succeeded in squeezing

167. *Id.* at 472.

168. However the court does discuss one issue that is equally relevant to co-employee and third party claims: employer knowledge. The court aptly notes that "[t]here is some uncertainty in the law" regarding the parameters of employer knowledge necessary to make out a *prima facie* case. *Id.* at 478. In this case, the court stated that Waltman could show actual notice since she had complained to "higher" management on three occasions as well as constructive notice because of the pervasiveness of the harassment, e.g., graffiti in numerous locations at her workplace. *Id.*

169. 756 F. Supp. 515, 518 (D. Kan. 1991).

170. *Id.* at 518-19.

171. *Id.* at 516.

172. *Id.* at 521.

173. EEOC Decision No. 84-3, 34 Fair Emp. Prac. Cases (BNA) 1887 (Feb. 16, 1984). The names of the parties involved are omitted because the statute bars identification of the parties to proceedings before the Equal Employment Opportunity Commission.

her buttocks. After this occurred, the waitress left their table and asked a male waiter to take her place; the customers then left without placing an order. The waitress continued working and reported the incident to the restaurant's owner when he later entered. He responded lightly and excused the conduct as drunken and typical for members of the alleged harasser's ethnic group. Later that evening, the customers re-appeared at a window, and the owner went out to talk to them. When the charging party sought details of this conversation the next day, it became apparent that the conversation had not been serious. This was confirmed several nights later when one of the harassers appeared with two other men, and they had dinner together with the owner. Although she had asked the owner to have these men apologize, no apology was forthcoming, and as she passed the harasser's table, she told him that he was disgusting. Two days later, her employer questioned her about this comment. At that time, she told him she found the behavior "humiliating, insulting, and offensive" and recounted other incidents of harassment which she had held back for fear of being fired if she had reported them. She also said that this behavior exceeded what she could handle with the "good humor required of a waitress," and asked that she not have to serve these customers again. When her employer said that she might have to be terminated, she asked to have a witness present. In response to this request and the disclosure that she had contacted an attorney, she was fired.¹⁷⁴

The EEOC relied on its own guidelines in the discussion and decision of this case. Noting that the charging party's story was credible and corroborated, the commission stated that no previous decision had addressed this issue, and in a footnote explained that research could disclose no case law on point.¹⁷⁵ But noting that the guidelines do cover harassment by a non-employee, they stated that the pivotal issues were whether the employer "knows or should have known" about the conduct, whether the employer took "immediate and appropriate corrective action," and further noted that in third party cases, the Commission should consider "the extent of the employer's control and any other legal responsibility" which the employer might have over the harasser.¹⁷⁶ In this case, it is undisputed that the charging party informed her employer of the harassment. Thus, the issue in this case was "whether it was within the Respondent's control to take immediate and appropriate corrective action

174. *Id.* at 1888-90.

175. *Id.* at 1890 n.2.

176. *Id.* (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1982)).

and if so, whether the Respondent took such action.”¹⁷⁷ These duties, the Commission stated in a footnote, are part of the employer’s affirmative responsibility to provide a “working environment free from unlawful harassment”¹⁷⁸

Because the harassing customer was a restaurant “regular” and the owner had a friendly relationship with him, the Commission was persuaded that the owner was in a position to take corrective action. For example, the Commission suggested that he could have informed the customer that this type of behavior was not tolerated in his restaurant and that he could have relieved the charging party of a duty to wait on this customer. Since none of these measures or similar ones were undertaken, the owner was liable for sexual harassment.¹⁷⁹ Moreover, the employer was also found liable for retaliating against the waitress for asserting her rights under Title VII.¹⁸⁰

The first reported judicial case,¹⁸¹ *Thoreson v. Penthouse Intl., Ltd.*, is an egregious one.¹⁸² Plaintiff Marjorie Thoreson was employed by

177. *Id.* at 1891.

178. *Id.* at 1891 n.3.

179. *Id.* at 1891.

180. *Id.* at 1892.

181. *Rife v. Am. Amusement Arcades, Inc.*, No. C7-89-1562, 1990 Minn. App. LEXIS 105 (Jan. 22, 1990) is slightly earlier, but it is an unpublished case. There, plaintiff’s job was to deliver stuffed animals to amusement arcades. *Id.* at *1. She had made an initial complaint about customer harassment during the course of her deliveries, and was told she need not enter a business where she felt “threatened.” *Id.* at *1–2. Eventually, she quit her job and filed for unemployment compensation benefits. *Id.* at *1. The issue in this case was whether the plaintiff had adequately reported further harassment to her employer after her initial complaint. Finding that she had failed to do so, and that her employer had made a reasonable response to her first complaint, the court upheld the Commissioner’s finding that she had quit without good cause. *Id.* at *3. It seems assumed in the text of the opinion that such harassment, if proven, could be grounds for quitting with cause.

Two years later, Minnesota courts produced another unpublished decision on this issue in *State v. Tasks Unlimited, Inc.*, No. C8-92-981, 1992 Minn. App. LEXIS 1076 (Oct. 28, 1992). Here, an administrative law judge had determined that Sandra Klein, an employee of Tasks Unlimited, had established a case of harassment, and the employer had appealed these findings to the court. *Id.* at *1. Klein alleged that her job as a customer liaison had subjected her to daily sexual harassment from customers over the eighteen-month duration of her job. She also claimed that her supervisors had knowledge of this harassment, and had failed to do anything about it. *Id.* at *2–*3. In affirming the ALJ’s decision, the court noted that the evidence supported a finding that Klein had told her employer about the harassment and that internal company memos recognized the employer’s own deficiencies in handling her complaints. Further, it noted that the employer had not taken any action to remedy the customer harassment. *Id.* at *3–4.

182. 563 N.Y.Supp.2d 968 (1990).

Penthouse and had a contract in which Penthouse promised to develop her acting potential. She was also intimate with Penthouse owner Robert Guccione. Although her dispute with Penthouse involved multiple issues, the salient one for these purposes is that Guccione insisted the plaintiff seduce and sleep with two business contacts that he deemed important to the Penthouse empire.¹⁸³ In one case, this conduct lasted over a period of 18 months. The business relationship between plaintiff and Penthouse/Guccione deteriorated, and she was fired.¹⁸⁴

Although the court did not find for all of plaintiff's claims, it did uphold her claim of sexual harassment, awarding \$60,000 in compensatory damages and \$4,000,000 in punitive damages.¹⁸⁵ The court reasoned that an employer cannot use its power to impose sexual demands, in this case with third parties, on employees as an "implicit condition of continued employment."¹⁸⁶ In justifying the award of punitive damages, the court noted that the state human rights laws are extensions of basic notions of equality and human dignity, and that society has an interest in upholding these principles through human rights laws.¹⁸⁷ Moreover, enforcement of these laws is designed to eliminate the idea that there are "subclass[es]" of people whose rights can be ignored, by denying them the ability to participate in the social order and characterizing them as inferiors. Her employer's demands made her choose between her personal liberty and her interest in continued employment.¹⁸⁸ On this particular point, the court's language is particularly instructive:

Unless eliminated, such conduct permits the employment structure to be permeated by attitudes and relationships which we have determined to be abhorrent. When female employees such as plaintiff are allowed to be confronted by sexual

183. One might argue as to whether this case is better characterized as an employer quid pro quo case, and indeed it might be. This case is discussed here because it represents an extreme form of third party harassment, in which employees are required not only to be sexually provocative to attract business, but are required to engage in sexual acts to further business relationships. In this sense, the case may be more properly categorized as a type of costume case, but its facts make it difficult to place in any one existing category of sexual harassment.

184. *Thoreson*, 563 N.Y.Supp.2d at 970-71.

185. *Id.* at 971-72, 977.

186. *Id.* at 972. Although the focus of this article is federal law, this state case, especially at the outset of this section, is instructive for providing a generalized theoretical justification for enforcing anti-discrimination law against third party harassment.

187. *Id.* at 973.

188. *Id.* at 975.

coercion on the job, women as a group are relegated to a subordinate status Defendant's attempt at sexual extortion entailed precisely the type of insult and indignity that the statute is designed to eradicate. Forcing plaintiff, because she is female, to choose between her right to liberty (bodily and personal integrity) and property (the right to earn a living) is *per se* discriminatory. As employers who abused their dominant status by forcing a female employee to choose between compromising either her job or her personal dignity, defendants are guilty of attempting to reduce plaintiff, because of her sex, into a position of servitude.¹⁸⁹

The court deemed that the nature of plaintiff's employment, which in part relied upon sexual exploitation, did not mitigate the error of defendant's conduct. Accepting a job which exploited sexuality was not a waiver of plaintiff's right to be free from sexual harassment.¹⁹⁰ Concluding, the court notes: "Defendants used the plaintiff in furtherance of their business as if she were property owned by them."¹⁹¹

One of the most widely cited cases in this small corpus to first squarely face the issue is *Powell v. Las Vegas Hilton Corporation*¹⁹² Plaintiff Carol Powell was hired as a "21" dealer in defendant's casino. Over the course of thirteen months, she was reprimanded four times for rudeness to customers, and was eventually terminated on this basis. Powell contended, however, that she was fired because she complained about hostile environment sexual harassment, and that her "rudeness" was a response to the boorish, sexual comments and acts of customers. The parties' differences do not end there, however. Defendant contended that it addressed plaintiff's concerns, while she alleged that her complaints were ignored.¹⁹³ Like many employers in these cases, the Las Vegas Hilton responded by filing a motion for summary judgment.

On the issue of sexual harassment, the court denied defendant's motion.¹⁹⁴ Noting that this was a case of first impression, and grappling with the paucity of precedent, the court deemed the costume cases unhelpful. Thus, it turned first to the EEOC guidelines as a "body of

189. *Id.* at 976 (internal citation omitted).

190. *Id.*

191. *Id.* at 977.

192. 841 F. Supp. 1024 (D.Nev. 1992).

193. *Id.* at 1025-26.

194. *Id.* at 1031.

experience and informed judgment” to which the court could turn for guidance,¹⁹⁵ noting that the Supreme Court accepted these guidelines in *Meritor*.¹⁹⁶ It also noted that a few lower courts, although not directly, had also cited the guidelines on the third party harassment issue. The court held that because *Meritor* guarantees employees a right to a harassment-free workplace, “in the appropriate case, an employer could be liable” for harassment of employees by customers.¹⁹⁷ Thus established, the issue was whether the plaintiff had presented a case that could go to the jury. Here, the court employed the Ninth Circuit test for hostile work environment sexual harassment, considering whether the behavior was (1) sexual, (2) unwelcome, (3) severe or pervasive and (4) whether the defendant responded appropriately. On the issue of the pervasiveness of the conduct, the court used the “reasonable victim” standard.¹⁹⁸ Adoption of this standard led the court to reject defendant’s argument that the public nature of plaintiff’s job, in a “fun” destination where alcohol is frequently consumed, excused the behavior of the customers. The court reasoned that to accept defendant’s argument would be to alter the status quo “so that, ironically, a previously sexually harassing environment is itself a defense.”¹⁹⁹ On the issue of employer responsibility to remedy the problem, the court noted that *Meritor* did not answer that issue, but that Ninth Circuit law holds employers liable for conduct of which management-level employees knew, or in the “exercise of reasonable care should have known.” Where knowledge is demonstrated, the employer must take action “reasonably calculated to end the harassment.”²⁰⁰

In *Magnuson v. Peak Technical Services, Inc.*,²⁰¹ another court also faced the “novel” issue of third party harassment. In that case, the plaintiff, Rebecca Magnuson, worked as an employee of a company that provided consultants under a service contract arrangement.²⁰² Although Magnuson’s ostensible employer was Peak Technical Services, Fairfax Motor Imports (a car dealer) and Volkswagen of America, Inc. were also listed as defendants in this case, because of the amount of control they

195. *Id.* at 1027 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976)).

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

197. *Powell*, 841 F. Supp. at 1028.

198. This standard was developed in the Ninth Circuit case of *Ellison v. Brady*, 924 F.2d 872, 878 (1991).

199. *Powell*, 841 F. Supp. at 1029.

200. *Id.* at 1029–30.

201. 808 F. Supp. 500 (E.D. Va. 1992).

202. The facts of this case are particularly significant in light of the rising number of “contingent” or “contract” employees in this economy.

had over her employment relationship. Peak arranged for Magnuson, a car sales and marketing consultant, to provide field marketing services for Fairfax, a Volkswagen dealership. Volkswagen provided her training, and she was assigned to work with dealerships in the District of Columbia area.

Under a new program, Magnuson began to work directly with one dealership, Fairfax Volkswagen, although she had other job duties for Volkswagen. Sometime into this relationship, Richard Blaylock became the new general manager at Fairfax, and almost immediately began to make repeated sexual advances towards Magnuson. When she contacted her supervisors at both Peak and Volkswagen and asked for a reassignment, the Peak supervisor told to put up with this behavior "for the sake of Volkswagen" and that such behavior was normal in the car sales industry. Her Volkswagen supervisor was similarly unresponsive. After further complaints, she was reassigned. But shortly after her reassignment, a Peak employee called her to tell her that she had been terminated. This was confirmed by a call to Volkswagen's offices, during which she was told that she was "too cute" for the position and would be harassed wherever she went.²⁰³

After concluding that all of the defendants were employers under Title VII, the court then dealt with the more difficult issue of which of the defendants were plaintiff's employer. To determine this, the court resorted to a broadly construed control test,²⁰⁴ and also noted that in this atypical case, it might be permissible under Title VII cases to find that she was an employee of more than one employer.²⁰⁵ Thus, in response to defendant's motion for summary judgment, the court found that Magnuson had raised a genuine issue on the matter of her employment relationship with Volkswagen and Peak. Similarly, the court concluded that it might be possible to deem Fairfax Volkswagen, the dealership, as an agent of co-employer Volkswagen.²⁰⁶

The court went on from here in its analysis of Magnuson's sexual harassment claim. Noting that neither Peak nor Volkswagen had a direct employment relationship with the harasser, the court raised the novel question of whether an employer could be liable for acts of a non-

203. *Magnuson*, 808 F. Supp. at 503-10.

204. *Id.* at 508.

205. *Id.* at 508-09 (citing *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344, 347-49 (S.D.N.Y. 1984) (holding temporary services agency and company that contracted with temporary services agency to both be "employers" of a temporary employee for purposes of Title VII) and other cases cited therein).

206. *Magnuson*, 808 F. Supp. at 510.

employee. In resolving this question, the court looked first to the EEOC Guidelines and found that deference to these guidelines was appropriate.²⁰⁷ It also reviewed the EEOC decision in support of a doctrine of third party harassment.²⁰⁸ Applying the guidelines and the cases, the court found that this situation could be analyzed similarly, and stated the elements of her claim as follows: "Peak and Volkswagen may be held liable for Blaylock's harassment of Magnuson if i) they knew of the harassment; and ii) they failed to take any corrective actions to remedy the situation."²⁰⁹ Thus, plaintiff's case survived defendants' motions for summary judgment.²¹⁰

For the Kansas United States District Court, third party harassment was also an issue of first impression in *Otis v. Wyse*.²¹¹ Again, the issue arose after the defendants in this case, Dr. Wyse and plaintiff's employer, the Great Plains Health Alliance, presented motions for summary judgment. Plaintiff had had a prior contact with Dr. Wyse as a student, when he harassed her during her training as a nurse practitioner. Later, she obtained a job with Great Plains, and Dr. Wyse's behavior continued. For example, he left her a "bouquet" of condoms. Plaintiff Sue Otis complained about this behavior on a regular basis. After eighteen-months of complaints, Dr. Wyse, even though he was not an employee of Great Plains, was asked to avoid contact with plaintiff and to cease behavior which would interfere with other's work. Unfortunately, within several months Dr. Wyse resumed his harassment. A new manager at the clinic told Otis that she would need to

207. *Id.* at 512-13.

208. *Id.* at 513. The court notes:

Although the EEOC did not specifically hold as such, the facts of this case render it a hostile environment harassment case. No *quid pro quo* harassment could be involved here because the nonemployee was not in the position to grant or deny tangible job benefits. Instead, the employer's acquiescence to, and refusal to take measures to correct, the customer's harassment of the waitress clearly gave rise to an abusive and hostile working environment.

Id. at 513 n.10.

209. *Id.* at 513. The court modified its knowledge requirement in the next paragraph, noting that with this circuit, the plaintiff need only demonstrate that the employer had "actual or constructive knowledge" of a hostile working environment. *Id.*

210. *Id.* at 514-15. The court also considered state law claims for breach of contract and tortious interference with contract. *Id.* at 515-17.

211. No. 93-2349-KHV, 1994 U.S. Dist. LEXIS 15172, at *1, *17 (D. Kan. Aug. 24, 1994).

work with Wyse if she wanted a raise and to “get on with it.” Plaintiff ultimately resigned.²¹²

Deeming this an issue about hostile environment sexual harassment, the court looked to the EEOC Guidelines on this “emerging issue.” The court described the liability test for non-employee harassment liability as “identical” to the test used for co-worker harassment within the Tenth Circuit. Unlike the Magnuson court, this court felt that the employment status of the harasser was irrelevant. Rather, the issue in this type of case was whether the employer clearly knew of the harassment and had the “ability to end the harassment but failed to do so.”²¹³ This approach, the court opined, would be consistent with current Title VII employer liability law in its circuit and it adopted the EEOC Guidelines wholesale.²¹⁴ In this case, because the employer did know of the harassment, the issue boiled down to whether Great Plains’ actions were “prompt and reasonably calculated to end the harassment.” Concluding that the employer didn’t act in this fashion, the court noted that Great Plains was making this determination aware that Dr. Wyse was not its employee, and that its ability to end the harassment might be more limited. This doctrinal approach is consistent with the factors listed in the guidelines, and it denied the summary judgment motion in order to leave these issues for a jury.²¹⁵

In another “first impression” case, plaintiff Maria Menchaca alleged that a regular customer of the record store at which she was employed harassed her and that nothing was done about it.²¹⁶ At its most extreme, the customer picked up plaintiff by the ankles and dangled her in the air while her employer merely watched.²¹⁷ After reviewing basic sexual harassment law, the court was stumped by the “novel question” of employer liability in this case. Relying on the EEOC Guidelines, the *Sage Realty* case, and EEOC’s own decisions, the court found in favor of the plaintiff’s argument that a customer’s non-employee status did not shield the employer from liability. As in prior cases, the court determined that the employer had been put on notice and that the salient issue was the employer’s ability to end the harassment. In denying defendant’s motion for summary judgment, the court rejected defendant’s

212. *Id.* at *1–6.

213. *Id.* at *17–18.

214. *Id.* at *18–19.

215. *Id.* at *20–22.

216. *Menchaca v. Rose Records, Inc.*, No. 94 C 1376, 1995 U.S. Dist. LEXIS 4149 (N.D. Ill. March 31, 1995) at *1–4, *7.

217. *Id.* at *1–4, *7.

argument that a customer was incapable of interfering with an employee's work, and that the customer's actions were "harmless" or just "play."²¹⁸

Third party decisions after *Ellerth* and *Faragher* show no marked change of direction. In *Lockard v. Pizza Hut, Inc.*, the company's policy forbade customer harassment and established a procedure for employees and managers to report customer harassment.²¹⁹ One night, a repeat customer went beyond his previous salacious comments and physically accosted Lockard. Her manager required her to continue serving these customers, one of whom then grabbed her breast and put his mouth on it. She quit. The court, after determining who was the actionable employer given the franchise structure of the business, found that the harassment was actionable, using the co-worker standard of liability and upheld the jury verdict in her favor.²²⁰

One last case raises potential questions about liability when it comes to the growing use of contract or contingent employees in the workforce. In this case, the plaintiff was a home health care aide whom an employment agency contracted out to a home health care concern. On one of her jobs, plaintiff alleged that the son of a patient harassed her. Responsibility for problems at the workplace was apparently shared by both the placement agency and the health care concern, and the plaintiff had a documented record of work problems. Here, the court ruled for the defendant, distinguishing it from *Sage Realty Corp.*, by stating that the employer had not knowingly put the employee at risk and had responded appropriately to her complaint.²²¹

3. *The Literature*: While there are dozens of articles on traditional forms of sexual harassment, almost nothing has been written about third party sexual harassment. Even in the leading 824-page treatise, harassment by non-employees garners only five pages.²²² Although it is unusual in a law journal article to discuss other articles at any great

218. *Id.* at *5-12.

219. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1066 (10th Cir. 1998).

220. *Id.* at 1067-77. Although not containing much of a discussion, another district court ruled for a plaintiff complaining of third party harassment in response to defendant's motion for summary judgment denying liability. *Oliver v. Sheraton Tunica Corp.*, No. 3:98cv203-D-A, 2000 U.S. Dist. LEXIS 3147 (N.D. Miss. Mar. 7, 2000).

221. *Hylton v. Norrell Health Care of New York*, 53 F. Supp. 2d 613, 613-20 (S.D.N.Y. 1999).

222. LINDEMANN & KADUE, *supra* note 3, at 248-52 (spending two pages on the costume cases, and one paragraph each on harassment by independent contractors, customers, consultants and vendors).

length, because of the paucity of any legal materials in this area, the few that exist have undue influence.

The earliest article appeared in 1983.²²³ Beginning his fourteen-page article by identifying non-employee harassment of female employees as an unsettled issue, the author writes that these cases “raise[] the question of the ultimate limits of employer responsibility” in the doctrinal law of sexual harassment.²²⁴ Because of the time at which the article came out, the author focused on the costume cases to develop a theory of employer liability. The author opined that the cases, although decided correctly, provided thin articulation of principles that would guide courts in the future. Continuing, he identifies employer knowledge as the first issue in these cases, and analogizes it to the employer’s need to police co-worker conduct as part of their duty to maintain a harassment-free workplace.²²⁵ After concluding that the same standard that applies to co-employee harassment, i.e., knows or should have known, should apply in non-employee cases, he noted that once the employer knows, it must act to end the harassment for to do otherwise is to approve of or tolerate the harassment. He added, however, that remedies that are reasonable in non-employee cases may differ from those in supervisor or co-worker cases.²²⁶ Harm to the harassed employee is identified as a second obstacle in these cases; that is, does the harassment affect the employees “terms, conditions, or privileges of employment?” He concludes that non-employee harassment is yet another variation of hostile environment harassment, and that the complaining employee need not show tangible job loss.²²⁷ As a result of this analysis, the author adopts the following *prima facie* test:

1. The employer knew (or should have known) of the harassment;
2. The employer failed to take reasonable measures to prevent or remedy the harassment; and

223. See Allegretti, *supra* note 3.

224. *Id.* at 98–99.

225. *Id.* at 100–01.

226. *Id.* at 101.

227. *Id.* at 102–04. The *Meritor* and *Harris* decisions, issued after this article, make this consideration far less problematic. See *Harris*, 510 U.S. 17; *Meritor*, 477 U.S. 57.

The harassment affected the employee's terms or conditions of employment, because it was sufficiently pervasive and severe to create an offensive working environment.²²⁸

The author concluded by reviewing the aptness of the two defenses that had been used in the costume cases: reasonable dress codes and the bona fide occupational qualification (BFOQ) defense, and concludes, as have the courts, that these are not ways to justify harassment.²²⁹ In a concluding line, the author opines that the "same basic approach" should be used in cases not involving sexually provocative dress.²³⁰

A more considered treatment of the subject appeared roughly ten years later.²³¹ Beginning their article by recognizing that non-employee harassment may have an even greater impact on employees than co-employee harassment, the authors' goal was to develop principles by which future courts might decide these cases, and policies by which employers could prevent them.²³² In this article, the authors also reviewed the costume cases, but concluded that they were not helpful, because they did not address the more typical forms of non-employee harassment. Thus, they saw their task as looking at analogous law and dicta to determine how the courts should resolve these cases.²³³ After pointing out that the costume cases were decided before *Meritor*, the authors suggest that the hostile environment theory developed in *Meritor* also describes the situation of an employee harassed by a non-employee:

For example, if a female sales representative were subjected to highly objectionable sexual conduct in a pervasive and severe manner by one of her customers, this would significantly alter the terms and conditions of her work. As a result, she might be reluctant to approach her harassing customer, who she now finds reprehensible. This would create a hostile environment

228. Allegretti, *supra* note 3, at 104. The author notes that the EEOC Guidelines use the same approach, but notes those guidelines call for the employer to undertake "immediate and appropriate corrective action" once it learns of the non-employee harassment. *Id.* at 104-05.

229. *Id.* at 105-09.

230. *Id.* at 109.

231. Aalberts & Seidman, *Non-Employees*, *supra* note 3. The authors produced two versions of this article. The one discussed here is the law review article cited in note 3. They also produced a version of this article for an employee relations journal for a non-legal audience that focused mainly on how to craft employer policies to avoid liability for non-employee harassment.

232. *Id.* at 451.

233. *Id.* at 453-54.

case because her customer's place of business is a part of her workplace. Moreover, if she were to react by ceasing any dealings with the customer, she would lose a valuable account which would affect her income and advancement.²³⁴

The doctrinal problem with this scenario, as the authors recognized, is that Title VII does not specifically address the situation of non-employee harassment, assuming rather that the employer is the sole source of discrimination in the workplace.

In justifying court censure of non-employee harassment, the authors argued that the courts can look to the EEOC Guidelines and dicta in four cases, which suggest that there is a cause of action for non-employee harassment.²³⁵ And, they generally dismiss the applicability of defenses resting on dress codes or a BFOQ.²³⁶

At the time these authors wrote, the courts had not directly decided any third party sexual harassment cases, therefore the authors derived their standards by looking at those hostile environment cases which they deemed most apt. The authors note that although the hostile environment cases originally developed from cases involving racial and ethnic harassment, they expanded the elements that a complainant must prove. Additionally, in the case of *Ellison v. Brady*, the Ninth Circuit introduced the "reasonable woman" standard which asks courts and juries to evaluate whether a "reasonable woman" would consider alleged hostile environment to be sufficiently severe as to alter the work environment.²³⁷ Aalberts and Seidman spend considerable time analyzing the effects of this case on a non-employee claim.²³⁸ Following much of the reasoning of the *Ellison* case itself, the authors argue that this standard would be preferable because it is not referenced to the status quo and it is sympathetic to the traditionally overlooked "experiences of

234. *Id.* at 456.

235. *Id.* at 456–458 (citing cases *Garziano v. E.I. Du Pont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987)(implying non-employee harassment is actionable, citing the EEOC guidelines); *Henson v. City of Dundee*, 682 F.2d 897 (adding that "even strangers to the workplace" can cause sexual harassment); *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985)(noting in dicta that an employer has a duty to act against non-employees for harassment of its employees); *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244 (N.D. Ind. 1985)(stating that the workplace can be rendered offensive by supervisors, co-workers or strangers to the workplace). *Id.*, respectively, at nn. 70, 73, 75 and 77.

236. Aalberts & Seidman, *Non-Employees*, *supra* note 3, at 458–61.

237. 924 F.2d 872, 878–79 (9th Cir. 1991).

238. Aalberts & Seidman, *Non-Employees*, *supra* note 3, at 464–66.

women.”²³⁹ The standard does not accommodate the reactions of a hyper-sensitive victim, but does hold defendant’s liable for non-intentional conduct on the part of the harasser.²⁴⁰

Finally, before outlining their proposed *prima facie* case, the authors review the totality of the circumstances test that is used in the 1985 EEOC Guidelines and directs the court to consider both the nature of the behavior and the context in which it occurred.²⁴¹ This portion of the article is inspired by dicta in *Meritor* to the effect that the plaintiff’s dress and speech are “obviously relevant.”²⁴² Unlike rape cases where this type of evidence is often considered irrelevant, the authors conclude that the Supreme Court was correct because “the circumstances surrounding certain jobs cannot be realistically ignored.”²⁴³

After disposing of these considerations, the authors announced the following model or set of factors for judging third party harassment:

1. The reasonable woman perspective should be adopted.
2. The conduct must be “sufficiently severe or pervasive” to alter working conditions.
3. The harasser’s intent is irrelevant.
4. The totality of the circumstances must be considered, although a woman’s consent to work in a “risky” environment is not a waiver of her Title VII rights.
5. The employer will be liable if it knew or should have known of the conduct, but fails to take prompt, remedial action.²⁴⁴

Drawing on the *Ellison* principles, the authors augment their model by dividing cases into three types depending upon the work the woman does: high-risk, medium-risk, and low-risk. In these sections, the authors attempt to describe the extent of an employer’s liability based upon what a woman might expect upon entering into one of these types of occupations. For example, they reasoned that a topless female

239. *Id.* at 466.

240. *Id.* at 466.

241. *Id.* at 466.

242. 477 U.S. 57, 69 (1986).

243. Aalberts & Seidman, *Non-Employees*, *supra* note 3, at 467. In a footnote, the authors contrast the sales clerk at a bookstore to the cocktail waitress, pointing out that in these differing contexts, the same allegedly harassing behavior may be judged differently.

244. *Id.* at 468–70.

dancer²⁴⁵ should expect stares that a woman in a bookstore would not. The gist of this idea is that employees in certain occupations should tolerate a greater or lesser degree of harassment, i.e., it should be actionable, depending upon their employment. Thus, at the other extreme, the employer of the bookstore clerk should be the “most protective and respond to even mild provocation” although a worker in this environment should expect fewer harassing incidents.²⁴⁶ The authors end by proposing some ideas for employers drafting policies to anticipate third party cases.

A final article focused on the problem of attorney-client harassment. Although increasing scrutiny has been brought to bear on attorneys who harass clients, this article turns the table.²⁴⁷ Narrowly targeted, the article outlines the development of sexual harassment doctrine,²⁴⁸ and provides background about the extent of the problem.²⁴⁹ Finally, after outlining the law that exists on third party harassment,²⁵⁰ the authors argue that the incentive structure that is in place to curtail co-employee or supervisor harassment does not exist for third party harassment,²⁵¹ and that the power imbalance that typifies traditional sexual harassment lies “at the root of” this form of harassment as well. For example, the authors argue that employer acquiescence in third party behavior gives the harasser additional power and is an extension of the “same power dynamic that fosters employee-employee sexual harassment.”²⁵² Drawing on facets of the attorney-client relationship, the authors identify various points for which the typical assumption of the “powerful” lawyer does not hold true, especially where a client’s

245. A recent article depicts the employment situation of the typical dancer. Most dancers are hired as independent contractors in an effort to limit a variety of duties that employers owe to employees and escape liability under statutes such as Title VII. Noting that American law has been traditionally reluctant to deal with the legal realities of sex work, Fischer argues that nude dancers should be treated as employees in order to limit the abuse of these women as a result of their employers manipulation of the legal system. Carrie Benson Fischer, *Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees*, 14 *LAW & INEQ.* 521 (1996).

246. Aalberts & Seidman, *Non-Employees*, *supra* note 3, at 470–71. It was the contrast between the bookstore clerk and the topless dancer that led to my exploration of the library as a “low-risk” workplace.

247. Honigsberg et al., *supra* note 3, at 715.

248. *Id.* at 717–19.

249. *Id.* at 719–20.

250. *Id.* at 720–23.

251. *Id.* at 728. This argument comes after a review of existing case law on sexual harassment.

252. *Id.* at 732.

decisions may directly affect an attorney's career.²⁵³ Because the authors' are writing to encourage law firms to develop policies to address third party harassment, the authors do not develop a model of a *prima facie* case of third party harassment.

4. *Summary*: The third party cases illustrate a major difference from the now classic supervisor or co-worker harassment cases. In the third party cases presented, the facts demonstrate that sex is used purposefully, tacitly or by acquiescence, to advance business interests. In the supervisor or co-worker cases, harassment detracts from business purposes and the harassment is for the personal, non-business related benefit of the perpetrator. Thus, a supervisor or co-worker will frustrate the legitimate business purposes of its employer. On the other hand, employers, tacitly or openly, may find that encouraging an atmosphere in which third party harassment is acceptable, or the norm, may further their business interests.

Sexual harassment is firmly placed in the Title VII firmament, but what is puzzling is the lack of cases attacking third party harassment, especially to the extent that it has been authorized in the EEOC Guidelines. This lacunae raises at least two questions:

- a. As a matter of law and policy should third party harassment be actionable?
- b. If it is actionable, what should be the elements of a *prima facie* case?

III. ANALYSIS AND RESOLUTION

A. Should Third Party Harassment Be Actionable?

Third party harassment definitely takes place, perhaps as frequently as supervisor or co-employee harassment. It may well be that as consciousness of sexual harassment has risen, and employers have sought to educate their workforce, that third party harassment may be the last major form of unregulated sexual harassment.²⁵⁴ The courts have acted in only a few cases. The purpose of this part of the article is to make the case for consistently recognizing a Title VII cause of action for third

253. *Id.* at 732-34.

254. For an article suggesting another basis for liability, see Christopher M. O'Connor, Comment, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501 (1999).

party harassment. To make this case, scholarship in the areas of feminist jurisprudence, sociology and psychology of work, and corporate law will be examined. Finally, an argument will be made that this cause of action is consistent with prevailing Title VII law.

In the course of this analysis, several themes emerge. First, I will address the question of silence; one of the most puzzling things about this phenomenon has been the lack of recognition from the courts in the face of its commonality. Second, many of these sources provide valuable insights about the harm that accrues as a result of any form of sexual harassment. Additionally, some of these areas of scholarship contribute further to our understanding of why sexual harassment occurs, and suggest possible avenues of both research inquiry and doctrinal evolution.

1. Feminist Jurisprudence: Over the last several decades, as women have entered the profession, a body of scholarship has emerged that is collectively called feminist jurisprudence. Although going under one name, this scholarship is composed of diverse points of view, and certainly cannot be considered a monolithic approach to legal issues. Scholars in this area differ, for example, on whether issues that concern women are best addressed from a difference point of view, or an equality point of view. The point here, however, is not to present an exhaustive overview of this scholarship, but rather to glean insights from classic samples of work in this area. The bottom line that emerges from much of this scholarship is that the courts, for a variety of reasons, do not take “women’s issues” seriously, and that this “silence” seriously harms the ability of any woman to participate freely and without restriction in the American economy and workforce.

a. Silence. One of the articles that speaks in a sustained fashion to the silence of the courts in the face of women’s experiences is authored by Wendy Pollack.²⁵⁵ Making liberal use of quotations from working women, Pollack regards conversations among women as one of the salutary benefits of the early women’s movement. Women realized that the experiences that they had at work shared common features, rather than being private and isolated occurrences.²⁵⁶ Citing Catharine MacKinnon,²⁵⁷ Pollack’s thesis is that because courts have refused or

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

256. *Id.* at 39.

257. *Id.* at 42–43, in which she cites Catharine MacKinnon:

denied women's experiences, current decisions "perpetuate both the oppression of women and culturally imposed sex roles."²⁵⁸ After presenting a brief doctrinal history, Pollack predicts that with the promulgation of the EEOC Guidelines on Sexual Harassment,²⁵⁹ women will have difficulty trying to fit their experience of harassment into the legal framework of the Guidelines. She concluded, "[w]omen have named sexual harassment, but have lost control of the context of its definition."²⁶⁰ The end result of this loss in translating a norm into the law is that women are not to be trusted nor taken seriously, their injuries are not serious, and the actions of the men who perpetrate harassment are not taken seriously.²⁶¹

Other condemnations abound in the literature. For example, Kathryn Abrams notes that while the courts have recognized claims for hostile environment discrimination since 1981, recent decisions show some confusion about the doctrine and discomfort with its "transformative potential."²⁶² For example, she cites several court opinions which

Women's lived-through experience, in as whole and truthful a fashion as can be approximated at this point, should begin to provide the starting point and context out of which is constructed the narrower forms of abuse that will be made illegal on their behalf. Now that a few women have the tools to address the legal system on its own terms, the law can begin to address women's experience on women's own terms.

MACKINNON, *supra* note 6, at 26.

258. Pollack, *supra* note 255, at 43-44.

259. EEOC Guidelines, 29 C.F.R. § 1604.11 (2000).

260. Pollack, *supra* note 255, at 48.

261. *Id.* at 69. This observation is followed by an analysis of several cases which serve to prove her points.

262. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1198-99 (1989). For other articles which raise the issue of the courts' silence on expanding or understanding notions of sexual harassment, see also Sarah E. Burns, *Evidence of A Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift System, Inc.*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 359 (1994) (noting that courts which had adopted stricter sexual harassment standards had done so because of "historic bias, trivialized discrimination, or underestimated the plaintiff's injury by evaluating offensive conduct out of the context in which it occurred"); Kenneth L. Pollack, Comment *Introduction to Special Project: Current Issues in Sexual Harassment Law*, 48 VAND. L. REV. 1009, 1012-13, 1015 (1995) ("[c]ase law underscores the societal tensions inherent in imposing legal sanctions in sensitive areas of human conduct"; and attributes court reluctance on this to concerns about the impact on workplace behavior and the regulation of human behavior. He also notes that the split in courts is attributable to a split in perspectives about sexual harassment: with one group calling for a workplace absolutely free of harassment, and another group resistant to government regulation of behavior and believing such a task to be either "impossible or misguided"); Glen

both trivialize the type of harm, and suggest that the boundary of sexual harassment doctrine is marked by a belief that the plaintiffs are complaining only about “rude” or “vulgar” behavior rather than behavior which limits their employment opportunities.²⁶³ She ascribes these views to the courts’ failure to take account of the perspectives of women, and because many men regard this conduct differently than women. And thus, she asserts that because “most judges are men,” they see workplace harassment as “harmless amusement” which women should expect as they enter the workplace.²⁶⁴

Other writers support Abrams, noting that the courts are hesitant to “believe women’s accounts” and that this translates into a strict and narrow application of existing legal standards.²⁶⁵ But altering this strict application of the law, observes Susan Estrich, will require more than “doctrinal manipulation” because the law “rests [on] a set of assumptions and attitudes about women and work that support both the rules and results of which I am most critical.”²⁶⁶ To the extent that Estrich links the realm of law creation with these structures outside of the law,

Allen Staszewski, Comment, *Using Agency Principles for Guidance in Finding Employer Liability For a Supervisor’s Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1098 (1995) (citing sources at notes 244–247 which maintain that the courts and rules “reveal a general distrust of women”).

263. Abrams, *supra* note 262, at 1199–1201.

264. *Id.* at 1202–03. In succeeding pages, Abrams argues that courts must see another perspective, recognizing both the attitudes women have towards their place at work, and their attitudes about sex, although she acknowledges there will be substantial variations among individuals. Thus, courts must alter the way they adjudicate sexual harassment claims. *Id.* at 1203–15. Such arguments also form the basis for proposing the “reasonable woman test” for sexual harassment cases. See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). Abrams’ arguments were central to the *Ellison* analysis. In a subsequent article, however, Abrams qualified her endorsement of the “reasonable woman test” arguing that it relies on an essentialism that ignores the variations in women’s experiences, and recommends that further empirical research is needed in this area. Kathryn Abrams, *Social Construction, Roving Biologist, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021 (1992).

265. Jeanne-Marie Bates, *Feminist Methodology: Influencing Hostile Environment Sexual Harassment Claims*, 15 WOMEN’S RTS. L. REP. 143, 143 n.4 (1993–1994), citing Christine A. Littleton, *Women’s Experience and the Problem of Transition: Perspective on the Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 27. Providing the following parenthetical: “explaining that ‘believing women’s accounts’ means examining the range of accounts that women give of their gender-specific injuries and asking what it would mean for the legal system if we took all these accounts seriously.” Bates, *supra*. Her article is focused on discussions of cases, such as *Ellison v. Brady*, 924 F.2d 872, which have incorporated feminist insights.

266. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 859 (1991).

she points to the ways in which courts define what behavior is trivial or "de minimis" and therefore not worthy of redress. She argues that the courts have "wrongly looked to social interaction outside the workplace as the standard, ignoring not only the 'captive audience' nature of the employment context but also the fact that 'society' hardly reflects a normative standard which women have had an equal role in shaping."²⁶⁷ This is especially true in the third party contexts described in this article.

Writers in areas outside of sexual harassment have also noticed this "silence." For example, Vicki Schultz makes a sustained argument that in a thorough analysis of the workplace sex segregation cases, "there has been a continuing (if not always conscious) sexism in the way working women have been envisioned within the law."²⁶⁸ After describing how cases based on sex discrimination have departed from the analysis more typically found in race cases in which the courts saw it as their mission to dismantle workplace racial discrimination, Schultz states that the courts have never had this mission in sex discrimination cases. She considers this a testimonial to the degree to which judges have accepted the dominant societal view of women as marginal workers. This view is linked to the cultural image of women as beings formed in and for the private domestic sphere, rather than actors shaped like their male counterparts by and for the public world of wage work.²⁶⁹

In exploring how courts explain job segregation, Schultz states that a consequence of the courts' impoverished notions of how women choose jobs and careers means that they "assume away the major problem that (T)itle VII should be addressing: the organization of work structures and workplace cultures."²⁷⁰ But not only does this mean that courts misunderstand how organizations work, for in Schultz's opinion, courts fail to understand how employers socially construe gender. And this, in turn, amplifies a false belief that the sexes are significantly different. "There is no room for the possibility that women are different from men in certain respects, yet still aspire to the same types of work."²⁷¹ Schultz posits that rather than having predetermined sex-based work aspirations, or being forced into jobs by employers, a woman's job

267. *Id.* at 843. Estrich cites *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620-22 (6th Cir. 1986) as an example of her point.

268. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1754 (1990).

269. *Id.* at 1770-71.

270. *Id.* at 1800.

271. *Id.* at 1805.

experience, i.e. her experience of the workplace organization and culture, can shape her choice, her job, or her career aspirations.

She argues that if we realize that the employer's structural conditions inhibit women's choices and aspirations in the workplace, rather than pre-work social forces beyond the reach of law, the law has something to do: change the structure. Legal inaction has "perpetuated the status quo of sex segregation by refusing to acknowledge its own power to dismantle it."²⁷² This means that there are facts for the courts to consider, i.e. the way in which any particular employer has structured its workplace and the way in which that structure is a barrier to the fullest utilization of women's talents and aspirations. Judges need to realize the way in which their decisions are "implicated in creating women's work preferences."²⁷³

Overlapping with observations made about the courts' regard for workplace harassment, similar arguments are made by writers in the area of street harassment. Cynthia Grant Bowman starts her article by stating: "A recurrent theme of feminist jurisprudence is that the law fails to take seriously events which affect women's lives."²⁷⁴ She also notes this silence extends beyond the law and into the social sciences. Using the words of Robin West, she points out that the entire phenomenon of street harassment is thus "entirely invisible to the state."²⁷⁵ At this point, most of the documentation of street harassment appears in the popular press and media. She quotes the wry comments of Catharine MacKinnon: "[S]cholars who look down upon such popular journalistic forays into policy research (especially by 'women's magazines') should ask themselves why Redbook noticed sexual harassment before they did."²⁷⁶ After completing her account of the reality of street harassment and the harm it causes, Bowman ponders whether the near-universality of such behavior means that it is accepted as "normal" and thus invisible as both a social issue and legal problem.²⁷⁷

272. *Id.* at 1816.

273. *Id.* at 1842.

274. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 518 (1993).

275. *Id.* at 522 (quoting Robin West, *Pornography as a Legal Text*, in FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 108, 111 (Susan Gubar & Joan Hoff, eds., 1989)).

276. Bowman, *supra* note 274, at 523 n.23 (citing MACKINNON, *supra* note 6, at 248 n.1).

277. *Id.* at 534.

Author Tiffanie Heben, like Bowman, argues that street harassment is a problem that deserves a legal solution.²⁷⁸ The first step, she suggests, is that women must “name” this behavior before they can complain about it in any formal sense, acknowledging that the legal system currently does not recognize street harassment as a wrong.²⁷⁹ Before proposing her own legal remedy for street harassment, Heben acknowledges that silence on this issue may be a social and legal comment that this type of behavior is private and thus beyond the realm of, and inappropriate for, legal regulation because it would overly interfere in citizen’s private lives.²⁸⁰ Her account of the legal silence, then, is somewhat at odds with Bowman’s, suggesting that there has been an active social and legal decision rather than a passive one.

Finally, Anita Bernstein provides a cross-cultural account of the way in which legal systems respond to sexual harassment.²⁸¹ Although her article focuses on comparing American and European responses to sexual harassment, Bernstein early on suggests that one lesson American feminists can learn from American silence is that they need to demonstrate how “a problem they have identified extends beyond the feminist agenda.”²⁸² While the downside of this strategy might be to risk control over doctrinal development, it would also, she argues, garner new supporters.²⁸³ One portion of Bernstein’s article describes the barriers that American plaintiffs face when bringing sexual harassment lawsuits. Before beginning her analysis she summarizes the problems as follows: “locating and convincing a lawyer, refuting archaic prejudices, and if she prevails, extracting meaningful damages from a legal system that does not often regard her injury as important.”²⁸⁴ There is, then, a “great gap” between the injuries that women perceive and those that the courts are prepared to redress.²⁸⁵

b. Harm. One of the major contributions of feminist jurisprudence, in breaking the silence, has been to reveal the way in which women are harmed in either the public or private sphere. What this scholarship reveals is that sexual harassment is “part of a continuum of

278. Tiffanie Heben, *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, 4 S. CAL. REV. L. & WOMEN’S STUD. 183 (1994).

279. *Id.* at 185–86.

280. *Id.* at 205.

281. Anita Bernstein, *Law, Culture and Harassment*, 142 U. PA. L. REV. 1227 (1994).

282. *Id.* at 1231.

283. *Id.*

284. *Id.* at 1267.

285. *Id.* at 1271.

violence against women.”²⁸⁶ Moreover, sexual harassment occurs in a number of places, for example, in prisons, housing and the armed forces.²⁸⁷ Much of the documentation of the ways in which harassment harms women focuses on their perceptions, in studies or other sources. Unfortunately, third party harassment as a discrete phenomenon has not been addressed in either legal literature or in the social sciences. However, there is no reason to suppose that the harm incurred from third party harassment is any different than that from traditional workplace harassment. Additionally, some scholarship on “street harassment” also provides insights on how third party harassment might harm women. The assumption in drawing on these sources is that, viewed from a perspective of harm, third party harassment can partake of both the harms women experience when they are harassed at the workplace, as well as the harms they experience when they are out in public in their non-work capacity. In this sense, third party harassment occupies something of a midpoint on a continuum that ranges from harassment in solely a workplace setting to harassment that happens in public, unrelated to one’s employment. This section of the article will attempt to survey and depict the ways in which harassment affects women.

One of the first things the literature reveals is that sexual harassment is not an isolated phenomenon. It often affects, or is affected by, other structures in the workplace. One of the focuses of feminist jurisprudence has been sex segregation at work, i.e. the practice which has led to lower wages for women and a sense of separate men’s and women’s labor markets or jobs. In an early article, Nadine Taub, stated that attitudes play an important role in maintaining sex segregated workplaces.²⁸⁸ These attitudes, she says, “reflect an expectation that a woman’s work force participation is secondary to, and contingent upon, family considerations.”²⁸⁹ One of the attitudes that Taub identifies as

286. DEBORAH L. SIEGEL, NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH & RESOURCES 1 (1992) (citing Charlotte Bunch, *Women’s Rights As Human Rights: Towards a Re-Vision of Human Rights*, in *Gender Violence: A Development and Human Rights Issue* 3 (Center for Women’s Global Leadership, 1991); Lois Copeland & Leslie R. Wolfe, Center for Women’s Policy Studies, *Violence Against Women As Bias Motivated Hate Crime: Defining the Issues* (1991). The authors also state that sexual harassment is about power, not sex.

287. Rachael A. Hetherington & Barbara Childs Wallace, *Recent Developments in Sexual Harassment Law*, 13 MISS. C. L. REV. 37, 43 nn.27–29 (fall 1992).

288. Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 352 (1980).

289. *Id.*

harming women and contributing to this perception, is their characterization as sexual objects. In a noteworthy passage, she writes:

Sexual references, as well as explicit demands for sexual cooperation, convey the message that a woman is a sexual object before she is a contributing worker, and whether it is consciously undertaken or not, such behavior serves to reinforce women's sexual role. Indeed, such behavior is probably the quintessential expression of stereotypic role expectations. Like other expressions of stereotypic expectations occurring at the work place, it is dysfunctional in two respects. Whether or not perceived as flattering by women, sexual advances remind women of a societal-imposed incongruity between their role as worker and as woman. By thus arousing role conflict in women, advances interfere with their performance. By underscoring their sexual identity in the eyes of male supervisors, sexual advances make it less likely that women will be viewed as persons capable of performing a demanding task, and consequently, less likely that they will have the opportunity to try to do so.²⁹⁰

Taub's point is useful. It documents the way in which sexual harassment is a product of stereotypes of women, and leads to further economic segregation. Most judges do not understand the ways in which harassment as a form of stereotyping "keeps women in their place."²⁹¹ What is needed is a richer doctrinal analysis of the structural consequences of stereotyping, sex segregation and any form of sexual harassment.

Gillian K. Hadfield, echoing Taub, argues that although sexual harassment is the source of multiple harms to women,²⁹² the traditional list of harms does not provide a solid enough basis for Title VII doctrine as currently interpreted. Rather, she argues that the strongest bias for analyzing the harms perpetuated by sexual harassment is to look at the economic impact of the behavior at the macroeconomic level. She notes, by way of example, that sexual harassment is "a factor in the

290. *Id.* at 361.

291. *Id.* at 362.

292. Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1169-70 & nn.76-80 (Oct. 1995). The harms she lists are as follows: psychological harm, interference with a woman's job, perpetuation of stereotypes, diminished self-esteem, and the perpetuation or reinforcement of male dominance in the workplace.

perpetuation of occupational segregation.²⁹³ This is particularly true for women attempting to enter traditionally male fields.²⁹⁴ Customer or client harassment exacerbates this segregation by adding yet more incidents that limit women's job choices.

Hadfield's contribution in tying sexual harassment to occupational segregation is to allow us to see that current doctrine erroneously ties sexual harassment only to psychological harm, rather than economic harm. This causes the court, mistakenly in her opinion, to delve into inquiries about the sufficiency of the psychological harm. Ultimately, she argues, this creates a false dichotomy, begun in *Meritor*, between quid pro quo economic harm and hostile environment non-economic psychological harm.²⁹⁵ She concludes:

By analyzing the hostile environment case as one of discrimination in the intangible psychological benefits of employment, courts have missed the essential violation of Title VII that the harassment perpetuates—the introduction of a discriminatory factor into women's economic choices. Sex-based harassment is a cost of employment that women alone bear, and this cost can be expected to lead women, conceived of as rational actors, to make employment decisions that differ from those made by men in otherwise similar circumstances. The flaw in the current analysis of sex-based harassment is that it finds discrimination simply in the differential cost imposed upon men and women. Closer analysis goes a step further to see that the discrimination worked by sex-based harassment stems from the rational response of female employees to harassment.

Once the focus is shifted to the impact of harassment on women's employment decisions, it is plain that sex-based harassment, even if not of the quid pro quo variety, is economic discrimination. Women's employment decisions, and consequently their economic status, are distorted by the practice of harassment in ways that men's employment decisions and economic status are not. Since harassment is discrimination that goes to the core of Title VII's concern with equal employment opportunity, there is no basis for a legal standard that requires

293. *Id.* at 1171.

294. *Id.*

295. *Id.* at 1168.

a case-by-case normative assessment of whether harassment is "hostile" or "abusive" enough to constitute an injury. Title VII decrees the injury: discrimination. The only inquiry that harassment law should make is whether alleged harassment introduces a distortion into the employment choices women make²⁹⁶

In succeeding pages, Hadfield demonstrates the ways in which harassment contributes to horizontal and vertical segregation and accompanying wage depression.²⁹⁷ This leads her, ultimately, to propose the following test, built on the normative principle of non-discrimination rather than efficiency:²⁹⁸ "Non-job-related sex-based conduct constitutes sex discrimination in violation of Title VII if a rational woman would alter her workplace behavior to her detriment in order to eliminate the risk of such conduct if she could do so costlessly."²⁹⁹ Third party harassment is yet another source of economic harm beyond the harm occasioned by supervisor and co-worker harassment.

Another valuable insight about the harms caused by sexual harassment comes from recent work on street harassment. Street harassment has been defined as occurring when an unfamiliar man approaches a woman in public and intrudes (or attempts to intrude) upon a woman's attention in a way that is unwelcome, by using language or behavior that is sexual in its content.³⁰⁰ This conduct differs from sexual harassment in the sense that the "sexual" in sexual harassment is there not to note the sexual content of the harassment, but rather to describe the target of the behavior. Nonetheless, these forms of harassment are similar in that a male, by acting in a fashion that is unwelcome to a woman, may limit her behavior or choices.

Using the term "informal ghettoization," Bowman points out that street harassment can also lead to segregation of women.³⁰¹ Quoting John Locke, she points out how the legal system's failure to recognize

296. *Id.* at 1168–69 (citations omitted).

297. *Id.* at 1171–75.

298. *Id.* at 1175.

299. *Id.* at 1180. She also proposes the following alternate formulation of her test: "Non-job-related sex-based conduct constitutes sex discrimination in violation of Title VII if a rational woman's choice between two jobs offering her substantially equivalent benefits would be influenced by the fact that such conduct is present in one job but not the other." *Id.* at 1180–81.

300. Bowman, *supra* note 274, at 575. See also Heben, *supra* note 278, at 186.

301. Bowman, *supra* note 274, at 520.

street harassment interferes with women's liberty, in the sense of freedom from restraint, by reducing the geographical and physical mobility and reminding them of "their place" at home and hearth.³⁰² She adds, later, that this form of behavior is a deviation from our general norm of civil inattention, and marks women as "open persons" with whom one is free to feel familiar, and that this intrusion is an invasion of women's privacy.³⁰³

Her comments here are quite apt for considering the effects of third party harassment for, most typically, service and retail employees. While these employees are "open" to strangers in the sense that they are there to assist members of the public with business transactions or other services, their openness is limited. When a stranger "hits" on a store clerk or librarian, they are transgressing the limits of that employee's role, and reminding them that they are sexual objects who may have no place in that setting. As she concludes, such behavior tells "women [that they] belong only in the world of the private."³⁰⁴ Bowman is concerned about the ways in which street harassment limits women's freedom and their equality as citizens, "leaving them in a Hobbesian wilderness men do not share."³⁰⁵ That same point can be analogized to third party harassment by the way in which customers or clients indicate that women are not considered workers nor do they have full employment opportunities.

Another study that Bowman draws on suggests that street harassment, and analogously third party sexual harassment, can hurt women. One study that Bowman reviews points out that street harassment does not occur in small villages where everyone knows each other, from which the study's authors concluded that harassment occurs in a world where people are strangers to one another.³⁰⁶ "Apparently if someone exists for you as an individual, you are less likely to harass her—a fact reflected in the prototypical question used to confront harassers: 'Would

302. *Id.* at 520 (quoting JOHN LOCKE, *The Second Treatise of Government*, in *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 3, ch. vi § 57 at 29 (T.W. Gough ed., corrected & rev. ed. 1956) (3d ed. 1698)).

303. *Id.* at 526.

304. *Id.* at 527.

305. *Id.* at 520–21.

306. *Id.* at 530 (citing Cheryl Benard & Edit Schlaffer, *The Man in the Street: Why He Harasses*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 70, 72 (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed. 1984)).

you want someone to treat your sister (or wife, or mother) this way?"³⁰⁷ Viewed in these terms, harassment is the stripping of individuality from women who venture into the public sphere, be it for their own private purposes or for work.

In addition to identifying the more global injuries that occur to women as a result of harassment, Bowman also catalogues discreet injuries that would be legally cognizable.³⁰⁸ The harms most frequently associated with street harassment are "the intrusion upon privacy and the fear of rape."³⁰⁹ Given the high proportion of women who have been raped, this is a widely and rationally held fear. She notes that street harassment can enable men to "test" which women would be most vulnerable to assault.³¹⁰ Women typically react to these assaults and their own fear by trying to appear as though nothing has happened, behavior which may lead to depression and feelings of disempowerment.³¹¹ These fears are also applicable in cases of third party harassment, especially in situations, such as business trips or contacts in isolated locations like library stacks, in which the harasser may be able to threaten and carry through with a rape.

Other injuries that Bowman describes are a loss of self-esteem by being reduced to a sexual object, and injuries that are also typical of workplace harassment such as "anxiety, stress, lack of motivation, . . . guilt, . . . disgust, hurt and anger."³¹²

One of Bowman's more interesting contributions to the catalogue of ways in which harassment is harmful is by also asking how street harassment harms women and society generally. The fear of harassment simultaneously creates a dependence upon men to protect women, and a

307. Bowman, *supra* note 274, at 530–31.

308. *Id.* at 534–42.

309. *Id.* at 535. Although it is probably apparent that third party harassment is an intrusion into privacy, it may not be as apparent that it can lead to fear of rape also. Consider this story that I was told in the course of my research: A male customer sought to have his hair cut at a local, leading beauty salon. He specifically asked for a female stylist. Once she began to cut his hair, he began to ask her questions about herself, including the general area of town in which she lived. Shortly thereafter, he began to fondle his genitals. He also began to make comments along the following lines, "Gee, that part of town is dangerous at night. Don't you worry about walking home alone?" When the stylist requested that this customer be given to another, preferably male, stylist if he should return, management refused her request. Apparently her concerns about a veiled threat of rape didn't dissuade them either.

310. *Id.* at 536.

311. *Id.* at 537.

312. *Id.* at 538.

distrust and hostility of men generally.³¹³ Additionally, women learn that the only safe place in society is at home, and that they do not belong in public, or by extension, in the workplace.³¹⁴ Ultimately, she argues, this limit upon women's freedom means that they are not full and equal citizens participating in the life of the commonwealth.³¹⁵ She concludes that "[f]or those of us who believe in the ideal of equality, such a result is damaging not only to half of the human population, but to society as a whole."³¹⁶ Translated to the workplace, these observations strongly suggest that third party harassment limits women's freedom and equality by objectifying them and controlling their choice of occupations. In turn our economy loses the contributions and talents of over one-half of its potential workforce, affecting all of society.

In *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, Tiffanie Heben makes many of the same points as Bowman.³¹⁷ She reminds us that women are individuals and their reactions to harassment may depend upon content, the messenger, or physical location.³¹⁸ She urges us to be aware of the following differences between women's experiences when evaluating harassment: severity, sexual orientation, race, class, ethnicity, and location.³¹⁹

Because workplace sexual harassment has received so much treatment in the last fifteen years, many of the ills it causes are well documented in both the popular press and the academic literature. Catharine MacKinnon, of course, provided the first in-depth treatment of this phenomenon, giving it life as a cause of action in her book, *Sexual Harassment of Working Women*.³²⁰ In the intervening years, other scholars have addressed the issues which arise as this doctrine continues to develop. It has also been enriched by writing about other areas of violence for women such as rape and domestic assault. Since women still

313. *Id.* at 540–42.

314. *Id.* at 541.

315. *Id.* at 542.

316. *Id.* at 542.

317. Heben, *supra* note 278, at 189–204 (discussing the following types of harm: physical reactions (nausea, trembling etc.), lowered self-esteem, reduced quality of life, denial of full citizenship rights, and feelings of powerlessness). She also points out that this should be considered systematic harm, not isolated occurrences.

318. *Id.* at 189–91. Heben makes it clear that she rejects essentialism, the idea that there is only *one* women's experience.

319. *Id.* at 190–201.

320. MacKINNON, *supra* note 6. The literature between the time of this article and MacKinnon's original work is voluminous, and no attempt will be made to canvass that literature.

lack full equality, feminist writers point to what has gone wrong with legal reform, and identify the ways in which law has hurt women. For example, Estrich states:

[R]eform failed not because feminists are not good at writing statutes, but because if there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself, even forced sex.³²¹

Given that harm is assumed and documented, the focus of these writers has been on the task of identifying the ways in which the law continues to harm women. For Estrich, this has translated into a different treatment for some issues of sex discrimination, including sexual harassment, than for other bases under Title VII.³²² Particularly unhelpful has been the legal system's lack of will in dealing with sexual harassment because it would change the way business is conducted in America.³²³ This has led Estrich to propose that courts do away with the welcomeness requirement in sexual harassment cases.³²⁴ She has pointed out other problematic parts of the traditional doctrine as well. As an example, she finds the current view of pervasiveness harmful because:

[I]n defining what counts as trivial or "de minimis," many courts have wrongly looked to social interaction outside the workplace as the standard, ignoring not only the "captive audience" nature of the employment context but also the fact that "society" hardly reflects a normative standard which women have had an equal role in shaping.³²⁵

Estrich, like the writers about street harassment, points out that women's choices about work are limited, they are rarely truly voluntary.³²⁶ In her view, a "reasonable woman" is expected to act like a man. The cost of "acting like a man," as the law instructs, is that women must tolerate the intolerable.³²⁷

321. Estrich, *supra* note 266, at 814–15.

322. *Id.* at 819–23.

323. *Id.* at 822.

324. *Id.* at 826–34.

325. *Id.* at 843.

326. *Id.* at 846.

327. *Id.* at 846–47.

Kathryn Abrams also attacks the limited effect the law has on “the norms that have structured the workplace,” pointing to the men who shape the norms of the workplace and who fail to perceive the inherent bias of these norms.³²⁸ For Abrams the “next phase of the struggle for gender equality in the workplace” is to ameliorate the harm of reading situations through traditional male norms and to recognize women’s perspectives.³²⁹ One of Abrams’ focal points is sexual harassment. Her analysis of the case law reveals many of the same failings identified by Estrich.³³⁰ In her view, much of the harm from sexual harassment also has to do with the reasons for silence: that men regard this behavior differently than women. Because most judges are males and share a similar viewpoint, they fail to treat harassment with sufficient attention.³³¹ For Abrams, the law is likely to do harm because, while it has largely eliminated quid pro quo sexual demands, many courts continue to find “verbal sexual abuse, casual touching, and dissemination or display of pornography” acceptable even though these behaviors “make women feel physically vulnerable and professionally undervalued.”³³² These tolerated behaviors may lead to feelings of vulnerability and fear that affect a woman’s job performance by objectifying women as sex objects and undermining their value as employees.³³³

328. Abrams, *supra* note 262, at 1189.

329. *Id.* at 1190. Abrams points out, however, that feminists do not agree on a philosophical underpinning (difference, domination, relation), *id.* at 1188–89, and that they have proposed a variety of ways and means to alter the current legal framework. *Id.* at 1190–92. Abrams favors transforming the prevalent male norms by integrating norms reflective of “women’s needs and experiences.” *Id.* at 1192.

330. *Id.* at 1197–1220. The second half of her article focuses on parenting policies. *Id.* at 1220–47.

331. *Id.* at 1202–03. The factors that Abrams highlights as different in the workplace for women is their status as newcomers to the workplace, often resulting in “marginal or precarious” status, *id.* at 1204–05, their generally different attitudes towards sexuality in the workplace as well as the places in which expression of sexuality is appropriate, and their “greater physical and social vulnerability to sexual coercion.” *Id.* at 1205.

332. *Id.* at 1206.

333. Of course, not every writer, nor every woman writer, agrees with the authors I have selected nor of feminist jurisprudence generally. For example, an argument that many, if not most, feminists would find repugnant appears in Kelly Ann Cahill, *Hooters: Should There Be An Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims*, 48 VAND. L. REV. 1107 (1995) (arguing that hostile environment sexual harassment doctrine should also include a defense of assumption of risk, even if the defense does not go by that name). Some feminists would laud this article since it implicitly proposes that the law should allow women to make their own choices, and that the law should not treat them, in any fashion, as victim. Also, for another approach to sexual harassment doctrine consider Marie T.

All of this scholarship demonstrates the ways in which harassment limits women's freedom. This limitation, in the workplace, means that women have fewer economic opportunities, typically due to job segregation, and that their ability to earn a living based on their merits is diminished. Fear of harassment from third parties in addition to supervisors and co-workers creates an iron triangle of harm. The harm that is done to women as people, however, is even greater. It sends women the message that at best, they are marginal, and at worst, nothing more than sexual objects.

2. *Sociology of Work—Sex and Work*: Like the relatively short life of doctrinal and legal writing about sexual harassment, harassment came to the attention of researchers only recently. The leading scholar in this area is Barbara Gutek, whose ground breaking work, *Sex and the Workplace*³³⁴ has been at the core of many of the legal writings described above. This section will draw primarily on her work as an exemplar of the available scholarship.

One of the starting points in looking at this area of scholarship is the central role that work now plays in our lives. It is one of the primary ways in which we identify ourselves, and increasingly, it is a locus of our social lives. Rather than church, home, and community, we meet at work, and many of our social interactions arise from work. Moreover, in the last sixty years, the workplace has become the locus of government regulation. It is no secret that women have entered the workplace in droves and that their entry was in large part made possible by Title VII. It is this world that Gutek and others examine in seeking to understand the ways in which sexual harassment occurs, how it might be precisely defined, and what impacts it has on the workplace.

a. *Silence*: Like the legal literature, one of the focal points of social science research has been reflection on why we know so little about sexual harassment. Gutek notes that sexual harassment did not really become a focal point of study until after the EEOC Guidelines were published in 1980, making most research comparatively recent.³³⁵ Even

Reilly, *A Paradigm for Sexual Harassment; Toward the Optimal Level of Loss*, 47 VAND. L. REV. 427 (1994) (using a law and economics approach to analyzing sexual harassment doctrine). Reilly is particularly critical of feminist scholarship because it is not sufficiently definite nor concrete in defining sexual harassment or proposing remedies. Additionally, she notes that "[l]uxuriously, MacKinnon and her followers ignore entirely the social cost of such a societal restructuring." *Id.* at 429.

334. Gutek, *supra* note 12.

335. Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 338 (1992). See also Bernstein, *supra* note 281, at 1241

within the study of workplace harassment, Gutek discovered other factors that would account for the silence that is also described by feminist writers. One coping mechanism that Gutek and other researchers identified is the strategy of remaining silent and not complaining to supervisors or others about their harassment.³³⁶ Other researchers report similar findings, some stating that women found it easier to quit than to complain.³³⁷

Gutek, however, identifies other reasons why incidents of harassment do not come to our notice. One of her primary insights has been that men and women tend to perceive what constitutes sexual harassment differently. For example, consider this chart:

TABLE I: WHAT IS SEXUAL HARASSMENT?³³⁸

	MALES	FEMALES
Is sexual harassment		
Complimentary comments	21.9%	33.5%
Insulting Comments	70.3	85.5
Complimentary looks, gestures	18.9	28.9
Insulting looks, gestures	61.6	80.3
Nonsexual touching	6.6	7.3
Sexual touching	58.6	84.3

n.76 in which she reports that in both the United States and Europe, the “magnitude of hostile-environment harassment remains underappreciated.”

336. Gutek, *supra* note 12, at 72. Women express a variety of reasons for not reporting sexual harassment: fear of being blamed for the harassment—“you brought it on yourself”—(60% of those surveyed), thinking that nothing would be done (60%), fear that the male perpetrator could be hurt (66%), feeling too embarrassed to report the incident (31%), thinking that it would take too much time to report the incident (32%), and belief that basically, there was no real need to report it (82%).
337. SIEGEL, *supra* note 286, at 12 (citing FREADA KLEIN, *THE 1988 WORKING WOMEN SEXUAL HARASSMENT SURVEY EXECUTIVE REPORT* (1988)). Citing other studies, the authors note that fear of retaliation was the major reason women fail to report harassment. An additional reason identified by the research surveyed was that because women are socialized to keep harmony in relationships, they often try to maintain contact with the harasser and attempt to “normalize” the interactions. *Id.* at 13. Estrich, *supra* note 266, at 851–52 notes that this failure to report appears in the court opinions she studied: “But in fact, one sees few cases of women who do this [complain]. Indeed, the opinions which most emphatically announce this standard of conduct almost always involve women who did *not* complain.” (emphasis in original). She then cites Gutek for social science support, *id.* at 852 n.153.
338. Gutek, *supra* note 12, at 43.

	MALES	FEMALES
Expected socializing	91.1	95.8
Expected sexual activity	94.5	98.0

Later, in a chapter entitled, "Women's and Men's Attitudes About Sexuality in the Workplace," Gutek notes that the biggest gap in male/female attitudes was in their "reactions to overtures from the opposite sex."³³⁹ For example, she found that 67% of males were flattered by propositions but that only 17% of women felt similarly.³⁴⁰ Gutek attributes some of this difference to the fact that most women do not see the workplace as a place to "verify or validate their sexual desirability," preferring instead to focus on their work-based accomplishments.³⁴¹

Another factor that Gutek identifies as contributing to our conspiracy of silence about sexual harassment is corporate culture itself. At the outset of her book, she writes that "theories of organization do not provide much room for the expression of sexuality. Sexuality is emotional, not rational."³⁴² Thus, she argues, while sexuality has always been present at the workplace, because most models of corporate or organizational behavior presume a rational environment, they have not focused on emotional or non-rational behavior that may influence corporate actors. Sexuality, in the corporate setting, until recently, was invisible.³⁴³

b. *Harm and Causation:* Gutek identifies many of the same harms identified previously. In the workplace, in addition to the pain and violation of privacy, Gutek reports that women's careers are interrupted, they fear retaliation, and they may "experience lower productivity, less job satisfaction, reduced self-confidence, and a loss of motivation and commitment to their work and their employer."³⁴⁴ Additionally, she notes that harassment can constrain workplace behavior as women try to avoid harassers, even if it is important to interact with those men during work. In general, harassment she concludes, will create a high stress environment which she describes as a "hidden occupational hazard." Gutek confirms that it also serves to maintain sex segregation.³⁴⁵ Finally,

339. *Id.* at 96.

340. *Id.* at 96-97.

341. *Id.* at 100-01. See also Hadfield, *supra* note 292, at 1154 nn.4-5.

342. Gutek, *supra* note 12, at 4.

343. *Id.* at 4-5.

344. Gutek, *supra* note 335, at 349.

345. *Id.* at 348-49, and sources cited therein.

she notes that harassment can have effects away from work, interfering with women's significant relationships with men.³⁴⁶

Aside from cataloging these consequences, Gutek's biggest contribution has been to explain why sexual harassment happens. At the beginning of her book, Gutek notes there have been three main social science models for studying sex at work: (1) the natural—biological, which argues that it is a result of natural attraction and has the least support in the literature; (2) the organizational model, in which sexual harassment is the result of opportunities within organizations to engage in harassment; and (3) the sociocultural model, in which sexual harassment reflects society's differential distribution of power and status between the sexes.³⁴⁷ Gutek, however, found that none of these explanations fully account for the "why" of sexual harassment and has proposed her theory of "sex role spillover."³⁴⁸

The theory begins with the idea that we tend to associate members of each sex with certain attributes. For example, we tend to think of women as emotional or sexy. "Sex-role spillover occurs when women, more than men in the same work roles, are expected to be sex objects or are expected to project sexuality through their behavior, appearance, or dress."³⁴⁹ Why does spillover occur? Gutek suggests that because gender is our most obvious social characteristic, we immediately notice it. Men tend to treat and react to women in the same manner regardless of the context, and women tend to conform to this stereotype drawn largely on home-based interactions between the sexes. Finally, sex roles and expectations tend to be more stable and are formed while young, while our work expectations may change.³⁵⁰ The point, says Gutek, is that "subtle pressures" exist for women to behave and be perceived as sexual at work, leaving others with the belief that it is a part of a working woman's repertoire.³⁵¹

3. *Corporate Dignitary Theories*: Most articles on sexual harassment derive their arguments from feminist sources, or from social sciences. Although many of them allude to a role for the corporate context or work environment in which harassment takes place, very few have sought to tackle reforming corporate structures directly. The purpose of

346. *Id.* at 349.

347. Gutek, *supra* note 12, at 12–15.

348. *Id.* at 15.

349. Gutek, *supra* note 335, at 353.

350. *Id.* at 353–54.

351. *Id.* at 354.

this section will be to survey some emerging theories about corporate law and corporate behavior which may suggest ways in which the corporation could be more responsive to complaints about third party harassment or harassment generally.³⁵²

This reluctance to tackle corporate structure head on seems a bit odd when one considers that the costs of sexual harassment accrue not only to the victim, but also to her employer, often some form of corporate entity. For example, one source suggests that in 1988, sexual harassment cost a typical Fortune 500 company \$6.7 million dollars per year in terms of lost productivity, employee turnover, and the cost of complaint mechanisms. The same source suggests that preventive mechanisms are far cheaper—thirty-four times less expensive.³⁵³ Likewise, a report of the U.S. Merit Systems Protection Board 1987 survey reported similarly high costs to the government as a result of sexual harassment.³⁵⁴ This is true not only of United States firms, but also for corporations abroad.³⁵⁵

There is ample research to suggest that sexual harassment can be a structural or systemic problem of an organization and can affect an organization in both indirect and direct ways. For example, Gutek states that the existence of sexual harassment within an organization can affect not only its workers and their jobs, but also the image of the organization.³⁵⁶ In fact, the very definition and name “hostile environment harassment” connotes the idea that this is a systemic phenomena, not just one that occurs in a private or individual setting. That is, the workplace environment is characterized by “pervasive” sexual harassment.

Gutek reports that views among corporations vary as to whether they see sexual harassment as “personal” behavior or as “organizational” behavior. And, she points out, the corporation’s point of view affects the type of remedy that a firm might employ. For example, she suggests that a corporation using the “old” or “personal” point of view is more likely

352. Although not everyone works for a corporation, a large majority of Americans do. The corporation is the locus of much of the legal regulation of the workplace. This makes it a particularly apt focus for legal or structural reform. Title VII assumes jurisdiction over firms that have 15 or more employees, 42 U.S.C. § 2000e (b) (2001), and many state or local statutes assume jurisdiction over smaller entities.

353. STEGEL, *supra* note 286, at 10 (citing KLEIN, *supra* note 286).

354. *Id.* (citing U.S. Merit Systems Protection Board, *Sexual Harassment of Federal Workers: An Update* (1988)).

355. Bernstein, *supra* note 281, at 1286 n.278 and accompanying text. Her overall point is that sexual harassment can affect a firm’s competitiveness both in terms of the type of talent it can attract as well as the way in which the costs of harassment can divert its use of its resources.

356. Gutek, *supra* note 12, at 2–3.

to transfer or fire the accuser, since it is most worried about retaining the highest status employee. On the other hand, a corporation following an organizational model is more likely to take harassment seriously and to seek ways in which the organizational sources of the behavior can be altered, as through classes or policies.³⁵⁷

Additionally, Gutek points out that one of the accounts that both seeks to explain sexual harassment and is implicated in any number of management and legal theories, is an organizational model in which “sexual harassment is the result of certain opportunity structures within organizations such as hierarchy.”³⁵⁸ Although the point of her theory of “sex role spillover” is that the prevailing models under-explain sexual harassment, she nonetheless notes that “[u]nderstanding the work environment is crucial to understanding what occurs there.”³⁵⁹ She identifies the following four aspects of workplace organization, which are crucial to understanding sex in the workplace:

- sex segregation of work
- status differentials
- working conditions
- personal characteristics of workers³⁶⁰

In later chapters, Gutek refines these generalizations and pinpoints more exactly other sources of organizational behavior.³⁶¹

357. *Id.* at 12.

358. *Id.* at 14.

359. *Id.* at 22.

360. *Id.* at 22–23. For explanations of sex segregation, see notes and accompanying text. Gutek has a similar meaning, which is that occupations tend to be sorted by sex into “men’s” and “women’s” work, and until recently men and women did not interact together in the workplace. *Id.* at 25–30. In speaking of status and hierarchy, she identifies the phenomena that men tend to occupy the highest status jobs and get the perks that come with that status. *Id.* at 31. In her section on working conditions, she notes that women prefer “cleaner, pleasanter” environments that are free of swearing or other sexualized behavior. *Id.* at 32. Additionally, she notes that while it is commonly known that attractiveness matters in the workplace, this is a more important determinant for women than for men. *Id.* at 33–34. Finally, while she notes that sex segregation is the most important variable, the sex of the supervisor can also make a difference, especially since the “most important organizational member for any worker” is the supervisor. *Id.* at 37.

361. *Id.* at Ch. 7 *passim*. Gutek particularly points to the types of contact or structure within which one has contact with the other sex, i.e., the “ambiance” and whether it can be characterized as professional or unprofessional, and whether the workplace is sexualized. She notes, additionally, that more research is needed. She concludes:

In this sense, also, the “customer is always right” totem is another structural impediment which inhibits an already compromised ability to complain about harassment. It contributes to the organizational/legal catch-22 for women: if you don’t complain, you may not be able to prove unwelcomeness in court, yet if you do complain about customer treatment, you could well lose your job.

Since the research suggests that corporate structure may well foster and perpetuate sexual harassment, and that there are corporate costs associated with harassment, it would make sense to rethink legal models of the corporation to foster more productive behavior. In an era of downsizing, shifting employee loyalty, and rising corporate litigation costs, it is imperative for corporations to rethink their approach to their labor force. Legal scholarship and law needs to be more concerned with the relationship between corporate structures and sexual harassment.³⁶²

Traditional economic theory, building on the work of Ronald Coase, posits that the firm is a “nexus of contracts,” in which the implicit and explicit contractual relationships between managers, workers, shareholders, suppliers and others define each corporate

From the standpoint of the general good of the work organization, sex at work has little to recommend it. It appears to be part of a cluster of unprofessional behaviors and attitudes—an unprofessional ambience—that characterizes some workplaces. . . . Even sex that is not viewed as a problem—sexual comments meant to be complimentary, for example—has some negative consequences for organizations in the form of lower job satisfaction for women.

Id. at 124.

362. See, Schultz, *supra* note 268, at 1770 (“To a large extent, however, the structures of the workworld that disempower most working women from ever aspiring to nontraditional work are left unexamined.”). Schultz makes a very deft argument that the courts, in sex discrimination cases, have not been as willing to examine and reform the structure of the workplace as they have been in race cases. *Id.* at 1770–71. She takes up this argument again at a later point in the article, declaring that judicial accounts of sex segregation in the workplace “ultimately assume away the major problem [T]itle VII should be addressing: the organization of work structures and workplace cultures to disempower large numbers of women from aspiring to and succeeding in more highly rewarded nontraditional work.” *Id.* at 1800. This leads her, ultimately, to argue that work structures and cultures significantly influence women’s perceptions of their opportunities at work. *Id.* at 1815–39. From her point of view, then, the law has an important role in transforming structures at work to eradicate discrimination against women. *Id.* at 1816.

Similarly, from a comparative law perspective, Anita Bernstein makes the following observation: “While Americans see the problem of sexual harassment as either wrongful private conduct between two people or as sex discrimination, Europeans have shaped it as a problem of workers, and sited the problem in the workplace.” Bernstein, *supra* note 281, at 1233.

entity.³⁶³ As further developed by theorists such as Oliver Williamson, economic theory, and the legal theory which adopts it, make assumptions about human behavior. Typically, these theories assume that people will act in a rational manner on the basis of the information that they have at the time, and that they may well engage in opportunistic behavior, seeking to benefit their own self interest.³⁶⁴ As it pertains to the maintenance of the workplace, employers and employees develop a set of explicit and implicit contractual arrangements that may rely upon legal enforcement, as in the case of a collective bargaining agreement, or extra-legal enforcement relying upon a firm's reputation and employee loyalty.³⁶⁵ What has often been missing in corporate theory is close attention to the role of human capital, and whether prevailing economic theories, focused as they are on self-interest and maximization of profit, either fully explain employee behavior or in any way seek to improve it.

Recent theorists have insisted that the theoretical foundations of corporate legal and economic theory need to be opened wider to admit the complexity of human relationships. The two that will be examined here, as exemplars, are those of Karen Newman and Marleen O'Connor. While most of these writers have been focused on general questions surrounding the relationship between the corporation and its workforce, particularly in the important labor question of how to foster meaningful participation, these theories have ramifications for other areas of the law, such as sexual harassment, which involves the relationship between a corporation and its employees.

At the heart of a harassment-free workplace is the desire for justice in the workplace. Newman observed that the "concept of justice . . . receives little attention in the workplace . . . [and] is not well understood in that context."³⁶⁶ She focuses her attention on how justice manifests itself in the workplace and how the workplace can be made more just.³⁶⁷ While employees pay attention to the actual administration

363. Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 905 (1993) (citing Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937)).

364. *Id.* at 905-07.

365. *Id.* at 907-11.

366. Karen L. Newman, *The Just Organization: Creating and Maintaining Justice in Work Environments*, 50 WASH. & LEE L. REV. 1489, 1489 (1993).

367. A major part of her article is the interpretation of a simulation study she ran over two years with 15 separate companies using 289 full-time MBA students who had worked an average of 3.7 full-time years before attending school. Each student, in role, had to

of justice, both in outcome and process, their perceptions of justice in the workplace may have an even stronger bearing on their behavior and relationship to their firm.³⁶⁸ This is because the moral climate of an organization is an outgrowth of employees' perceptions of "the way in which problems are perceived, people are treated, and decisions are made."³⁶⁹ There are three acknowledged types of moral climate: egocentric, rule-oriented, and principled.³⁷⁰ An egocentric climate focuses on self-interest mediated through contracts. A rule-oriented one, obviously, is based upon a set of rules which the employees have accepted. Finally, a principled or ethical climate is one "based on principles of justice, respect for the dignity of individuals, and maintenance of social obligations."³⁷¹

Karen Newman's study³⁷² and theory suggests that justice, defined as granting employees dignity and voice in the workplace, does matter

evaluate an "in basket" of memos which included memos from the company's president designed to send messages about the company's moral climate. She assessed responses for four dependent variables (commitment, decision-making, willingness to work hard, and performance) and five independent variables (voice, dignity, relationship with supervisor, ethical climate, and rule-oriented climate). The results demonstrated that "commitment among employees is higher when companies allow more participation and when a respectful and trusting relationship exists between supervisor and subordinate." *Id.* at 1507. She could not find a correlation between commitment and dignity but hypothesized that this may have more to do with interpersonal relations. Similarly, employees who are allowed "voice" and who are treated with dignity tend to be willing to work harder. Again, her focus is on participation in the workplace but her results have obvious bearing on a firm's willingness to develop and enforce a meaningful sexual harassment policy. Assuming that such a policy is a part of recognizing each worker's dignity, the existence and enforcement of a policy is more likely to garner employee loyalty and increased efforts. There is no reason to suppose that employees would distinguish between supervisor, co-employee and third party harassment in perceiving whether their employer is committed to ending all harassment. In fact, it would be likely that the prohibition of traditional harassment, along with a tolerance or encouragement of third party harassment, could send a strong mixed message to employees.

368. *Id.* at 1490.

369. *Id.* at 1496. To expand a bit, Newman defines corporate culture as the "norms, values, and assumptions that form the foundation for interaction in the firm," and notes that psychologists refer to this as a climate. *Id.* at 1496. Thus, "[t]he *moral climate* of an organization is based on the perceptions of the organization's members about practices and procedures that have moral content, that exist in the realm of what the firm values, believes in, and considers right." *Id.* See also *supra* note 27 and accompanying text (emphasis in original text).

370. *Id.* at 1497.

371. *Id.* at 1497.

372. *Id.*

and can increase employee effort and performance.³⁷³ Thus, the imposition of a policy or rules about sexual harassment may not be sufficient to garner the results, not just in legal compliance but in positive employee outcomes, that many firms seek. Mere rules do not foster trust or dignity, nor do they insure honesty and respect. Moreover, rules can increase employee commitment to the firm which can help employees and employers weather hard times or changes in the firm.³⁷⁴ This can also be an important commitment as companies move from a traditional hierarchical model to a modern post-hierarchical, knowledge-based firm and jobs become more broadly defined.³⁷⁵

A second voice in the new corporate literature is Marleen O'Connor, whose work has focused on corporate law and developing structures and laws for the participation of workers in workforce decision-making. Observing that many workers will remain with a firm for some time, O'Connor is critical of traditional theories of labor markets to explain employee behavior and argues that internal markets develop between workers and their firm.³⁷⁶ In a world where employee cooperation is becoming increasingly important for the modern post-hierarchical corporation, O'Connor focuses on how firms can gain employee loyalty and trust. She argues that the old models don't explain how or why these capacities might be created, and that we need to develop "organizational arrangements that are best suited to motivate a highly committed workforce to utilize fully their . . . abilities."³⁷⁷ In her opinion, the key is understanding how firms can foster trust, which she views as "beyond individual rational choice."³⁷⁸ Echoing Newman she states:

373. *Id.* at 1511.

374. *Id.* at 1510.

375. Charles D. Watts, Jr., *In Critique of a Reductivist Conception and Examination of "The Just Organization,"* 50 WASH. & LEE L. REV. 1515, 1517 (fall 1993) (responding to Prof. Newman).

376. O'Connor, *supra* note 363, at 907-08.

377. *Id.* at 917. O'Connor's discussion is preceded by an analysis, using game theory, of why the traditional "nexus of contracts" approach to employee relations is not going to work. Both parties have risks in making commitments to one another often leading to low trust and high conflict in this current era of corporate re-structuring and downsizing. *Id.* at 926. Her argument, in a nutshell, is that we need to foster participatory programs as a way to break out of the adversarial, non-cooperative prisoners dilemma of corporate relations that is currently played out.

378. *Id.* at 929.

The language of economics fails to encompass the reality of moral commitments because it has no way of discussing the concept of trust except by treating it as a commodity that can be exchanged. Discussing trust as a commodity is not only dehumanizing, it is also self-defeating because genuine trust is not experienced in utilitarian terms.³⁷⁹

O'Connor shifts her analysis from economics to the findings of sociologists, in particular George Akerlof and Amitai Etzioni. They suggest that trust is the result of a gift exchange between employees and their firm. Social conventions and moral values help to define what is appropriate behavior in this exchange. As parties make their decision, they operate through the medium of "loyalty filters," that is, past experiences, which affect the content and strength of their loyalties and commitments.³⁸⁰ O'Connor goes on to suggest that the legal environment is a key determinant of new models of trust and participation because it promotes cultural conditions and incentives. In her view, other theorists, like Oliver Williamson, have tended to ignore the way in which the law affects industrial relations by shaping behavior.³⁸¹

What is the salience of this for third party sexual harassment? The law and relationships captured by Title VII are a significant part of the workplace. Gutek suggests that our traditional views of the firm focus on the rational and thus miss many of the obvious and subtle facets of human actions that contribute to behavior, both productive and non productive, within a firm. O'Connor suggests that, in addition to Newman's sense of justice, it is also important for firms to create an environment in which employees can trust the firm. Seeking the eradication of third party harassment within the control of the firm is one step a firm could take to foster that trust. Thus, the failure of courts to remedy or even entertain third party sexual harassment claims sends a message to the firms as well as to the public that this is tolerable behavior.

O'Connor enriches this portrait of the firm in subsequent work. Again, moving from the thesis that inspires her work—that conventional economic models fail to accurately portray modern workplace issues—she looks to socio-economics to suggest ways to

379. *Id.* at 930.

380. *Id.* at 931–32.

381. *Id.* at 944–45.

enrich the classical description of the firm.³⁸² Rather than relying on the classical economics of self-interest as a way out of the prisoners' dilemma, she focuses on socio-economics. Socio-economics suggests that ethical obligations to cooperate and feelings of group solidarity and identity can increase cooperation and improve working conditions.³⁸³ O'Connor rejects the notion that "trust" is only for the private sphere, arguing that it has a role to play in the organization of the firm. She hypothesizes that trust can explain differences in productivity, and explores how it can be developed and fostered.³⁸⁴ In the course of her analysis, O'Connor observes that we need to make "more open use of ethical language in discussing economic life" and that our "rhetoric counts" in shaping an environment in which ethics and trust matter. In this view, traditional economics' focus on self-interested behavior leads to an atmosphere of cold calculation which is inimical to fostering other human values that could exist in the workplace.³⁸⁵ She also reaffirms her view of the role of law in this process:

In fostering corporate cultures that will allow employees to act as moral agents, we need to consider the interplay between the legal system and less formal systems of social control. In my view, the law exerts a tremendous influence on the ongoing process of the development of cooperative norms in the workplace Of course, cooperative impulses are not directly traceable to labor laws, but the law can influence the socialization processes that play a major role in preference formation. The most significant aspect of employment law is symbolic and pedagogic because in many instances the threat of formal sanctions is remote. To me, the way we talk about trust in the employment setting is crucial because the most distinguishing characteristic of labor law is its operation as a system of moral education that promotes cooperation in the workplace.³⁸⁶

Finally, working from a comparativist perspective, rather than an economic one, Anita Bernstein suggests another way in which harassment is a structural problem. Bernstein compares American perspectives

382. Marleen A. O'Connor, *A Socio-Economic Approach to the Japanese Corporate Governance Structure*, 50 WASH. & LEE L. REV. 1529, 1533-34 (fall 1993).

383. *Id.* at 1534-36.

384. *Id.* at 1539-40.

385. *Id.* at 1542-43.

386. *Id.* at 1545 (citations omitted).

on sexual harassment with those held in Europe, where it is largely regarded as a workplace problem.³⁸⁷ Bernstein tellingly claims that the American focus on tort aspects of sexual harassment, focused as they are on individual harm, have prevented us from seeing how this is a problem of the workplace, and that a typical European workplace-health approach and an American tort approach need not be an either/or proposition.³⁸⁸ Thus, she points out four different insights that an examination of European law brings to the problem of sexual harassment:

1. It is a problem of the workplace, and is a danger to health and safety.³⁸⁹
2. Sexual harassment imposes economics costs on employers, governments and individuals. As she states succinctly, it “amounts to a tax on women who venture into the workplace.”³⁹⁰
3. Sexual harassment is an affront to the dignity of workers and this concept broadens the base with which to form opposition to sexual harassment.³⁹¹
4. Decentralization: Here, rather than impose one European Community standard, the Europeans are “trusting” that national solutions can be developed. Given the national applicability of Title VII, this approach is of little utility in the United States.

After a critique of the American fault-based approach to harassment, Bernstein points out that in Europe, in addition to having a right to be free from sexual harassment, workers also have an “enforceable right to be treated with dignity.”³⁹² Because harassment is structurally embedded into the United States, Bernstein is more willing to consider a rich notion of safety regulation to combat harassment.³⁹³ She concludes: “Sexual harassment is a problem of money, health and safety,

387. Bernstein, *supra* note 281, at 1233.

388. *Id.* at 1259.

389. *Id.* at 1256–60.

390. *Id.* at 1260–62 (citations omitted).

391. *Id.* at 1262–64 (confirming indirectly the observations of Newman and O'Connor, Bernstein notes that ideas of dignity and justice play a larger role in European discussions of workplace conditions. In this view, dignity is a minimal component of workplace justice. The advantage of addressing sexual harassment in terms of dignitary interests is that it could broaden the groups of people opposed to sexual harassment because it would be a worker's issue rather than a women's issue).

392. *Id.* at 1283.

393. *Id.* at 1297.

and morality. To isolate it as a women's issue is not only to choose a weak tactic but also to conceal a large portion of the truth.³⁹⁴

4. *Current Doctrine*: Paradoxically, while much of this section has been a dance between silence and voice, that is not exactly the case. Title VII doctrine does address third party sexual harassment, and in the EEOC Guidelines, third party sexual harassment is made actionable.³⁹⁵ What has been puzzling, however, is the reluctance of the courts to legitimate and activate the language of the Guidelines. The argument is straightforward: recognition of third party harassment is consistent with both the goals and current doctrine of Title VII.

From the beginning, the goal of Title VII litigation has been to make victims whole, and to eradicate discrimination.³⁹⁶ To put a finer point on the latter, it is to deter conduct that would be unlawful as well as to "eliminate barriers" to equal employment opportunity.³⁹⁷ There is nothing about recognition of third party harassment which would be inconsistent with these goals. As documented above, the victims of third party harassment suffer in ways that are identical to victims of conventional sexual harassment: they suffer psychological and physical distress, they may leave or quit a job, etc. Third party harassment can operate as a "barrier" to greater employment opportunities for women by affecting their choices about various types of work or workplaces. A person, for example, who does not think she can suffer salacious customer comments in silence is not going to take a service position that highlights such service. And, in other types of job, say the practice of law, client behavior can affect an associate and in turn affect her billable hours, client contact and other factors upon which partnership decisions are made. By pursuing a strategy of more rigorous enforcement of the EEOC Guidelines, as they pertain to this type of harassment, one more barrier for women in the workplace would be eradicated because employers would have an incentive to eliminate third party harassment within their control.³⁹⁸ At the very least, it would suggest a tempering of

394. *Id.* at 1302 (citation omitted).

395. 29 C.F.R. § 1604.11 (e) (2001). *See supra* note 11 for the pertinent text of the Guidelines. This is also reinforced in the Commission's Compliance Manual. "The harasser does not have to be the victim's supervisor. (S)he may also be . . . a non-employee." EEOC COMPLIANCE MANUAL, § 615.2(b)(2) (2000). This is further developed in a later section of the manual. *Id.* at § 615.3(e).

396. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

397. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

398. At a minimum, employers can promulgate policies which provide that third party harassment will not be tolerated and provide reporting mechanisms. Once employees

the doctrine that “the customer is always right.” If the customer is acting in an illegal fashion, they aren’t right and the employee should not have to bear the consequences of their boorish or illegal behavior. To ask them to do otherwise only encourages and creates a “safe harbor” for sexual harassment.

Second, recognition of third party harassment is consistent with current doctrine in this area, as the EEOC already recognizes. The *prima facie* case as developed by the EEOC and adopted in this article is consistent with previously existing approaches to more conventional sexual harassment. Moreover, it is preferable that the constellation of factual circumstances possible under this doctrine be treated consistently.

Finally, there is ample precedent for the recognition that relationships with third parties may cause liabilities for an employer.³⁹⁹ As a starting point, the law of agency itself, which *Meritor*⁴⁰⁰ endorses as a baseline for judging employer culpability, suggests ways in which the employer might be liable. At a minimum, Section 219(2)(b) of the Restatement of Agency⁴⁰¹ suggests that employer’s can be liable for their negligent or reckless behavior,⁴⁰² and this has been used in hostile environment cases for imposing liability where employers fail to respond to

believe that they can report harassment without repercussions, the employee and employer can work together to develop creative solutions to the problem of customer/client harassment. Similarly, many employers could easily post “no harassment” policies at the doors of their establishments.

399. For a collection of other sources of liability, see Jeannie S. Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN’S L.J. 163, 175–76, nn.61–65 (1997) (touching on workers’ compensation, landlord’s liability for trespassers, etc.)

400. *Meritor*, 477 U.S. at 72.

401. That text provides: “(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless. . . (b) the master was negligent or reckless, . . .” RESTATEMENT (SECOND) OF AGENCY § 219 (1958). Consider also Agency Restatement § 213 which provides:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: (a) in giving improper or ambiguous orders of [sic] in failing to make proper regulations; or (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others: [sic] (c) in the supervision of the activity; or (d) *in permitting, or failing to prevent, negligent, or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.*

RESTATEMENT (SECOND) OF AGENCY § 213 (1958) (emphasis added).

402. *Meritor*, 477 U.S. 57. As it has been applied by the courts, this has become part of the notice requirements for a cause of action.

complaints about harassment. Thus, at the very least, these sections suggest that an employer who has been informed about third party harassment has some duty to investigate the complaints and remedy them if the facts so warrant. Section 213 suggests that the employer may have affirmative duties to address harassment when the third party harasser acts on its premises.

B. Elements of a Prima Facie Case of Third Party Harassment

The last task remaining is to craft and support a *prima facie* case of third party harassment.⁴⁰³ At this point, based on the limited amount of doctrine in this area, there tend to be two general approaches. One is to follow the *prima facie* case which is set out in the EEOC Guidelines, and the lead cases which have interpreted it. The second is to follow the Guidelines but to add qualifiers as to whether, by virtue of the type of job, the woman had accepted the “risk” of third party harassment.⁴⁰⁴ The *prima facie* case should follow the initial contours set out in the EEOC Guidelines without any augmentation. The thesis is simple: Third party sexual harassment interferes with a woman’s ability to perform her job, and in some cases, the selection or retention of employment opportunities. These barriers violate both the letter and spirit of Title VII. Therefore, if an employer knows of third party harassment and does not exercise the available control over the situation, and provide a prompt and appropriate remedy under the circumstances, then it should be held liable. Women’s ability to seek protection from third party harassment should not depend upon the nature of their

403. The focus here will be based on the assumption that all third party sexual harassment claims are going to come under the rubric of hostile environment harassment. The implicit assumption has been that a third party is not in a position to exercise the authority that would make a *quid pro quo* case possible. I think that analysis is wrong, have chosen not to address it in depth in this article. But consider the following scenario: An associate is having dinner with a firm’s major client. During the course of the dinner, the client requests sexual favors or the account will be withdrawn from the firm. Given the particular atmosphere at the firm, and a number of other personal factors, the associate may conclude that she has no choice but to “acquiesce” in order to retain the client for the firm, and her position within it.

404. See Aalberts & Seidman, *Non-Employees*, *supra* note 3, at 470–72 (women’s jobs are divided into categories of risk—low, medium and high); see also Reilly, *supra* note 333 (urging that this doctrine also be augmented by a notion of contributory negligence or assumption of risk).

employment or what they may be wearing or doing at any particular moment.

Although the basic framework of a sexual harassment case was laid out earlier, some of it bears repeating. Generally, the EEOC Guidelines, *Meritor*, *Harris* and the other leading cases provide that for hostile environment sexual harassment to cause employer liability, there must be unwelcome conduct directed at the victim because of her sex that interferes with her work or working conditions. Further, in the case of third party harassment, the employer must know about the behavior, or should have known about it, and failed to take prompt remedial action. As it pertains to third party harassment specifically, the Guidelines provide:

(e) An employer may also be responsible for the acts of non-employees, with respect to the 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. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.⁴⁰⁵

405. EEOC Guidelines, § 1604.11(e) (1985). The EEOC has provided additional guidance on these issues in supplementary publications, which generally focus on the amount of control or legal responsibility that the employer may have over the third party. See, e.g., Section 615.3(e), EEOC Compliance Manual. It states:

This section provides that an employer *may* also be responsible for the sexual harassment of an employee by a non-employee. The basic standard applied by this section is similar to that in the preceding section defining employer responsibility for co-worker sexual harassment. The employer may be responsible where the employer, or its agents, or its supervisory employees knew or should have known of the unlawful conduct and the employer failed to take immediate and appropriate corrective action. However, the difference between the two sections is that an employer is liable for co-worker sexual harassment if the two conditions (knowledge and failure to take remedial action) are met. An employer is *potentially* liable for non-employee sexual harassment in the same circumstances, but actual liability depends upon additional factors as well.

This section identifies these additional factors as the extent of the employer's control over the non-employee and any other legal responsibility which the employer may have with respect to the non-employee's conduct. The Commission will determine an employer's liability for non-employee sexual harassment on the basis of the total facts and circumstances of each

The Aalberts model,⁴⁰⁶ on the other hand, follows the guidelines for the most part. They depart from this model when they suggest that it is possible to divide women's work into three categories: high-, medium- and low-risk occupations. High-risk occupations would be those where the job holder would expect harassment.⁴⁰⁷ This approach has its roots in the *Meritor* opinion where Justice Rehnquist, in dicta, opines that the dress or speech of the victim might make a difference for liability.⁴⁰⁸ Although this model may have a respectable pedigree, it should be squarely rejected. Just as appearance makes no difference in race harassment cases, it should make no difference in sexual harassment cases. Here, Justice Rehnquist misunderstands that the gravamen of this case is not about sexuality per se, but about targeting women for behaviors that impede their ability to be successful in the workplace. It is also reminiscent of arguments, now rejected in the rape context, that "she asked for it." The focus of the court's inquiry should be on the behavior of the harasser, not on the behavior, dress, or appearance of the victim.⁴⁰⁹ Such an approach is more consistent with the goals of Title VII of eradicating

case, including employer knowledge, corrective action, control, and other legal responsibility. (See § 615.4(a) below on investigative procedure.)

. . . . (Examples omitted.)

It bears repeating that, although the victim in both of the examples reported the non-employee's sexual harassment, such reporting is not a requirement. However, it could have a bearing on the issue of employer knowledge. (Citation omitted)

Because the Commission will decide the liability issue on a case-by-case basis, evidence that the wrongful conduct was by a non-employee of a certain type or description (for example, a salesperson, or a repairperson, or a customer) will neither conclusively establish nor bar employer liability. Whether an employer is ultimately responsible will depend on the relationship between the employer and the non-employee as revealed by the specific factual context in which the allegedly unlawful conduct occurred.

(Emphasis in original.)

406. See Aalberts & Seidman, *Clients*, *supra* note 3. See *supra* text beginning at note 228.

407. Aalberts & Seidman, *Clients*, *supra* note 3, at 470–71. Other people suggest that an assumption of risk defense should be added to the doctrine to also capture these differences in occupations. See, e.g., Cahill, *supra* note 333.

408. *Meritor*, 477 U.S., at 69.

409. Comparisons between rape law and sexual harassment law abound in the literature. It has led many to argue that the unwelcomeness requirement should be abandoned. For a strong statement of this position, see Estrich, *supra* note 266.

employment discrimination since it puts responsibility back on the harasser and on the employer rather than on the woman.⁴¹⁰

Obviously, under the proposed model, the tougher issue here is the employer's ability to control the acts of third parties. Although the development of the doctrine will ultimately be at the hands of the courts and the EEOC, a few observations are offered. Assuming that an employer has knowledge of either actual third party sexual harassment or its potential, the employer has to approach this issue from two perspectives: reactive and proactive. That is, an employer must reactively focus on what responsibilities it has once an act of harassment has been reported and verified. At the same time, responsible employers should proactively attempt to create a work environment in which opportunities for third party harassment are minimized, and when they occur are dealt with swiftly and efficiently.

Employers are not the helpless entities that courts seem to make them out to be. Corporate claims of powerlessness are unconvincing, as a few examples will demonstrate. Take, for example, a situation that is discussed in the EEOC Compliance Manual:

Example 1—When the waitress asked if the four male customers seated at the table were ready to order, one man put his arm tightly around her waist and told her that what he wanted was not on the menu, prompting his companions to laugh and comment in the same vein. When she was finally able to finish taking their orders, the man removed his arm and patted her as she turned to leave. She went directly to the restaurant manager and reported the unwelcome sexual conduct . . . (The employer could have done something) as relatively simple as switching table assignments to have a waiter finish serving that table and making whatever arrangement might be necessary so that the waitress would not be financially or otherwise harmed by the substitution (for instance, by losing the amount of a tip she could have earned).⁴¹¹

While the EEOC at least suggests a remedy, it does not really go far enough. In the case in which this example is based, there was a second incident of harassment in which the waitress responded more

410. Rhee, *supra* note 399, at 203.

411. EEOC Compliance Manual § 615.3(e) (2000).

vigorously, and she informed her employer, requesting an apology. For her efforts, she was fired.⁴¹²

What should the employer have done? For starters, the employer should have taken her first complaint seriously. It was clear, in the real incident, that the harassers were "friends" of the employer, and on this basis it is assumed he had control over them. Since they were friends, it would not have been unreasonable for him to ask his friends to apologize to the waitress. If this was impossible, the employer had control of his premises, and he could have left a standing order that customers who behave in this fashion be asked to leave. Either would have been a better solution than asking the waitress to change tables or areas. Often, table areas vary in terms of ease of servicing and likelihood of tips, and are thus assigned on the basis of seniority, or some other factor. Asking the waitress to change tables, while it removed her from the harassment, sends two messages. It tells the complaining waitress that her economic needs may be sacrificed if she complains. And second, it tells the offending customers that there is little if any sanction for harassing employees, especially if they fail to note the change in waitstaff or are not told the reason for the change. After the fact, the restaurant owner could have barred these customers from his restaurant. This would not be unusual, as at many restaurants, it is common for there to be lists of people whose credit is suspect or who have passed bad checks to the establishment. Although a list of harassers should not be publicly posted, it should be readily available to staff. Finally, if this had been a situation with a collective bargaining agreement, and the waitress' discharge had gone to arbitration, a defense to the charge of insubordination and customer rudeness is that she spoke back against unlawful sexual harassment.

To act proactively will not really add much of a cost for employers who are already abiding by the law, and have existing sexual harassment policies and procedures in place. Moreover, because of the language in *Meritor*, *Ellerth* and *Faragher* stating that an employer can limit its liability by prompt remedial action and a targeted sexual harassment policy, many courts have spoken to this issue at length and much of the doctrinal contours of what is advisable are already in place. Although many employers do have sexual harassment policies that include third party situations, they should review their policies to make sure that this type of harassment is covered and that their grievance mechanism is

412. EEOC Decision No. 84-3, *supra* note 173.

prepared to handle complaints of this nature. Employers also may want to re-think their corporate culture to see if employees would be comfortable reporting third party harassment because they believe their employer cares about their dignity and respect.

Additionally, an employer may want to perform an audit of the way in which it forms and conducts its relationships with third parties. For example, as part of a law firm retainer or the admission papers to a hospital, the employer may want to include a statement that it observes all equal opportunity laws, and expects that clients or patients will treat its employees with respect and refrain from any type of sexual harassment. Or similarly, a restaurant could include a line or two on its menu: "We treat you with respect. Please treat our waitstaff with courtesy and respect."

The types of changes suggested above are not "rocket science." An employer of goodwill and commonsense can easily implement many of these suggestions without incurring significant costs or losses in productivity. The return in greater employee loyalty will also be a benefit of instituting these policies.

CONCLUSION

Until I started working and thinking about this article, I had forgotten an incident that occurred to me when I was seventeen and working at my first "real" job. It was the summer before I started college⁴¹³ and I was a receptionist at a local and sizeable printing press. That morning, an ink salesman approached the front desk with his sample case, hoping to see the lead pressman. After I told him there would be a bit of a wait, he leaned across the counter to ask me my name, saying, "You're new around here." After that, he began to make a number of comments about my appearance, none of them welcome since, at the very least, he was far older than I. His comments culminated in a particularly graphic invitation to lunch at his apartment. I looked up through demure and lowered lashes, and declined the invitation, noting that I was "jail bait." My only satisfaction in this encounter was his reaction, as he dropped his sample case, recovered it, and went bustling off in the direction of the presses.

413. For the historically particular, this would have been the summer of 1971.

I never told anyone at work about this encounter. I did not think they would believe me; I did not think that they would care.⁴¹⁴ I remembered being disgusted, and embarrassed. It was difficult to focus for the rest of the day, and it made me somewhat apprehensive about handling customers and salespeople in the future. I was captive behind that desk. I had to be a “nice girl,” no matter what. That evening at dinner, I told my family, and was applauded for handling the incident well. My father suggested I should have decked him, but I pointed out that I would have lost my job. As I write this, I wonder how many women are coming home to describe the same types of incidents to their family. Women who have decided, resignedly, that this kind of treatment is part of the job.

This article emphasizes how much the law matters, both when it speaks and when it is silent. The law is part of the rhetoric that shapes our sense of what is acceptable, and as an act of language can “at once reveal and reshape the attitudes and value choices of our community.”⁴¹⁵ The kind of social change suggested by this article is consistent with the spirit, if not the letter, of Title VII: that law can act as a positive force for changing behavior, and perhaps, ultimately, attitudes.⁴¹⁶ The expres-

414. Upon reflection, the only beneficial thing about the encounter was that “at least” this man, who was white, was willing to harass someone across racial lines, which was rare for the times.

415. O’Connor, *supra* note 382, at 1543.

416. Consider, for example, the words of the court in *Ellison v. Brady*:

‘Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.’ We hope that over time both men and women will learn what conduct offends reasonable members of the other sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged.

924 F.2d at 880 (citation omitted) (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990)). Abrams also states that:

[F]ormal equality does not always herald a change in attitudes. . . . Those declaring early victory for working women have mistaken the nature and scope of the enterprise. It is not the challenge of opening doors, but the more complex and elusive task of opening minds that will secure for women the experience, as well as the forms, of gender equality.

Abrams, *supra* note 262, at 1247–48. Without belaboring the point, there is a long tradition of debate between those who think that law changes only behavior, and those who think it can ultimately change attitude. Obviously, I fall into the latter camp. Thus for me, law is “in no small part, a chronicle of formerly acceptable out-

sion of women's experience, detailed in the first part of this article, is a predicate for any type of legal or social change. Even in the few cases that addressed third party harassment, counsel and the courts apparently spent little time trying to document whether third party harassment was a problem of such magnitude that it deserved some type of treatment by the court. Although there is clearly a need for further empirical work in this area, the material presented here documents the need for legal treatment of this issue. A recognized legal remedy will raise public awareness of the dignitary interests of workers as well as raise the cost of ignoring those interests as it presents individual redress to victims of actionable third party harassment.

By locating sexual harassment, whether by third parties, supervisors, or co-workers, in debates about dignity, and workplace health and safety in addition to the feminist venue, we will have a broader base for understanding the way in which third party harassment affects us all, both within our lives with organizations and in the broader social and political community. This article has sought not only to identify a different form of sexual harassment and extend the definition of actionable conduct in the legal arena, but also to suggest that this is not just a problem for women, but a problem for all of us. It reflects on the kind of civil dignity and respect that we are willing to accord one another as we go about our work.⁴¹⁷ In the long run, it might lead to a civic culture in which any kind of abuse or harassment, for whatever reason, would be inappropriate.⁴¹⁸

rages." Henry Louis Gates, Jr., *Men Behaving Badly*, *NEW YORKER* Aug. 18, 1997, at 4 (quoting a sentence that originally began with the phrase, "History is . . .")

417. The endpoint of this analysis is a unified theory and treatment of all workplace harassment on whatever basis: race, sex, religion, disability, sexual preference, age, color and national origin. The EEOC's rescinded proposed guidelines suggested such an approach, and they are endorsed here.

See also, Frank S. Ravitch, *Contextualizing Gender Harassment: Providing an Analytical Framework for an Emerging Concept in Discrimination Law*, 1995 U. DET. COLL. L. MICH. ST. L. REV. 853, 882 (After comparing a number of harassment cases, he comments: "[O]ne can see the similarity in the types of conduct alleged in gender, racial, religious, and national origin harassment. The conduct is not based on any attraction or sexual need, but rather upon hatred or disapproval of an individual or individuals because of membership in a protected class.").

418. Literary and social critic Henry Louis Gates takes us to task for forgetting that the word "sex" in sexual harassment did not limit this action to abuse which arose out of the abusive use of sexuality, but rather was meant to cover harassment of any form directed at a woman, on account of her sex, in order to impede her performance at the workplace. As a result of this confusion about the word "sexual," he argues, correctly I think, that we have made this doctrine a litmus test for inappropriate displays of sexuality as opposed to its correct role in attacking abuse or harassment

People who know of the San Diego Zoo and Wild Animal Park are probably familiar with this sign, which is posted about the zoo and sold as a souvenir: "PLEASE DO NOT annoy, torment, pester, plague, molest, worry, badger, harry, harass, heckle, persecute, irk, bully rag, vex, disquiet, grate, beset, bother, tease, nettle, tantalize or ruffle the animals."

The question this article asks is why do the animals at the zoo get more protection from unwelcome harassment than the people at the souvenir stands and food booths? Isn't it time for a change? ♣

that impede's women's opportunities in the workplace. Gates, *supra* note 416, at 5. Again, this also aids the argument that our long term goal is to end abuse in the workplace and the tyranny of the "Boss from Hell." It is a misuse and distortion of doctrine to use Title VII to target bad bosses, and that's another article beyond the scope of this one.