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## A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss

Marie T. Reilly

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# A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss

Marie T. Reilly\*

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## I. INTRODUCTION

The emerging law of sexual harassment has focused discussion on the political, sociological, and legal issues surrounding sexual conduct. Some commentators have argued that the developing law insufficiently addresses an underlying political imbalance between men and women. Although these commentators eschew sexual harassment law as a plausible means of achieving an egalitarian, sex-

blind society, they offer few concrete suggestions for reaching their goal. A few scholars have taken a position at the other extreme, that sexual harassment is more or less a chimera, and that the injury women claim to experience is simply part of the vicissitudes of life, or, in the case of workplace harassment, of their employment bargain.

Sexual harassment, however defined, is an unusual social problem in that one group of people engage in the challenged conduct and another group bears the loss, with virtually no overlap. The groups are easily identified as men and women. Commentators have explained the phenomenon as evidence of the subordination of women by men.<sup>1</sup> The insular quality of the groups and the political imbalance between them has prompted some commentators to draw the conclusion that sexual harassment should be addressed as part of global social policy, not as an issue of allocation of loss among individuals.<sup>2</sup>

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1. See, for example, Catharine A. MacKinnon, *Sexual Harassment of Working Women* 1 (Yale U., 1979); Catharine A. MacKinnon, *Toward a Feminist Theory of the State*, 217, 219, 227 (Harvard U., 1989); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *Yale L. J.* 1177, 1194 (1990); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 *Harv. Women's L. J.* 1, 21 (1985). Some commentators have described sexual harassment as a tool men use to reinforce male domination in the workplace and to relegate women to traditional "female" and inferior work. See, for example, Suzanne C. Carothers and Peggy Crull, *Contrasting Sexual Harassment in Female—and Male—Dominated Occupations*, in Karen Brodtkin Sacks and Dorothy Remy, eds., *My Troubles Are Going to Have Trouble with Me: Everyday Trials and Triumphs of Women Workers* 219 (Rutgers U., 1984); Peggy Crull, *Sexual Harassment and Male Control of Women's Work* (Working Women's Inst. Res. Ser. Rep. No. 5, 1982). On the subordination of women, see generally Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (U.N.C., 1980); Ellen Carol Dubois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869* (Cornell U., 1978); Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (Oxford U., 1982); Angela Y. Davis, *Women, Race and Class* (Random House, 1981).

2. See MacKinnon, *Sexual Harassment* at 172 (cited in note 1). See also Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 *Harv. Women's L. J.* 35, 40 (1990) (noting that sexual harassment is a "social, systemic problem[] and not the isolated problem of a lone victim"). One commentator has observed that antidiscrimination law "obscures for women the actual causes of their oppression and treats discrimination against women as an irrational and capricious departure from the normal objective operation of the market, instead of recognizing such discrimination as a pervasive aspect of our dichotomized system." Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1552 (1983). See also Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 *Harv. C.R.-C.L. L. Rev.* 79, 149-54 (1989) (examining the failure of discrimination analysis to deal with issues of power and gender).

The perspective that appears common to feminist criticism of individual loss allocation is that sexual harassment causes global *but not* individual loss, or at least that individual loss is theoretically eclipsed by the global loss. See, for example, MacKinnon, *Sexual Harassment* at 172. See

For example, Catharine MacKinnon advocates sexual harassment policy that would "change the society so that this kind of injury need not and does not recur."<sup>3</sup> Luxuriously, MacKinnon and her followers ignore entirely the social cost of such a societal restructuring.<sup>4</sup>

Determining what conduct constitutes sexual harassment would seem central to any attempt to formulate a sensible policy, yet the definition of the concept continues to spark passionate debate among scholars, on factory floors, and around photocopy machines. Some academic commentators define sexual harassment broadly as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."<sup>5</sup> This definition might suffice for a political science final examination, but it does little to guide the adjudication of conduct and the allocation of loss in the real world. Feminist<sup>6</sup> commentators take great pride in having named sexual harassment.<sup>7</sup> But simply naming the harm does not provide a practical means of delineating harmful sexual behavior from valuable, productive conduct.<sup>8</sup>

also note 23 and accompanying text. Notwithstanding the strong political usefulness of this view, it is not the only possible perspective.

3. MacKinnon, *Sexual Harassment* at 172 (cited in note 1).

4. Richard Posner has noted in response to critics of the positive theory of economic analysis of law: "A theory, unless quite hopeless, is overturned not by pointing out its defects or limitations but by proposing a more inclusive, more powerful, above all more *useful* theory." Richard A. Posner, *Economic Analysis of Law* 26 (Little, Brown, 4th ed. 1992) (emphasis in original). Criticisms of the emerging law of sexual harassment that offer no alternative theory or no more useful perspective than that which criticizes the status quo are similarly ineffectual.

5. MacKinnon, *Sexual Harassment* at 1 (cited in note 1). In the same breath, MacKinnon recognizes that her definition of sexual harassment places sexual conduct on "a continuum of severity and unwantedness . . . depending upon the employment circumstances." *Id.* at 2. See also Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* 14-15 (McGraw-Hill, 1978) (defining sexual harassment as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as worker"); Pollack, 13 *Harv. Women's L. J.* at 53 (cited in note 2) (defining sexual harassment as "any conduct that is linked to male dominance and requires female subordination").

6. The term "feminist" is susceptible to so many meanings that it has virtually none. Laura Stein recently defined the term to mean "all persons engaged in the struggle against the social oppression of women." Laura Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 *Minn. L. Rev.* 1153 & n.1 (1993). See note 16.

7. See MacKinnon, *Sexual Harassment* at 27-28 (cited in note 1); Pollack, 13 *Harv. Women's L. J.* at 41 n.16 (cited in note 2) (arguing that "[t]he power of naming one's own self and one's own reality, to understand that one contributes to the creation of one's own culture, is taken away from those who are oppressed and it must be reclaimed").

8. For example, Naomi Cahn proposes a standard of reasonable sexual conduct that would "be contextual, focusing on the victim's actual reactions." Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 *Cornell L. Rev.* 1398, 1435 (1992). Cahn recognizes that her proposed standard results in a "broad indeterminacy of legally appropriate behavior." *Id.* at 1436.

In *Harris v. Forklift Systems, Inc.*,<sup>9</sup> the Supreme Court held that actionable sexual conduct under Title VII is that which a reasonable person would find hostile or abusive.<sup>10</sup> The Court's opinion leaves lower courts virtually without guidance as they embark on the task of identifying how reasonable people feel.<sup>11</sup> It leaves individuals in the dark about what workplace conduct is "reasonable" and what is not.

The dialectical impasse on the subject of sexual harassment arises from the absence in the emerging law and contemporary scholarship of a principled, practical paradigm under which to allocate the loss associated with the same sexual conduct. Casting sexual harassment as a *sui generis* problem born of an intractable perception gap between men and women turns sexual harassment into a political anthem.<sup>12</sup> Apart from the rhetoric, however, the loss caused by sexual harassment is similar to other loss routinely addressed by laws—it occurs, its causes can be identified, although imperfectly, and it can be prevented. Ignoring the capacity of sexual harassment policy to allocate loss wastes its potential to maximize wealth and to achieve an economically optimal distribution of loss.

Fortunately for those who know there is "no free lunch,"<sup>13</sup> the law has developed a means of arriving at an optimal level of loss under conditions of scarcity. This Article proposes a paradigm that draws from the common-law rule of negligence. It defines actionable sexual conduct in the workplace in terms of the cost of precautionary conduct and the increased safety such precaution would have yielded. Like the rule of negligence, the proposed paradigm creates incentives for men and women to take steps to prevent sexual conduct loss to the point at which the cost of an additional increment of precaution is equal to the value of the reduction in risk of loss.<sup>14</sup> This point is the

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9. 114 S. Ct. 367 (1993).

10. *Id.* at 370. Additionally, the plaintiff must subjectively perceive the conduct as abusive. *Id.* The Court recognized that its decision did not yield a "mathematically precise test." *Id.* at 371. *Harris* held that whether a working environment is "hostile" or "abusive" "can be determined only by looking at all the circumstances." *Id.*

11. See *id.* at 372 (Scalia, J., concurring).

12. Perhaps fanning the flames of controversy, rather than contributing to the process of resolving it, is the true goal of some scholars on the subject. See Stein, 77 *Minn. L. Rev.* at 1186 (cited in note 6). Stein recognizes that feminist arguments based on concepts of equality have a "moral high ground" that arguments expressly directed at advancing the interests of women as a discrete group lack. She observes: "Losing this high ground is a practical danger; it is questionable whether women have the political muscle to flourish if we become just another interest group." *Id.* She gives as an example of the ineffectiveness of "women" as a political group the recent passage of state statutes that restrict women's access to abortions. *Id.* at 1186-87 n.138.

13. Milton Friedman, *There's No Such Thing as a Free Lunch* (Open Court, 1974).

14. The premise that common-law rules like the negligence principle can be understood as a means of allocating loss efficiently underlies the positive theory of the economic analysis of law.

optimal level of precaution. After this point, additional precaution might further reduce sexual conduct loss, but the cost of such precaution would outweigh the resulting benefit.

Admittedly, focusing on the costs of preventing loss from sexual conduct to inform the allocation of such loss does not create a politically "neutral" basis for evaluating sexual conduct. No paradigm, however conceived or applied, can obscure its purpose—determining what conduct is and is not "reasonable" under given circumstances.<sup>15</sup> Some commentators propose a standard for workplace sexual conduct reflecting their individual tastes, or those of an inspecific group of women. Any standard of conduct, including those proposed in the best interest of women, imposes a cost that, although seldom directly addressed by the proponent, is very real.

The proposed paradigm provides a framework against which to measure the social cost of competing standards of workplace sexual conduct. It presents a method to identify "reasonable" conduct, defining it as taking precaution up to the point that the average cost (averaged over all potential actors) of additional precaution would not be offset by a reduction in expected cost (averaged over all potential reactors). A proposed standard that requires care beyond "reasonable care," so defined, wastes social resources because on average, the additional precaution does not yield a sufficient improvement in workplace conditions to be worth its price. Defined this way, "reasonable care" is a dynamic concept adaptable to specific circumstances in a given case, as well as to changes over time in attitudes about what level of cost and benefit is "average."

Practical application of the paradigm to workplace sexual conduct reveals more the absence of a social consensus than the existence of one. Individual tastes regarding sexual conduct vary widely and conclusions about what a "reasonable person" or even a "reasonable woman" would find offensive or harmless in a given situation are precarious. Even so, for some sexual conduct, like that which constitutes "quid pro quo harassment," consensus is relatively strong. In contrast, for some, but not all, so-called "hostile work environment harassment," there currently may be no consensus. In the absence of a social consensus regarding the costs and benefits of

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See generally Posner, *Economic Analysis of Law* (cited in note 4); Robert Cooter and Thomas Ulen, *Law and Economics* (Scott, Foresman, 1988).

15. See generally Ehrenreich, 99 Yale L. J. 1177 (cited in note 1). The search for neutrality is futile as long as there are diverse preferences for sexual conduct. See generally *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

challenged conduct, there is no assurance that reallocating loss will yield an efficiency gain sufficient to offset the considerable administrative costs of adjudicating the dispute. In such cases, the optimal loss allocation rule is not to intervene at all.

Part II of the Article proposes an adaptation of the rule of negligence as a paradigm for allocating the loss sexual conduct can cause. Part III applies the paradigm to the problem of loss from sexual conduct, with particular focus on sexual conduct in the workplace. Part IV responds to some of the criticisms of the emerging law of sexual harassment.

## II. A PARADIGM FOR SEXUAL CONDUCT LOSS

### A. *A New Vocabulary for Sexual Harassment*

The vocabulary courts and commentators have developed to address the problem of sexual harassment is inadequate to evaluate competing sexual harassment policies. The current lexicon is missing words for key concepts. Their absence appears to be more than just semantic. Perhaps writers on the subject of sexual harassment deliberately have failed to develop the words because recognition of such concepts would undermine their conclusions. At the least, the gaps reveal a lack of scholarly rigor.

The term "sexual harassment" itself has no static meaning.<sup>16</sup> Both the word "sexual" and the word "harassment" invoke a meaning

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16. See Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 Tulane L. Rev. 1363, 1371 (1993). Interestingly, the term "feminism" also appears to lack objective meaning. Feminists readily acknowledge that there is no one correct feminist position. See, for example, Morrison Torrey, Jackie Casey, and Karin Olson, *Teaching Law in a Feminist Manner: A Commentary from Experience*, 13 Harv. Women's L. J. 93, 109-10 n.51 (1990). Eschewing any single positive theory, feminists effectively have immunized themselves from logical refutation. The term "feminism," although it does not describe a theoretical position, does connote an inviolate supposition about human interaction, namely, oppression by men of women. See, for example, Hester Eisenstein, *Contemporary Feminist Thought* xix (G. K. Hall, 1983) (stating that "[f]eminism is an egalitarian impulse, seeking to free women from oppression by removing all of the obstacles to their political, economic, and sexual self-determination"). Feminism takes oppression in all aspects of existence as a given and adopts activist rather than academic means to eradicate it. See, for example, Patricia A. Cain, *Teaching Feminist Legal Theory*, 38 J. Legal Ed. 165, 172 (1988); Clive Dalton, *Where We Stand: Observations on the Structure of Feminist Legal Thought*, 3-4 Berkeley Women's L. J. 1, 2-3 (1988); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 Fla. L. Rev. 25 (1990).

that varies widely depending on the person considering the words.<sup>17</sup> Thus, it is impossible to evaluate the current proposals dealing with "sexual harassment" on the basis of their relative effects on the conduct. If the goal of policy is to eliminate sexual harassment, then obviously it is necessary to identify the conduct to be eliminated. We cannot tell if the policy reduces "sexual harassment" if we do not know *ex ante* what "sexual harassment" is.

Skipping the hard definitional problem immunizes feminist criticism of existing policy from refutation. Instead of honestly searching for a way to identify "sexual harassment" among the universe of interpersonal conduct, some commentators use the term to refer generally and without elaboration to conduct *they* consider negative.<sup>18</sup> Thus, any loss allocation scheme that yields a result of which they disapprove is, virtually by fiat, flawed.<sup>19</sup>

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17. For some feminist writers, the sexual aspect of the challenged conduct distinguishes it from any other type of conduct and justifies special treatment for the loss it causes. See note 5. Whether conduct is sexual would seem a critical threshold determination, yet feminist scholars have yet to define "sexual" conduct or distinguish it from the universe of "nonsexual" conduct. Some writers implicitly define virtually all human interaction as sexual. See, for example, *Downes v. FAA*, 775 F.2d 288 (Fed. Cir. 1985) (supporting the view that all human interaction is sexual). Others define conduct as sexual if it is undertaken by a male and "requires female subordination." Pollack, 13 Harv. Women's L. J. at 53 (cited in note 2). Yet other commentators contend that conduct is sexual whenever it is directed at a person "because of her gender," even if it is not explicitly sexual in the biological sense. See, for example, Barbara Zalucki, Comment, *Defining the Hostile Work Environment Claim of Sexual Harassment Under Title VII*, 11 W. New Eng. L. Rev. 143, 171-75 (1989). The EEOC Guidelines state that "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" can constitute sexual harassment under certain circumstances, see note 79 and accompanying text, but they do not provide guidance on when conduct is "of a sexual nature." Several courts appear to have embraced a broad definition of "conduct of a sexual nature." For example, in *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497 (11th Cir. 1985), the plaintiff alleged that her supervisor insulted her by calling her the "pimp for the office" and talking to her "like [she] was about two years old and two inches high." *Id.* at 1499. The Eleventh Circuit held that the alleged conduct, although not explicitly sexual, was within the scope of Title VII because it affected the conditions of the plaintiff's employment and was directed at her because she was a woman. *Id.* at 1501-03. See also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C. Cir. 1985).

18. As used by some commentators, the term "sexual harassment" incorporates a distributive judgment as to who should bear the cost of such conduct, just as labelling driving on the sidewalk as negligent reveals a judgment that the driver should compensate an injured pedestrian. Wendy Pollack's discussion of the Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson* illustrates the theoretical abyss created by the use of "sexual harassment" as both a descriptive term and a distributional conclusion. She asks rhetorically: "If only 'unreasonable interference' is actionable, does this mean there is reasonable interference? Isn't it unreasonable to ask the victim of sexual harassment to tolerate *any* interference with her ability to perform her job?" Pollack, 13 Harv. Women's L. J. at 48 (cited in note 2) (emphasis in original).

19. See generally Pollack, 13 Harv. Women's L. J. 35 (cited in note 2); Christine Merriman and Cora Yang, *Employer Liability for Co-Worker Sexual Harassment Under Title VII*, 13 N.Y.U. Rev. L. & Soc. Change 83 (1984-85). Commentators frequently identify the flaw as the patriarchal



Feminists have coined the term "sexual harassment" to refer to sexual conduct they find offensive. As of yet, however, no one has coined a companion term for non-offensive sexual conduct.<sup>20</sup> To fill this gap in the lexicon, this Article proposes the terms "negative" and "positive" sexual conduct to characterize sexual conduct by reference to the tastes of a particular person. Characterizing sexual conduct based on the tastes and preferences of an individual who experiences that conduct presupposes that an individual's reaction to conduct (positive or negative) accurately reflects the value or cost of that conduct to her.<sup>21</sup> She is presumptively the best judge of whether and to what extent the challenged conduct harmed or benefitted her.<sup>22</sup> Thus, one worker may consider pictures of unclothed women posted in unavoidable areas in the workplace negative sexual conduct but her co-worker may consider the display of the same pictures positive sexual conduct.

The idea that the existence and boundaries of loss or benefit lie within the province of the individual constitutes one of the cornerstones of economic theory. Feminist theory, on the other hand, upends the primacy of the individual with concepts that identify harm or benefit to individuals based on the perceptions of a group of observers, usually feminists.<sup>23</sup> For purposes of this Article, however, harm is

attitudes of judges, who, they observe, are predominantly male, and presumptively not fit to judge sexual conduct. See, for example, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1203 (1989) (claiming that "[b]ecause most judges are men, who have experienced the traditional forms of male socialization, their instinctive reaction is to accept the perspective of the employer"); Kenneth Karst, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 54 n.304 (1977); Kit Kinports, *Evidence Engendered*, U. Ill. L. Rev. 413, 420 (1991). See also Kenneth Karst, *Judging and Belonging*, 61 S. Cal. L. Rev. 1957, 1959 (1988) (explaining that "[w]omen know that, in general, men tend to be blind to the realities of women's lives"). But see *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (Ward, J.) (involving opinions decided by male judges who were able to overcome their "instinct").

20. To suggest that some women consider some sexual conduct beneficial will no doubt be controversial with radical feminists. See Andrea Dworkin, *Intercourse* (Free Press, 1987) (claiming that sexual intercourse is by nature coercive and perpetuates the subordination of women). Nonetheless, overwhelming anecdotal evidence supports the proposition.

21. Individuals who consider sexual conduct negative incur a cost; those who consider it positive either are unaffected or incur a benefit from the conduct.

22. Expressly recognizing that an individual response to particular conduct can be either positive or negative circumscribes the importance of whether the challenged conduct is "sexual" or not. The "sexual" aspect of conduct is important only to the extent it affects the positive or negative value an individual associates with the conduct.

23. See, for example, Elizabeth Fox-Genovese, *Feminism Without Illusions* 33-54 (U.N.C., 1991) (arguing that feminist thoughts focusing on individualist notions of "empowerment" are misguided; surrender to the "community" will lead to a better life for women). The notion that group relations take primacy over individual ones stems from the unsupported premise that

determined by asking the individual exposed to the sexual conduct if she feels harmed. If she truthfully says yes, then she is harmed, or, in other words, she has suffered a loss. But if she says no, then she is not harmed, regardless of how another person may have answered the question.

A corollary to the premise that benefit or loss reflects individual preferences is the notion that, at least at the outset of the inquiry, no conduct is inherently good or bad. The loss or gain one person experiences is a product of the interaction of that person and another person and the way the law allocates the consequences of that interaction. For example, suppose a skeet shooting range is located next to a funeral home. The presence of the range next to the funeral home results in a loss to the home unless the funeral home is entitled to an injunction against the skeet shooting range, in which case the close proximity of the funeral home results in a loss to the range. This example hopefully pares away biases and preconceptions to reveal the point that the noise from skeet shooting is not, at the outset, intrinsically virtuous or blameworthy, any more than is the funeral home patrons' preference for quiet.

The current scholarship ignores the fact that loss from sexual conduct is a product of the interaction between men and women.<sup>24</sup> Writers refer to the complaining woman as the "victim" and the defendant as the "injurer."<sup>25</sup> But a woman is no more a victim of a man's crude remarks than a man is a victim of the woman's sensitivity to them. Scholarship that characterizes defendants in

women reject notions of self-determination and individual choice in favor of other, usually unspecified values such as "compassion." See Kenneth L. Karst, *Woman's Constitution*, 1984 Duke L. J. 447, 479 (stating that "[m]any women appear to see individual autonomy as threatening not only their security in a web of relationships, but also their very sense of self"). Susan Kupfer identified the "dichotomy" of individual and community in feminist thought: "The possibility of autonomy for individual women risks subscribing to liberal ideology, with its known inequities; yet, focus on community flirts with reductionism, seeing women as only connected to others." Susan Kupfer, *Autonomy and Community in Feminist Legal Thought*, 22 Golden Gate U. L. Rev. 583-84 (1992). She observes that the "dichotomy" is somewhat artificial, a viewpoint she coins as "postmodern." *Id.* at 586. Kupfer correctly concludes: "There is no reason that autonomous individuals cannot be joined by an interest or goal in transformative imaginings of the possibilities of difference." *Id.* at 590. See also Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 Yale J. L. & Fem. 7-8 (1989).

24. That injuries are a cost of both the injurer and the victim's conduct is a fundamental premise in the work of Renald Coase. See Renald Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

25. "Victim" appears to refer to the person on whom the incidence of loss from sexual conduct initially falls before any rule of law shifts the loss to someone else. The "injurer" is thus the person whose conduct is at issue. On the emerging importance of victimhood in our law and culture, see Charles J. Sykes, *A Nation of Victims: The Decay of the American Character* (St. Martin's, 1992); Martha Minow, *Surviving Victim Talk*, 40 U.C.L.A. L. Rev. 1411 (1993).

sexual harassment cases as "injurers" and plaintiffs as "victims" presupposes an ethic under which plaintiffs' values morally trump those of defendants. The choice of language obscures the ultimate question: when should one type of conduct yield to another? To answer the question requires a means of identifying what is "fair" and "moral" based on principles that do not preordain the outcome.<sup>26</sup>

The goal is to identify a paradigm for allocating loss from sexual conduct that creates incentive for investment in the optimal amount of precaution. Thus, the paradigm proposed reflects the normative conclusion that loss allocation should achieve allocative efficiency. Some writers criticize the normative economic theory of tort law<sup>27</sup> underlying the proposed paradigm as immoral.<sup>28</sup> Resolution of these conflicting viewpoints is beyond the scope of this Article, if not impossible.<sup>29</sup> In any event, it is not necessary to embrace the normative theory to find merit in economic analysis as a policy tool. Wealth-maximization frequently is subverted in favor of some other social goal. Identifying the economically optimal allocation provides a metric of the social cost of a competing policy. Certainly, ignoring the social cost of policy does not make the cost go away. Sober recognition of that cost may not be politically expedient, but it is honest.

## B. *Toward the Optimal Level of Sexual Conduct Loss*

### 1. A Model of Rational Behavior

Under conditions of scarcity, all conduct produces both benefit and cost.<sup>30</sup> One of the central assumptions underlying economic theory is that a decisionmaker will shape her behavior to achieve the greatest benefit at the least cost.<sup>31</sup> She will engage in conduct up to

26. See, for example, Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. Legal Stud. 187 (1981).

27. The normative theory of economic analysis posits that an efficient allocation of loss is the fair one.

28. See, for example, Ronald Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191 (1980).

29. For a discussion of the tension between justice and efficiency in the common law, see *Symposium on Efficiency as a Legal Concern*, 8 Hofstra L. Rev. 485 (1980).

30. See, for example, Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. Legal Stud. 13, 25 (1972).

31. See Jeremy Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and Legislation* 125, 298 (Oxford U., Harrison ed. 1948). A recurring criticism of the economic analysis of law is that it is premised on unrealistic assumptions regarding human behavior. See, for example, Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 Cal. L. Rev. 677, 685 n.46 (1985); G. Edward White, *Tort Law in America: An Intellec-*

the point at which the benefit of the conduct no longer exceeds the cost. This is the economically optimal level of conduct because it is wealth-maximizing. Conduct in excess of the optimal level depletes the decisionmaker's wealth because the benefit of additional conduct would be less than the cost to undertake it. At a level of conduct lower than the optimal level, the decisionmaker could become wealthier by incurring cost for a greater benefit.<sup>32</sup>

To illustrate with non-controversial conduct, consider crossing a busy street. It yields a benefit by providing access to the other side of the street. It also imposes a cost by increasing the risk of being injured by an automobile driving on the street. The increased risk of injury creates a present cost equal to the probability of the injury times the magnitude of loss, if it occurs. This risk of injury from the conduct is called the expected loss.<sup>33</sup> Thus, assuming rational conduct, a pedestrian will cross the street as long as the benefit of doing so outweighs the expected loss.

Sexual conduct similarly yields both benefits and costs. The person enjoying the benefits, however, may be able to externalize some or all of the costs.<sup>34</sup> Unlike the pedestrian who bears both the benefits and costs of crossing the street, a worker displaying nude photographs of women around his work area enjoys the benefit but

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*tual History*, 220-23, 230 (Oxford U., 1980); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 *Yale L. J.* 697 (1978). William Landes and Richard Posner respond to this critique by pointing to statistical evidence that shows the deterrent effect of law. For example, statistical evidence regarding the certainty and severity of criminal sanctions and the level of criminal activity illustrates the practical implementation of rational human conduct. William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 10-11 (Harvard U., 1987). See also Christopher J. Bruce, *The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature*, 6 *L. & Pol'y* 67, 84-90 (1984); Jerry Wiley, *The Impact of Judicial Decisions on Professional Conduct: An Empirical Study*, 55 *S. Cal. L. Rev.* 345, 383-84 (1982).

32. This underlying assumption does not mean that economists assume, or believe, that humans or legal entities always act rationally. The assumption that people act to make themselves better off implies that people respond to incentives. In other words, the economic model of rational conduct is built on the assumption that if a person's surroundings change so that by changing her conduct, she can make herself better off, she will do so. See Posner, *Economic Analysis of Law* at 4 (cited in note 4). The extent to which a person will change her conduct in response to a change in conditions is outside the scope of economic theory. Measuring the magnitude of change in conduct in response to incentives requires empirical analysis of the elasticity of conduct with respect to the changed conditions.

33. Expressed as a formula:  $E = PL$ , where E is the expected loss, P is the probability of the loss, and L is the magnitude of the loss, if it occurs.

34. The biologically derived ability of men to externalize to women one of the costs of sexual intercourse (the risk of pregnancy) is at the heart of the controversy over abortion rights. See, for example, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. Pa. L. Rev.* 955, 1016-28 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L. J.* 1281, 1309-24 (1991).

does not bear the entire cost. Assume that the worker can impose costs on his co-workers but that no law requires him to compensate them. Because some of the costs of the worker's conduct therefore fall on other workers, he can externalize the cost.<sup>35</sup>

When an individual can externalize some or all of the costs of his conduct, the individual's decision regarding whether to engage in the conduct, although privately optimal, is not socially optimal.<sup>36</sup> A level of conduct is socially optimal when the aggregate benefits of such conduct are maximized in relation to the average costs measured over all participants in the society. If an individual takes into account all costs and benefits of his conduct, he will engage in it until the total benefit to him maximally exceeds the total cost.<sup>37</sup> Thus, if the worker is forced to consider all the costs of his conduct, including the cost he imposes on his co-workers, his private decision whether to display nude photographs at work will be socially optimal.<sup>38</sup>

Regardless of whether he considers only his own costs, or costs initially borne by others that he internalizes, an individual can reduce the costs of conduct by taking precautions. For example, the worker could reduce the expected loss from the display of his photographs by posting them in his locker, rather than on the shop floor. Assuming that the worker could be forced to internalize the costs of his conduct fully, before he decides where to post the pictures he would weigh the expected costs to his co-workers if he chooses the more private location as opposed to the more public one. Restricting display of the photographs to his locker is precautionary conduct. It would lower the probability that a co-worker would be injured, thus reducing the expected loss from his conduct relative to the expected loss if he posts the photographs on the shop floor.<sup>39</sup>

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35. The cost imposed on co-workers from the presence of nude photographs of women in their workplace is an externality of the worker's conduct.

36. See generally A. C. Pigou, *The Economics of Welfare* 134, 192 (Macmillan, 4th ed. 1932).

37. Costs are internalized when a decisionmaker's self-interest yields the same result as the economic conception of public interest—minimized private costs equal minimized social costs. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal. L. Rev. 1, 4 n.8 (1985).

38. Whether display of sexually explicit material in the workplace creates a hostile work environment actionable under Title VII is controversial. Compare *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990), with *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 622 (6th Cir. 1986).

39. Recall that the expected cost is the product of the probability of loss and the magnitude of loss (PL). If P is lowered, the product of P and L will be smaller.

In other words, precautions yield a benefit in the form of a lower expected loss.<sup>40</sup> But precautions, like all conduct, involve both benefit and cost. Confining his photographs to his locker imposes a cost on the worker, assuming he would derive additional benefit by displaying them on the shop floor. His cost equals his foregone enjoyment.<sup>41</sup> In the context of sexual conduct at work, the costs of precaution are sometimes subtle, but in all cases are real. For example, if an employer hires a floor supervisor to monitor the conversations of workers in order to detect and report sexual innuendo, the supervisor's salary is a cost of precaution to the employer. Workers bear a companion cost of this precaution—reduced privacy and autonomy at work. If an individual worker interrupts her work to tell her co-worker she does not appreciate his lewd commentary, her lost privacy is a cost to her; her lost productivity is a cost to her employer.

A rational person will only undertake the precaution as long as the potential benefit (reduction in expected loss) exceeds the cost.<sup>42</sup> At this point, an additional investment in precaution would not yield an offsetting benefit in the form of a reduction in expected loss. The optimal level of precaution thus is not necessarily the one that prevents all injury. Some loss may still occur at the optimal level because it is cheaper to endure the loss than to prevent it.

Note one further complication: in the case of sexual conduct, as in virtually all human interaction, both the actor and the reactor can take precautions to reduce expected cost. For example, the workers in the path of injury could avoid the area on the shop floor where the

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40. When the expected loss = PL, precautions are those actions that lower either P or L or both. For example, wearing a helmet when bicycling does not reduce the probability of being hit by a car, but it does reduce the magnitude of loss.

41. Such precautionary conduct is costly even though it is not readily measurable in dollar terms. The value of something to an individual is measured by reference to the amount an individual would pay to acquire it or demand to part with it, as the case may be. When no explicit market transaction occurs, this amount sometimes is referred to as a "shadow price." See, for example, Posner, *Economic Analysis of Law* at 16 (cited in note 4). For example, leisure time has value even though it is not bought or sold on a market. The value of leisure is measured by reference to the opportunity cost of leisure, that is, the amount of work income an individual forgoes in favor of relaxing.

42. In other words, the optimal level of care is the point at which a small change in the cost of precaution reduces the expected accident loss by the same amount. See Posner, *Economic Analysis of Law* at 164 n.2 (cited in note 4). The optimal level of precaution is expressed more accurately in this way, as a marginal concept. Each additional increment of precaution presumably has a diminishing effect in preventing loss. At the same time, it is also assumed that each additional increment of precaution costs more than the previous increment because resources committed to precaution are scarce and increased demand for them yields increased cost. *Id.* at 165 & fig. 6.1.

photographs are displayed, or avoid the workplace altogether.<sup>43</sup> Either type of precautionary conduct is costly to the worker, the latter costlier than the former. When more than one person can take precautions against loss, the efficient solution calls for the person who can prevent the loss most cheaply to do so.

Assuming full internalization of costs, the worker wishing to display the photographs might pay his co-workers to take precautions if they could do so more cheaply than he could.<sup>44</sup> In reality, workers probably do not make such bargains because the costs of striking the bargain outweigh the benefits.<sup>45</sup> Courts and loss allocation rules enter the picture when private bargaining cannot be expected to result in an efficient arrangement.<sup>46</sup> In a world without transaction costs, rational individuals would bargain among themselves to ensure that the total package of precaution they collectively take would yield the greatest amount of benefit to the group at the lowest possible cost. But, in the practical world, transaction costs exist. Collectively imposed loss allocation rules provide a substitute path to the optimal level of precaution when transaction costs inhibit a voluntary exchange.

Sexual harassment, when it occurs in the workplace, involves transaction costs lower than those facing, for example, strangers who meet because of a car accident. The potential defendant and plaintiff are employer and employee or co-workers. In some cases, the parties have entered into an express employment contract, but few contracts contain an express agreement about the incidence of loss from sexual conduct. Notwithstanding relatively lower transaction costs, employers and employees do not expressly allocate sexual conduct loss through contract terms.<sup>47</sup>

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43. Numerous commentators dispute the notion that women can prevent sexual conduct loss. See, for example, Korn, 67 *Tulane L. Rev.* at 1392-93 (cited in note 16).

44. See generally Coase, 3 *J. L. & Econ.* 1 (cited in note 24) (claiming that if transactions are costless, the initial assignment of an entitlement will not prevent efficient use of resources).

45. The transaction costs of striking such a bargain include the virtually infinite costs of determining which co-workers would be injured by the pictures in order to identify those potentially able to take precautions.

46. Contract law concerns relationships between people for whom the *ex ante* costs of bargaining are relatively low (low enough that the costs of reaching an agreement do not exceed the benefits). Tort rules, on the other hand, concern relationships between people for whom the *ex ante* costs of bargaining are relatively high, and thus they cannot by private agreement allocate loss between them. See Cooter and Ulen, *Law and Economics* at 341 (cited in note 14).

47. In any event, determining the optimal level of loss under common-law contract rules would involve approximately the same analysis as the negligence determination under tort rules. Common-law rules, whether contract, property, or tort, all tend to allocate loss, under the identical paradigm, to the party who *ex ante* could bear the loss more cheaply. Cooter, 73 *Cal. L. Rev.* 1 (cited in note 37). When parties to a contract fail to allocate loss expressly, the court does so by implying a contract term. *Id.* To achieve efficiency, the process of implication should

One economic explanation may be that even in the employment context, the transaction costs of reaching an express allocation of sexual conduct loss are too high. In other words, the benefit from such negotiation, in terms of reduction in expected loss, generally does not outweigh the cost of negotiation. Transaction costs are lower than between virtual strangers, but not low enough to induce express allocation of loss. The absence of express allocation is not surprising because the very issues that complicate (and raise the cost of) creation of a social allocation raise the cost of reaching a private allocation.<sup>48</sup>

## 2. The Paradigm

The proposed paradigm can be articulated as follows: a person should be liable for sexual conduct loss only if his cost of precaution was less than the expected loss, and the plaintiff could not have avoided the loss at an even lower cost.<sup>49</sup> The paradigm, which evaluates conduct by reference to the costs of precaution and expected loss, is based on the negligence rule that has come to be called the Hand formula, after Judge Learned Hand, who first articulated it expressly.<sup>50</sup> Like the Hand formula, the paradigm encourages prevention of loss up to the point at which the saved loss is no longer worth the price of precaution.

Just as some loss-producing conduct is not negligent, some loss-producing sexual conduct, under the proposed paradigm, will not be "sexual harassment." The paradigm thus optimizes, rather than

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allocate loss to the party who would have agreed to accept the risk of loss had the parties expressly bargained over it. Accordingly, the law can reduce transaction costs, and increase social wealth, by placing liability on the party who would have contracted for it. See, for example, Posner, *Economic Analysis of Law* at 164 (cited in note 4); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *Yale L. J.* 1231, 1241 (1984). This observation raises the possibility of pursuing workplace sexual harassment claims as breaches of contract, the exploration of which is beyond the scope of this Article.

48. The cost of negotiating a private allocation of risk is especially significant if the probability or magnitude of a given loss is low compared to the value of the contract to the parties. This may be the case with risk of loss from sexual conduct. See generally Sykes, 93 *Yale L. J.* at 1242-43 (cited in note 47). Moreover, employer-employee relations are and have been heavily regulated through labor laws and worker compensation systems. The effect of these regulations on transaction costs is beyond the scope of this Article. For a discussion of the economics of allocation of risk of injury in the labor market, see W. Kip Viscusi, *Risk by Choice: Regulating Health and Safety in the Workplace* (Harvard U., 1983).

49. See, for example, Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29, 32 (1972); Henry T. Terry, *Negligence*, 29 *Harv. L. Rev.* 40 (1915).

50. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).



minimizes, the amount of sexual conduct loss.<sup>51</sup> The result under the paradigm, although quite unremarkable for other loss, no doubt renders the paradigm unacceptable to some feminist writers.

These writers argue, either implicitly or explicitly, that all loss from sexual conduct must be eliminated without regard to the cost.<sup>52</sup> Regrettably, in a world of exhaustible resources, there is no way to escape the balancing of costs and benefits.<sup>53</sup> Ignoring the cost of policy does not eliminate that cost. Even if the only morally acceptable goal is the elimination of negative sexual conduct, the paradigm illuminates the cost of achieving that outcome.

Any loss allocation rule has two functions: compensation and incentive creation.<sup>54</sup> The negligence rule, for example, provides a means by which a plaintiff can obtain compensation when she can establish that the defendant failed to take due care for her safety, or, in other words, negligently caused her injury.<sup>55</sup> At the same time, the decision in a particular case provides incentive for potential defendants and plaintiffs to take due care, that is, to invest in the minimal level of care necessary to escape ultimate liability for loss. Potential plaintiffs have an incentive to take precautions to reduce or eliminate the risk to them remaining after a potential defendant has taken due care for their safety. The proposed paradigm incorporates the incentive-creating potential of the negligence rule with the goal of wealth maximization. Simply stated, under the paradigm, a plaintiff

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51. Landes and Posner, *The Economic Structure of Tort Law* at 13 (cited in note 31). Most commentators and some courts interpret Title VII as imposing a positive duty on employers to maintain a "harassment free" workplace. See, for example, Merriman and Yang, 13 N.Y.U. Rev. L. & Soc. Change at 98 (cited in note 19); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976); *Croker v. Boeing Co.*, 437 F. Supp. 1138, 1191 (E.D. Pa. 1977). This interpretation is not inconsistent with the result under the paradigm, which confines "harassment" to loss-causing conduct that could have been prevented more cheaply.

52. See, for example, Korn, 67 Tulane L. Rev. at 1386 (cited in note 43) (arguing that "[a]lthough sexual harassment is commonplace, we need not accept it as a risk inherent in the workplace. It can, unlike true industrial accidents, be eliminated.>").

53. See Guido Calabresi, *Ideals, Beliefs, Attitudes and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse U., 1985).

54. Scholars criticizing courts' interpretation of Title VII's prohibition against sex discrimination are apparently cognizant of its function as a loss allocation rule. See Merriman and Yang, 13 N.Y.U. Rev. L. & Soc. Change at 105 (cited in note 19) (citing the "dual objectives" of Title VII: to eliminate all forms of discrimination in employment and to make victims whole).

55. Some writers in the legal-realist movement argued that the only function of tort law was the provision of social insurance. See, for example, William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 Yale L. J. 584 (1929); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951); Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L. J. 549 (1948). Like some of their feminist successors, these writers advocated placing liability on "deep pocket" injurers regardless of the fault of the injurer or the conduct of the victim.

is entitled to compensation when granting compensation would create incentives toward the optimal level of precaution in the future.<sup>56</sup>

The negligence rule creates incentives for both potential defendants and plaintiffs to take due care.<sup>57</sup> Because both men and women can take precaution to avoid loss from negative sexual conduct,<sup>58</sup> the negligence rule provides a useful model for a sexual conduct loss paradigm. In contrast, rules of no liability or strict liability provide inadequate incentives for precaution when both parties can take precaution. If the rule of law is no liability, the defendant has no incentive to take precaution and thus will take none. Conversely, if the rule is strict liability with no defenses based on the plaintiff's conduct, the plaintiff has no incentive to take precaution.<sup>59</sup>

Suppose an employer can avoid one hundred dollars' worth of sexual conduct loss to a worker by taking a precaution that costs ten dollars. Further suppose that the worker also can avoid the loss, but only by taking a precaution that costs one thousand dollars. Under the paradigm, the employer would be liable for its failure to take the ten dollar precaution. This rule provides employers with an incentive to take precaution against sexual conduct loss up to the point at which the cost of an incremental increase in precaution would not reduce expected loss by an offsetting amount.<sup>60</sup>

Now suppose that the worker can avoid the same loss by taking a precaution that costs five dollars. In this case, applying the

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56. Richard Posner has observed that avoiding the wasting of social resources may itself be an important moral value. He observed:

Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.

Posner, 1 J. Legal Stud. at 33 (cited in note 49).

57. To illustrate, suppose that by taking a cost-justified amount of precaution, a potential defendant could reduce expected loss, but not to zero. The defendant would not be negligent (and thus not liable to the plaintiff) if the loss occurred notwithstanding the precautions. Potential plaintiffs bear this residual risk and have incentives to take cost-justified precautions to reduce it.

58. See note 43 and accompanying text.

59. John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. Legal Stud. 323, 338 (1973). If, because of imprecision in the system, the victim does not receive full compensation, the victim will have an incentive to take precaution to the extent of the under-compensation. This incentive is unrelated to the efficient level of precaution, however, and will not achieve efficiency. See Cooter, 73 Cal. L. Rev. at 6 (cited in note 37). In many cases purportedly applying strict liability, contributory negligence or some variation of it is a defense. See W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 79 at 565-66 (West, 5th ed. 1984).

60. In this hypothetical, the employer would be liable for failing to invest in precaution up to \$100.

paradigm results in a judgment for the employer. Even though the employer could have prevented the worker's loss for a cost much lower than the total reduction in expected loss, the worker could have done so even more cheaply. To create an incentive for similarly situated workers to take the cheaper five dollar precaution in the future, the law should allocate loss to the worker.<sup>61</sup> Under the paradigm, if both parties have taken precaution at less than the optimal level, the loss should fall on the party who could have avoided it more cheaply.

The negligence rule, with its bilateral incentive-creating capacity, appears especially well-suited to the allocation of sexual conduct loss. Unlike an absolute liability rule, the negligence model acknowledges and exploits the capacity of both the sexual actor and reactor to reduce the risk of sexual conduct loss. The relative effectiveness of the various permutations of the negligence principle, as opposed to absolute liability rules, in maximizing social wealth has engendered much scholarly debate.<sup>62</sup> In particular, scholars disagree on the relative efficiency of negligence and strict liability loss allocation schemes. This Article holds these arguments in abeyance and adopts the negligence rule as a paradigmatic starting point.

## 2. "Reasonable" Conduct and Social Consensus

The paradigm creates a definition of "sexual harassment" under which liability decisions minimize sexual conduct loss relative to the cost of preventing it. The conduct identified as legally prohibited should be coextensive with that conduct which results in loss that

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61. If both parties' costs of prevention were lower than the reduction of expected loss resulting from such precaution, why should the defendant get off scot free? The economic answer is that holding such a defendant liable for injury to such a plaintiff creates an insignificant additional incentive for the defendant to take additional precaution. Conversely, a rule that relieves a negligent defendant from liability for injury to a contributorily negligent plaintiff does not significantly affect the plaintiff's incentives. See Posner, 1 J. Legal Stud. at 39-40 (cited in note 49). The common law, through contributory negligence, lets the chips fall where they may on the premise that the costs of shifting the loss from a negligent plaintiff to a negligent defendant are not justified by a potential increase in social wealth. See Posner, *Economic Analysis of Law* at 171 (cited in note 4).

Most states have replaced the defense of contributory negligence with comparative negligence, but this change does not affect the incentives for precaution built into the negligence rule. Comparative negligence preserves the same incentives because it does not come into play unless the defendant was negligent. Thus, regardless of whether the plaintiff will be totally barred or proportionately barred from recovery if she is negligent, a potential plaintiff still has incentive to take precautions against residual risk. Comparative negligence yields a transfer payment to a negligent plaintiff but does not affect the incentives for efficient conduct built into the Hand formula.

62. Landes and Posner, *The Economic Structure of Tort Law* at 125-26 (cited in note 31).

would have been cheaper to prevent. Thus, challenged sexual conduct is actionable "sexual harassment" only if the cost to the defendant of preventing the loss was less than the expected loss, and the plaintiff could not have avoided the loss at an even lower cost.

The paradigm allocates sexual conduct loss by focusing on the expected loss from the conduct and the cost of preventing it. Determining the expected loss and the cost of precaution in the context of sexual conduct is no easy matter. Nonetheless, so focusing the inquiry illuminates some of the reasons why the law governing sexual conduct is fraught with controversy.

Perhaps the most obvious problem is measuring costs in the absence of market indicators. The paradigm cannot yield scientifically precise results in the absence of precise data. Even in the absence of market "prices," however, the cost of sexual conduct loss and the cost of preventing it are measurable at least in part by observing rough, yet absolute, changes in human dignity, personal integrity, and freedom of expression. Although these aspects of human identity and interaction are not traded on a recognizable market at an identifiable market price, they indisputably have value.<sup>63</sup> To oversimplify, more of any of these aspects make an individual better off, while less make an individual worse off. Although the effects of sexual conduct are not all susceptible to cardinal measurements, ordinal relationships may be observable. The paradigm inquires into the cost of preventing sexual conduct loss and the expectation of loss at a certain level of conduct. It is not impossible to conclude, in a given circumstance, that a trivial additional investment in precaution would have yielded a huge reduction in expected loss.

The second problem is identifying costs over a heterogeneous society. So far, discussion of the paradigm has focused on the costs of precaution and expected loss to *individuals* experiencing sexual conduct loss. But the costs of determining individualized costs in each case likely would swamp the efficiency benefits of the loss allocation scheme.<sup>64</sup> For this reason, the paradigm adopts the negligence rule's

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63. Indeed, common-law courts routinely balance such non-market values in tort actions.

64. See Posner, *Economic Analysis of Law* at 169 (cited in note 4); Landes and Posner, *The Economic Structure of Tort Law* at 123-27 (cited in note 31). Naomi Cahn's discussion of her proposal for adjudicating sexual harassment claims illustrates the virtually infinite cost of determining individual, subjective reality: "This does not mean that we should make women's experiences the only reality; we must recognize that there are multiple realities. A new standard could recognize the multidimensional nature of disputes and experiences of reality. Instead of labelling the male reality the 'objective' one, each reality is both objective and subjective for the participants." Cahn, 77 *Cornell L. Rev.* at 1437 (cited in note 8) (citation omitted). See also Holly

mechanism of estimating the average capacity (or the capacity of a "reasonable person," using the language of negligence) for avoiding or enduring a loss.<sup>65</sup> Put another way, a defendant will be liable under either scheme if he did not take "due care" to avoid loss, regardless of his actual, subjectively measured capacity to avoid or endure loss. Due care thus is a surrogate for the socially optimal level of precaution in a given case. "Due care" or "reasonable conduct" is the level of precaution that, *on average*, is socially optimal.

Substituting average costs as a surrogate for individual ones can result in inefficiency, at least in the context of a particular case. To illustrate, suppose a defendant could have prevented an accident with an expected cost of one hundred dollars by taking a precaution that would have cost her one hundred and fifty dollars. Not surprisingly, the defendant did not take the precaution and an accident occurred. Further suppose that the "average person's" cost of taking the same precaution was twenty dollars. Using average costs as a surrogate for the defendant's actual costs, the defendant would be liable, even though the judgment will not induce the defendant to take additional precaution in the future.<sup>66</sup> On the other hand, suppose an exceptional person could have avoided the loss at a cost of ten dollars. Now, using average costs as a surrogate, the exceptional person would escape liability, even though he did not invest in the optimal level of precaution given his individual costs.<sup>67</sup>

A standard of care based on average costs may be efficient in the end, however, because it creates incentives for individuals to adjust their future conduct so they can better behave as reasonable persons. For example, an illiterate person's cost of preventing loss by reading a warning label is very high relative to a literate person's cost. Not permitting an illiterate person to recover for loss in a given case provides illiterate persons with incentives to learn to read. The

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Fechner, Note, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and Reconstruction of Facts*, 230 U. Mich. J. L. Ref. 475, 487 (1990).

65. The finder of fact compares the conduct of the defendant with that of a "reasonable person." If the defendant took the precautions a reasonable person would have taken and nonetheless the loss occurred, then the defendant is not negligent, and the plaintiff must bear the loss. See Oliver Wendell Holmes, Jr., *The Common Law* 108 (Little, Brown, 1881) (explaining that a person may be negligent if, though he did his best, he was just clumsier than average). On the other hand, if the defendant did not take the precautions a reasonable person would have taken (even though he did the best *he* could), the court requires the defendant to compensate the plaintiff for her loss.

66. The judgment in favor of the plaintiff in this case would be a transfer payment with no efficiency effect. Posner, *Economic Analysis of Law* at 167 (cited in note 4); Landes and Posner, *The Economic Structure of Tort Law* at 124-25 (cited in note 31).

67. Landes and Posner, *The Economic Structure of Tort Law* at 124-25.

resulting increase in literacy and decrease in loss may be efficient in the long run even though, in a particular case, an illiterate person would have found it too costly to protect against the loss *given* her inability to read.

Substituting average costs in the guise of "reasonable conduct" or "due care" for individual costs is economically justifiable, notwithstanding its potential for inefficiency, if it minimizes the total costs (including the social cost of inefficient results) of allocating loss relative to efficiency gains.<sup>68</sup> The lower the accuracy of a standard of care, the greater the cost, in terms of lost efficiency, of implementing it as a means to allocate loss.

To illustrate the use of average costs as a surrogate for individual ones, consider how the paradigm would work for ordinary, uncontroversial conduct. Suppose, for example, that two people are moving household goods packed in heavy boxes. If a box falls, it will cause injury proportionate to the bone mass of the person on which it falls. A smaller-boned person will incur a relatively more serious injury than a larger-boned person. Assume further that one of the movers is a woman. Accept for the moment that the challenged conduct is one for which women as a group are likely to experience a relatively higher magnitude of loss than men.<sup>69</sup> Now assume that the other mover drops a box, injuring the woman.

In this circumstance, the proper standard of care for the defendant is one that takes the woman's relatively higher expected loss into account. Her relatively greater vulnerability to injury was readily observable to the other mover prior to the occurrence of the loss-producing conduct. When an individual belongs to an easily identifiable group that is peculiarly susceptible to loss from an injury, a standard of care based on that group's characteristics will increase the accuracy of the standard as an indicator of the individual's capacities at a relatively low cost. The cost of using this special standard depends on the costs of gathering information about the particular capacities of the group. The more easily observable the particular capacities are, the lower the costs of gathering information about them.

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68. Using average costs as a surrogate for individual costs, notwithstanding the potential for inefficient results, is a relatively inexpensive means of evaluating conduct compared to the cost of gathering information about an individual's subjective costs of precaution or expected loss. See Posner, *Economic Analysis of Law* at 167 (cited in note 4).

69. The greater magnitude of loss for women yields a greater expected loss from the conduct to women than to men.

The example illustrates the use of a group-specific standard of care as a surrogate for the determination of an individual's expected loss.<sup>70</sup> Group-specific standards also can be cost-effective surrogates for individualized determinations of the cost of precaution. Continuing the foregoing example, suppose the mover who dropped the box was a young man. Assume that the only way the young man could have prevented this accident was by exerting upper body strength against the errant box. Again, accept for the moment that men, on average, have a greater capacity for upper body strength than women. Because, in these circumstances, gender correlates with the cost of precaution, an individual man's cost of precaution should be measured by reference to the average cost to men, rather than the average cost to all people (including women). The characteristic of gender is readily observable and reliably indicates a cost of precaution at variance with the average over all members of society.<sup>71</sup>

To maximize efficiency, the paradigm for sexual conduct loss should implement standards of care based on their relative accuracy as surrogates for individual costs. In the case of sexual conduct loss, men are the likely actors and women are the likely reactors. The characteristics of gender are easily observable, but whereas the observable characteristic of gender reliably indicates higher costs of precaution and expected loss for women relative to men in the box-lifting example, the characteristic of gender does not invariably indicate costs and loss with respect to sexual conduct.

In the foregoing example, the reader accepted, hopefully without controversy, that women on average have lower bone mass than men and that men on average have greater upper body strength than women. By directing the reader to accept these characteristics as common to the group, the discussion assumed that there is a costless and perfectly accurate way of determining group-specific average costs. Of course, no such method exists. The more disparate costs are

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70. Under the paradigm, the plaintiff's cost of precaution is compared to the expected loss.

71. The common law has recognized that certain plaintiffs have a lower capacity to exercise care for their own safety than "ordinary" members of society. See, for example, *Memorial Hosp. v. Scott*, 261 Ind. 27, 300 N.E.2d 50 (1973) (holding a plaintiff with multiple sclerosis not contributorily negligent for pushing the hot water knob rather than the toilet flusher). See also *LaCava v. New Orleans*, 159 S.2d 362 (La. Ct. App. 1964) (finding that disability due to old age affects the standard of care). Guido Calabresi has observed that the common law is more willing to accommodate plaintiffs' reduced capacity to protect themselves from harm than defendants' reduced capacity to take precaution against injury to others. Calabresi, *Ideals, Beliefs, Attitudes and the Law* at 32-33 (cited in note 53).

among a particular group, the more expensive it is to determine the average.<sup>72</sup>

The question of what constitutes reasonable sexual conduct in the workplace provokes controversy because people disagree about average costs. This problem is inherent in developing a benchmark of reasonable conduct when the conduct at issue is sexual conduct. Intuitively, tastes for sexual conduct would appear to vary more widely than tastes for less subjective activity, like swimming, for example. Moreover, variance among tastes for sexual conduct is not uniformly diverse. Rather, tastes for some sexual conduct will vary less (more like swimming) than those for other sexual conduct. For example, most people would characterize violent sexual assault as negative sexual conduct imposing a large loss on the victim. In contrast, a sexual remark, such as a comment about a co-worker's physical appearance, would likely evoke a much wider array of responses, ranging from negative to positive.

Apart from the wide variation in tastes for sexual conduct, costs do not appear to correlate invariably with readily observable characteristics like gender. For some sexual conduct, for example, the threat of physical sexual assault, gender may provide an easily observable and reliable indicator of high expected loss. As for other sexual conduct, for example, a sexual remark, gender may indicate high expected loss; then again, it may not. In either case, gender alone does not provide easily observable information about how much higher than average a particular reactor's expected loss might be.

### III. APPLICATION OF THE PARADIGM TO SEXUAL HARASSMENT

The legal response to loss from sexual conduct in the workplace has taken three forms. This Article focuses on the first and vastly more significant form, which treats sexual harassment on the job as a form of sex discrimination prohibited under Title VII of the Civil Rights Act of 1964.<sup>73</sup> A worker can also pursue a tort remedy, or a

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72. The increased expense is attributable in part to information costs associated with gathering data about a particular group and in part to the increased capacity for inefficiency.

73. 42 U.S.C. §§ 2000e to 2000e-17 (1988). Title VII provides in relevant part: "(a) It shall be unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2. Persons can challenge the sexual discrimination of state employers under 42 U.S.C. § 1983 (1988) by alleging that the employer's conduct deprived



workers' compensation claim.<sup>74</sup> Although these legal responses are different, they share many common features. Under either Title VII or tort theories, the central question is the same: When should a defendant be required to compensate a plaintiff for sexual conduct loss?

Anti-discrimination law reflects social policy to achieve equality in employment opportunity and to compensate persons subject to employment discrimination based on sex and certain other personal characteristics.<sup>75</sup> Congress left it to the courts to determine what conduct constitutes "discrimination" and, accordingly, when the victim of discrimination is entitled to compensation.<sup>76</sup> Allocating sexual conduct loss to maximize social wealth is not inconsistent with Congress's broad mandate. Consideration of economic efficiency can and should guide the courts in deciding sexual harassment cases.

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."<sup>77</sup> Less than twenty years ago, a court recognized that certain sexual conduct can constitute discrimination based on sex under Title VII.<sup>78</sup> Since then, the Equal Employment Opportunity Commission (the EEOC) has promulgated guidelines that

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the employee of the federal constitutional guarantee of equal protection under the law. See, for example, *Forrester v. White*, 484 U.S. 219, 220-21 (1988).

74. See, for example, *Wangler v. Hawaiian Elec. Co.*, 742 F. Supp. 1465, 1467 (D. Haw. 1990); *O'Connell v. Chasdi*, 400 Mass. 686, 511 N.E.2d 349, 350 (1987). See also Korn, 67 Tulane L. Rev. at 1379-80 (cited in note 43) (arguing that a workers' compensation remedy should not be the exclusive remedy for a worker alleging injury from sexual conduct). The courts appear split on this issue. See *id.* at 1380 n.94.

75. See, for example, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

76. Richard Posner has posited that legislatures enact statutes that leave broad interpretation and implementation to the courts because the costs of statutory production of legal rules is high. Posner, *Economic Analysis of Law* at 542-43 (cited in note 4).

77. 42 U.S.C. § 2000e-2(a)(1) (1988). "Employer" means "a person [individual or organization] engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b).

78. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), rev'd on other grounds sub nom., *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), remanded sub nom., *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980). See also *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Garber v. Saxon Business Products, Inc.*, 552 F.2d 1032 (4th Cir. 1977). Before 1976 and *Saxbe*, courts generally ruled that conduct now referred to as sexual harassment was not discrimination based on sex. See, for example, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), rev'd, 600 F.2d 211 (9th Cir. 1979).

purport to define actionable sexual conduct, that is, sexual harassment.<sup>79</sup>

The guidelines recognize two distinct forms of sexual harassment: quid pro quo harassment and hostile work environment harassment. Quid pro quo harassment occurs when the harasser conditions employment benefits on submission to sexual conduct.<sup>80</sup> For example, a person engages in quid pro quo harassment when he fires a worker for refusing to engage in sexual conduct, or denies her a promotion or other employment benefit for the same reason.<sup>81</sup> The second type, hostile work environment harassment, occurs when a harasser engages in "conduct [that] . . . unreasonably interfer[es] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment."<sup>82</sup> Quid pro quo harassment can be inflicted only by a worker's supervisor, but hostile work environment

79. The EEOC guidelines read as follows:

Harassment on the basis of sex is a violation of section 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 or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1992) (footnote omitted). EEOC guidelines do not have the force of law; however, courts have relied on them implicitly and explicitly in deciding sexual harassment cases. See, for example, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

80. 29 C.F.R. § 1604.11(a)(1) & (2). Before *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), which recognized hostile work environment sexual harassment under Title VII for the first time, the only actionable sexual conduct was quid pro quo sexual harassment. See, for example, *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.C.N.D. 1981).

81. See, for example, *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990); *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992); *Caleshu v. Merrill Lynch, et al., Inc.*, 737 F. Supp. 1070 (E.D. Mo. 1990). Quid pro quo harassment also can take the form of an inducement rather than a threat. For example, the harasser may condition an employment benefit on the victim's performance of sexual acts.

82. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)). See also *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). In *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the court expanded actionable sexual conduct to include hostile work environment sexual harassment because otherwise an employer could harass an employee "with impunity by carefully stepping short of firing the employee or taking any other tangible actions against her in response to her resistance." *Id.* at 945. Hostile work environment sexual harassment also has been coined the "conditions of work" theory of sexual harassment, MacKinnon, *Sexual Harassment* at 32-47 (cited in note 1), or "absolute harassment," Merriman and Yang, 13 N.Y.U. Rev. L. & Soc. Change at 86 & n.10 (cited in note 19).

harassment can be perpetrated by a worker's supervisors, co-workers, clients, or customers.<sup>83</sup>

### A. *Quid Pro Quo Harassment*

#### 1. Inefficient Conduct by Definition

The rules governing quid pro quo sexual harassment under Title VII allocate loss to the employer whenever an employee engages in certain sexual conduct—conditioning employment benefits on submission to sexual conduct.<sup>84</sup> By definition, the employee must be a supervisor, that is, someone with authority to hire and fire.<sup>85</sup> An employer is strictly liable for the conduct of the supervisor regardless of whether the employer knew of or condoned the challenged conduct, and regardless of whether the employer tried to prevent the loss.<sup>86</sup>

83. "Supervisor" means "any individual having authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action." National Labor Relations Act, 29 U.S.C. § 152(11) (1982).

84. See, for example, *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). This definition of quid pro quo harassment excludes those instances in which a supervisor promises an employee a job benefit to which the employee otherwise would not be entitled in exchange for sex. *Id.* at 909. This conduct does not result in a loss to that employee. Indeed, the employee experiences a gain. This is not to say that the conduct cannot be negative sexual conduct; another employee might experience a loss due to the conduct.

85. See, for example, *Horn v. Duke Homes*, 755 F.2d 599, 604-05 (7th Cir. 1985) (stating that supervisors are agents with authority to make decisions regarding the employment of other agents).

86. The United States Supreme Court in *Meritor* did not hold expressly that employers are vicariously liable for quid pro quo harassment. *Meritor Savings Bank*, 477 U.S. at 72. Rather, the Court instructed lower courts to apply general agency principles. *Id.* Justice Marshall, in a concurrence joined by Justices Brennan, Blackmun, and Stevens, would hold that an employer is vicariously liable for quid pro quo harassment by a supervisor. *Id.* at 77-78. Following *Meritor*, lower courts have held that an employer is vicariously liable for quid pro quo harassment by a supervisor. See, for example, *Horn*, 755 F.2d at 604-05; *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80-81 (3d Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979). The rule of absolute liability for employers in the quid pro quo context is consistent with the courts' treatment of racial harassment. See *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Young v. Southwestern S. & L. Ass'n*, 509 F.2d 140, 143-44 (5th Cir. 1975); *Anderson v. Methodist Evangelical Hosp., Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). See also 29 C.F.R. §§ 1604.11(c) (1987) (finding that an "employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence"). For a critical view of employers' strict liability, see Robert F. Conto and David L. Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability*, 32 Drake L. Rev. 407 (1982-83).

Given Congress's goal of providing compensation to persons injured by discrimination based on sex, application of the paradigm to quid pro quo harassment should and does minimize sexual conduct loss relative to the cost of precaution. In the case of quid pro quo harassment, the cost of precaution generally is much lower than the expected cost of the injury.<sup>87</sup> Moreover, imposing liability on the employer for the employee's acts without regard to the employer's fault makes economic sense.

Recall that under the proposed paradigm, a person should be liable for sexual conduct loss only if the average cost of precaution was less than the average expected loss, and the plaintiff could not have avoided the loss at an even lower cost. The type of conduct defined as quid pro quo harassment provides a relatively easy case for loss allocation under the paradigm. The absolute standard of care prohibiting conduct falling within the definition of quid pro quo harassment is, not surprisingly, relatively uncontroversial.

Consider first the standard of care for the actor, virtually always a man, in the context of quid pro quo sexual conduct. It is not obvious that men as a group have a higher or lower cost of precaution than the average cost over all members of society, nor is it obvious that women as a group face a higher or lower expected loss from quid pro quo conduct than members of society generally. It is much clearer, however, that the difference between the cost of precaution and the expected loss likely will be wide.

Assume that the relevant precautionary conduct is refraining from quid pro quo sexual conduct. The supervisor's threat is a proposed contract modification. The resulting contract (sex for benefit), if the employee accepts it, would be presumptively non-optimal because the employee would have acquiesced under duress. Courts do not enforce contract modifications under duress because to do so would induce people to invest in making threats and protecting against them. Such conduct is socially wasteful in the sense that it lowers the net social wealth. Because sexual coercion is socially costly, the average cost of refraining from sexual coercion is negative.

In contrast, the average expected loss is very high. Recall that expected loss is the product of the probability of the loss and the magnitude of the loss. With respect to the first factor, the average

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87. This fact may explain why courts recognized quid pro quo harassment before hostile work environment harassment, and why quid pro quo harassment is relatively less controversial than hostile work environment harassment.

probability that quid pro quo sexual conduct will yield a loss is one hundred percent. Clearly, no one would view the conditioning of job benefits on sexual favors as positive sexual conduct. Compare the case of quid pro quo sexual conduct to one in which the supervisor asks the employee for a date. In the latter case, the probability of loss is no longer one hundred percent, assuming that some might view the sexual conduct as positive (and thus non-injurious).<sup>88</sup>

As to the second factor, the magnitude of the loss is large and easy to determine. If the employee does not comply, that person will lose the value of the employment benefit, including both its pecuniary and non-pecuniary aspects. If the person does comply, that person will lose the difference between the value of the employment benefit (unconditioned on sex) and the value of the conditioned benefit. The value of the conditioned benefit likely will be close to zero, or less than zero, taking into consideration non-pecuniary costs associated with the condition, such as diminished self-esteem. The potential injurer likely knows this amount; it is the lever for his coercion.

Moreover, when the challenged conduct falls within the definition of quid pro quo sexual conduct, the plaintiff is hardly likely to have been able to prevent the loss more cheaply than the defendant. A female employee can take precaution against quid pro quo harassment, perhaps by forgoing employment where men are her supervisors. Any precaution a woman can take, however, likely will be very costly and will greatly exceed the injurer's cost of precaution.<sup>89</sup>

## 2. Employer Liability

Title VII provides a remedy against the employer, but not against the supervisor.<sup>90</sup> Most courts have held an employer strictly liable for the actionable sexual conduct of its supervisors.<sup>91</sup> Imposing

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88. Quid pro quo sexual harassment is analytically similar to an intentional tort because, in both cases, the probability of loss is close to 100%.

89. The extremely high costs of precaution for women against quid pro quo sexual conduct explain why "unwelcomeness" is not an element of the plaintiff's claim. See notes 129-35 and accompanying text.

90. See note 77 and accompanying text. A tort action may be available against the supervisor individually.

91. The Supreme Court in *Meritor* held that the lower court had "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors" in hostile work environment cases. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). The Court held that ordinary agency principles should provide the rule of decisions. *Id.* Since *Meritor*, courts generally appear to conclude under agency principles that an employer is vicariously liable for the hostile work environment created by a supervisor. See, for example, *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557-58 (11th Cir. 1987); *Hicks v. Gates*

liability on the employer for the quid pro quo harassment of its employees is economically justified because such a liability rule achieves an efficient allocation of loss.

Under the paradigm, allocating loss to the supervisor is economically justified because, between the supervisor and the victim, the supervisor can avoid costs more cheaply. Allocating loss to the supervisor forces him to internalize the costs of his conduct, creating a personal incentive to invest in the optimal level of precaution.

The incentive effect of a judgment against a supervisor, however, is only effective to the extent that a potential judgment would affect him. For example, if a potential injurer would be insolvent in the face of a judgment, the expected personal cost of his conduct is less than the expected loss to the victim. Because of this discrepancy, the injurer would have a smaller incentive to take precaution than he would if he were solvent at all relevant times.<sup>92</sup> This Article refers to this inefficiency as "precaution inefficiency."

Title VII limits the plaintiff to an action against her employer, perhaps for distributional reasons. Nonetheless, the limitation is consistent with efficiency because it recognizes that precaution inefficiency will occur with a rule of individual liability to the extent such individual is or may become insolvent.

Making the employer strictly liable for the negligence of its employees creates an incentive for employers to require the level of care that employees responding to personal liability for their own negligence would take (if such employees were solvent at all relevant times). Once liable for the work-related negligence of its employees, an employer internalizes the harm its employees cause but do not internalize.<sup>93</sup> The employer now has an incentive to supervise its employees and impose sanctions and rewards for carelessness and carefulness, respectively. The employer will take these precautions as long as the cost is offset by at least an equivalent reduction in the expected loss.<sup>94</sup>

The vicarious liability of an employer for the negligence of its employees is subject to an economically important limitation. Under

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*Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988). Contrast *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983, 992-93 (D.C. Cir. 1977).

92. See Posner, 1 J. Legal Stud. at 42-43 (cited in note 49).

93. *Id.* at 43.

94. The employer's expected loss is equal to the aggregated expected loss for all employees whose negligence is imputed to the employer, plus the expected loss from its own actions.

the common law, an employer is strictly liable for torts committed by an employee "within the scope of employment," but not otherwise.<sup>95</sup> This limitation is economically justified because it maximizes efficiency. Recall that the socially optimal use of resources requires each actor to internalize the costs of its conduct, but no more or less. The "scope of employment" rule limits the amount of cost the employer internalizes to that which is "caused" by the operation of the business.<sup>96</sup> To the extent a liability rule imposes on an employer more costs than those the employer causes, a second type of inefficiency results<sup>97</sup>—"production inefficiency."<sup>98</sup>

The economic concept of causation turns on whether the existence of the employment relationship has any effect on the *ex ante* probability of loss.<sup>99</sup> In other words, if removal of the employment relationship between the employer and the negligent employee would have reduced the probability of loss to zero, the employer "caused" the loss.<sup>100</sup>

Alan Sykes illustrates the idea of probabilistic causation with the following examples.<sup>101</sup> Suppose a service station employee beats his spouse. The service station owner does not "cause" the tort of assault because the probability of assault would not be affected if the employer closed the service station and fired the employee.<sup>102</sup> Conversely, if the tort in question is not assault, but rather negligent repair of automobiles, the service station owner "caused" the loss because the probability that the employee would repair automobiles negligently would be zero if the owner closed the station and laid off the employee.<sup>103</sup> Of course, there is a difficult, intermediate case.

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95. Restatement (Second) of Agency §§ 228, 229 (1958).

96. For discussion of the economic significance of causation in tort law, see Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. Legal Stud. 463 (1980); William M. Landes and Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. Legal Stud. 109 (1983); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563, 571-73 (1988). For a non-economic survey of causation in tort law, see Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735 (1985).

97. See Sykes, 101 Harv. L. Rev. at 574 (cited in note 96); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L. J. 499, 514 (1961); Young B. Smith, *Frolic & Detour*, 23 Colum. L. Rev. 444, 461 (1923).

98. The employer's business would bear more than the full costs caused by its operation. Its profitability would be lower than if it internalized only the costs of its operation. In a competitive market, such a business is likely to contract below the socially optimal level.

99. Sykes, 101 Harv. L. Rev. at 572 (cited in note 96).

100. *Id.*

101. *Id.* at 572-73.

102. *Id.* at 572.

103. *Id.*

Suppose, in the case of assault, that the stress of the employee's job increased the probability that he would assault his wife. In this case, elimination of the employment relationship would reduce the probability of loss, but not to zero. All that can be said is that the employer partially caused the loss.<sup>104</sup>

In the case of quid pro quo harassment, the employer, by definition, caused the loss in the economic sense. Absent the employment relationship between the supervisor and the victim, the loss would not have occurred. In other words, the conduct of the supervisor is within the scope of his employment, and the loss properly is considered a cost of the operation of the employer's business.

Moreover, the employer can take precautions that will reduce the probability of loss. The employer, at a relatively low cost, can implement rewards for supervisors who do not engage in quid pro quo harassment and sanctions for those who do, taking up the slack in incentive effect from any precaution inefficiency. Thus, imposing vicarious liability on the employer for the quid pro quo harassment of its supervisor corrects precaution inefficiency without creating production inefficiency.

### *B. Hostile Work Environment Harassment*

#### 1. Definitional Failure in the Absence of Social Consensus

Considering the relatively easy case of quid pro quo harassment foreshadows the complexity of arriving at an efficient loss allocation rule when the challenged conduct is hostile work environment harassment. Although the United States Supreme Court has recognized that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult,"<sup>105</sup> not all negative sexual conduct "affects a 'term, condition, or privilege of employment' within the meaning of Title VII."<sup>106</sup> In its most recent opinion on the subject, the Court held that conduct rises to the level of actionable hostile work environment sexual harassment if a reasonable person would find the conduct hostile or abusive.<sup>107</sup>

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104. *Id.*

105. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). See generally 45 Fed. Reg. 74,676 (1980).

106. *Meritor*, 477 U.S. at 67. See also *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991).

107. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993).



The legal problem remains the same: identifying conduct that is unreasonable. Under the paradigm, the employer should bear the loss when such a rule would create incentives toward the optimal level of precaution. Thus, sexual conduct should be actionable hostile work environment sexual harassment when the defendant's cost of precaution is lower than the expected loss, and the plaintiffs' cost of precaution (even if lower than the expected loss) is higher than the defendant's. Moreover, when allocating loss away from the plaintiff produces only low potential efficiency gains, sexual conduct should be actionable only when the potential efficiency gains outweigh the social cost of litigation.

Courts have developed a legal standard for allocating loss from negative sexual conduct, other than quid pro quo harassment, that provides virtually no principled basis to determine which sexual conduct deserves the label of hostile work environment sexual harassment. In *Meritor Savings Bank, FSB v. Vinson*,<sup>108</sup> the Supreme Court sketched the contours of abusive or hostile work environment sexual harassment under Title VII.<sup>109</sup> The Court held that sexual conduct other than quid pro quo harassment is actionable under Title VII provided it is "sufficiently severe or pervasive" to alter the victim's working conditions and to "create an abusive working environment."<sup>110</sup> Thus, sexual conduct negatively affecting a worker's employment rewards—including not only pecuniary value but also mental, emotional, and physical work environment—can be actionable under Title VII, but only if it rises to a certain level of seriousness.<sup>111</sup>

The Court addressed the question of whether and how a plaintiff's conduct affects allocation of loss.<sup>112</sup> It held that even if the al-

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108. 477 U.S. 57 (1986).

109. Mechelle Vinson, a bank employee, testified that a vice president of the bank "fondled her in front of other employees, followed her into the women's restroom . . . [and] exposed himself to her. . . ." *Id.* at 60. She said that she agreed to have sexual intercourse with him because she was afraid of losing her job, and that on other occasions he raped her. *Id.* Vinson testified that she never reported the conduct to the vice president's supervisors or used the bank's complaint procedure because she was afraid of him. *Id.* at 61. The bank vice president denied Vinson's allegations and contended that her accusations were in response to a business dispute. *Id.* Vinson testified that the alleged conduct completely stopped after 1977. *Id.* at 60. In September 1978, she informed the vice president that she was taking indefinite sick leave. *Id.* About two months later, the bank discharged her for excessive use of sick leave. *Id.*

110. *Id.* at 66-67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

111. See, for example, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

112. The district court had held that even if the conduct had occurred, it was voluntary and unrelated to Vinson's continued employment at the bank. *Vinson v. Taylor*, 23 FEP Cases (BNA) 37, 42 (D.C. 1980). The district court apparently held that Vinson was not asked to submit to sexual demands "as a condition to obtain employment or to maintain employment or to obtain promotions." *Id.* at 43. The court held that in no event could Vinson recover because she

leged sexual conduct was "voluntary," in the sense that the defendant did not force the plaintiff to participate in it against her will, the challenged conduct still could be actionable under Title VII.<sup>113</sup> As the Court explained, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'. . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."<sup>114</sup> The Court recognized that determining whether particular sexual conduct was "unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact."<sup>115</sup> Nonetheless, its holding made it clear that the plaintiff's response to or participation in the challenged conduct is relevant to a determination of whether it was unwelcome.<sup>116</sup> Ultimately, if the plaintiff welcomed sexual conduct, she cannot recover under Title VII.

The Court's loss allocation rule in *Meritor* leaves much to be desired from both a legal and an economic standpoint. No lower court had ruled on the merits of Vinson's hostile work environment sexual harassment claim.<sup>117</sup> The Court held that Mechelle Vinson had alleged facts that, if true, could constitute actionable hostile work environment harassment and remanded the case for reconsideration.<sup>118</sup> The Court's holding therefore provides no guidance on when negative sexual conduct is "sufficiently severe or pervasive" or when it is "unwelcome."<sup>119</sup>

The Court's recent opinion in *Harris v. Forklift Systems, Inc.*<sup>120</sup> resolved a conflict that had arisen among the circuits courts regarding whether challenged sexual conduct must "seriously affect [an em-

admitted she "voluntarily" participated in a sexual relationship with the bank vice president, in the sense that "she was not forced to participate against her will." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986).

113. *Meritor*, 477 U.S. at 68.

114. *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)). The Court's opinion in *Harris* did not mention the "unwelcomeness" requirement established in *Meritor*. Welcomeness was not an issue raised by the defendant in *Harris*.

115. *Meritor*, 477 U.S. at 68.

116. The Court held: "While 'voluntariness' in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant." *Id.* at 69.

117. See *id.* at 62.

118. *Id.* at 73.

119. The legal history of sexual harassment as a form of sex discrimination is labyrinthian, and the Court's analysis necessarily was set in that legal context, not on a theoretical clean slate.

120. 114 S. Ct. 367 (1993).

ployee's] psychological well-being" by holding that it need not.<sup>121</sup> The Court reiterated its holding in *Meritor*, explaining that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."<sup>122</sup> Conspicuously absent from *Harris* is any guidance for courts struggling to distinguish conduct that is "abusive or hostile" from that which is not. As the following discussion illustrates, using efficiency as a guide for allocating sexual conduct loss pierces through the rhetorical fog that currently obscures the issues.

From an efficiency perspective, it is only worthwhile to allocate loss through the judicial system to the extent that the costs of doing so do not outweigh the benefits. Although the Court did not explain it this way, its holding in *Meritor* sets a threshold to distinguish cases presenting large potential efficiency gains from those that do not. The Court held that the plaintiff must be able to allege "sufficiently severe or pervasive" conduct to support an actionable claim.<sup>123</sup> The standard furthers an efficiency goal if it identifies those cases in which the average expected loss is likely to be high, but the average cost to the actor of precaution is likely to be low.<sup>124</sup> Under these circumstances, the possible efficiency gains likely will justify the investment of resources to litigate the case.<sup>125</sup>

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121. The Court cautioned, "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.* at 370. The district court and the Sixth Circuit in *Harris* interjected the requirement that the plaintiff show that the challenged conduct inflicted serious psychological harm, following Sixth Circuit precedent in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986). *Harris*, 114 S. Ct. at 370.

122. *Harris*, 114 S. Ct. at 370. The Court further held that the plaintiff must subjectively perceive the conduct as abusive. *Id.*

123. *Meritor*, 477 U.S. at 67. See also *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

124. The threshold requirement also is expressed by requiring the plaintiff to show that the alleged conduct adversely affected a term or condition of her employment. In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), a racial harassment case, the court held that challenged conduct affects working conditions if it impacts on the pecuniary or psychological well-being of the worker. Thus, isolated incidents of harassment or pervasive harassment that do not impair the affected employee's emotional and psychological stability were not actionable harassment. *Id.* at 238. See also *Henson*, 682 F.2d at 904. The EEOC guidelines appear to suggest a threshold, stating that conduct violates Title VII when it "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)(3) (1980). Some commentators contend that the guidelines encompass as actionable harassment nonpervasive, nonsevere incidents of negative sexual conduct. See Merriman and Yang, 13 N.Y.U. Rev. L. & Soc. Change at 85-86 (cited in note 19).

125. Another threshold requirement is the so-called "subsequent remedial action defense." Courts relieve an employer of liability if the employer took prompt remedial action upon learning of the negative sexual conduct. See, for example, *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); *Henson*, 682 F.2d at 905.

Application of the paradigm to sexual conduct other than quid pro quo harassment illustrates the difficulties in identifying a relatively inexpensive and accurate standard of care. For example, suppose a woman seeks a remedy for the loss she experienced when her co-worker asked her for a date during work hours. The legal question is whether the challenged conduct is "sufficiently severe or pervasive" to alter the victim's working conditions and "create an abusive work environment."<sup>126</sup> The question under the proposed paradigm is whether the co-worker's cost of precaution was less than the expected loss and if so, whether the woman could have avoided the loss at an even lower cost.

First, consider the relative complexity of determining an accurate average expected loss to insert into the standard-of-care formula. Unlike the case of quid pro quo sexual conduct that invariably causes loss, some members of society may view the challenged conduct as positive, rather than negative, sexual conduct. As illustrated above, gender sometimes, but not always, indicates the average probability and magnitude of loss appropriate for a particular individual. Regarding the conduct at issue in this example, however, gender alone does not indicate anything about average expected loss. In other words, women are not, by virtue of the observable characteristic of their gender, more vulnerable than men to this particular loss.<sup>127</sup>

Because gender alone does not reliably indicate anything about expected loss, the construct of the "reasonable woman" is virtually useless. Individual expected loss in a given situation depends on personal characteristics, many of which are entirely unobservable. For example, a particular woman might be especially vulnerable to a request for a date at the workplace because of her cultural or religious beliefs. Note that these characteristics are not as readily observable as gender. The cost of acquiring information about the existence of such traits and their impact on expected loss increases the cost of fashioning a standard of care that directs precautionary conduct to the socially optimal level.

In addition to personal traits, case-specific circumstances can affect the amount of expected loss from sexual conduct in a given case. Returning to the single request for a date, the circumstances of the request will affect whether a woman views the conduct as positive or

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126. *Harris*, 114 S. Ct. at 370.

127. But see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard U., 1982).

negative. For example, a request for a date made during a staff meeting at which a woman worker was presiding on average likely would be negative, rather than positive, sexual conduct, assuming that most people would find the request a deliberate or inconsiderate act seeking to undermine authority or credibility.<sup>128</sup> When the rule of decision depends on case-specific circumstances, it is no longer truly a rule. The cost savings that result from using average costs to inform the rule of decision erode. Unless the potential for efficiency enhancement is very high, the costs of making individualized decisions likely will overwhelm efficiency gains.

The Court's threshold requirement that conduct be "sufficiently severe and pervasive" therefore can and should be viewed as a threshold for identifying those cases in which expected loss, regardless of its precise value, is likely to be extremely high. In such a case, the efficiency gains from the judgment likely will outweigh the cost of fashioning a standard of care.

## 2. Women's Conduct

### *a. Unwelcomeness*

Perhaps the most controversial aspect of the emerging law of hostile work environment sexual conduct is its focus on the conduct of the plaintiff. Even if the defendant's conduct was "unreasonable," a plaintiff cannot recover unless she can show that the unreasonable conduct also was "unwelcome."<sup>129</sup> The choice of words is unfortunate—no person considers loss to be welcome. Nonetheless, the result is not inconsistent with efficiency.

Under the paradigm, a woman should bear the loss from sexual conduct if she could have prevented it more cheaply than the defendant. The requirement of "unwelcomeness" viewed through the lens of efficiency ostensibly serves the same function. Both expressly recognize the capacity of women to prevent sexual conduct loss and provide women with an incentive to achieve the optimal level of precaution against loss.

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128. The loss experienced by women from sexual conduct in the workplace is, in large part, the negative product of their objectification. Sexual conduct directed at women workers can have the negative effect of undermining their credibility and impairing their effectiveness vis-a-vis their male peers. See generally Abrams, 42 Vand. L. Rev. at 1204-05 (cited in note 19).

129. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

Interpreting the "unwelcomeness" requirement to achieve economic efficiency snatches it from ambiguity and gives it a definite, justified purpose. For example, in *Meritor*, the Court held that even though the plaintiff may have participated willingly in sexual conduct, she still could make out a hostile work environment claim as long as she did not "welcome" the sexual conduct. The decision can be read consistently with the paradigm. *Meritor* recognized that saying "no" to negative sexual conduct is precautionary conduct, but that sometimes the costs of saying "no" exceed the benefits. Thus, although refusing to participate in sexual conduct may have avoided some or all of the loss, failure to refuse is not necessarily inefficient. According to the Court, the plaintiff should bear the loss from sexual conduct if she "welcomed" it. According to the paradigm, she should bear the loss if, notwithstanding the defendant's suboptimal investment in precaution, she could have avoided the loss for an even smaller investment.

The Court acknowledged that the plaintiff's speech or dress may be evidence that she "welcomed" the conduct. Under the paradigm, the plaintiff's speech or dress would be relevant only if: (1) refraining from speaking or dressing as she did would have reduced her expected loss,<sup>130</sup> and (2) the cost to her of speaking or dressing a different way is lower than the defendant's cost of precaution.

Determining "welcomeness" this way narrowly circumscribes the circumstances in which it will bar recovery. Indeed, it is difficult to think of an example in which the conduct is "sufficiently severe and pervasive" (thus yielding a relatively high expected loss), and the plaintiff's cost to avoid the loss would be lower than the defendant's. When the expected loss is high, cases in which the average cost of precaution for women would be lower than that for men (and both below the expected loss) will be relatively rare. Conversely, when the expected loss is low, the likelihood that the woman might avoid the loss more cheaply is greater.<sup>131</sup>

Consider a case in which the challenged conduct yields a relatively high expected loss; for example, a woman alleges that her supervisor sexually assaulted her.<sup>132</sup> Suppose the defendant argues that

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130. Changing her speech or dress are precautions only if they would have reduced her expected loss.

131. This relationship arises because precaution by the woman generally affects the probability but not the magnitude of loss.

132. This conduct would yield a relatively high average expected loss because the average probability and magnitude of loss are both relatively high. The average probability of loss is relatively high because most, if not all, women would view the conduct as negative. Because it in-

the plaintiff welcomed the challenged conduct because she wore a "low-cut" blouse. Thus, the defendant argues that: (1) the plaintiff could have worn a different, less revealing blouse; (2) if she had, the probability that the defendant would have assaulted her would decrease;<sup>133</sup> and (3) the plaintiff's cost of wearing a different blouse was lower than the defendant's cost of refraining from the conduct.

The difficult determination of fact, as the Court described it, is not so difficult once broken into its component parts. The truth of premise (2) depends on a view of human conduct that many reasonable people find inaccurate, if not outrageous—that women's clothing *causes* men to assault women.<sup>134</sup> Even giving full credit to the social stereotype, a woman's choice of blouse at most partially "causes" assault. Assuming it would reduce the probability of loss at all, wearing a different blouse certainly would not reduce the probability of loss to zero.<sup>135</sup> Thus, at best, the reduction in expected loss would be relatively small.

Even momentarily accepting the second premise to be true, the third premise is not necessarily true. Freedom to dress as one pleases is valuable; giving it up is costly. The cost to the plaintiff of dressing "differently," whatever that might mean, intuitively outweighs the cost to the defendant of more carefully determining the willingness of his sexual targets.

### *b. Assumption of the Risk*

Now suppose the woman alleges that vulgar language and photographs of nude women in the workplace created a sexually hostile work environment. Further suppose that the defendant claims the woman knew about the language and photographs when she took the job. Again the plaintiff's conduct is at issue. In essence, the defendant claims that the woman "assumed the risk" of her loss<sup>136</sup> by

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volves a potential affront to privacy and physical security, the average magnitude of loss also would be relatively high.

133. Wearing a different blouse would in no event affect the magnitude of the loss. Wearing a different blouse could reduce the expected loss only if it reduced the probability of loss.

134. See the discussion in notes 182-83 and accompanying text.

135. For a discussion of the economic concept of probabilistic causation, see the discussion in notes 99-104 and accompanying text.

136. Before workers' compensation schemes, the assumption-of-the-risk defense barred an employee from recovering for a workplace injury when the injury was the result of hazards she knew about. See Posner, 1 J. Legal Stud. at 45 (cited in note 49). Moreover, the plaintiff was barred even if the cost of precaution was less than the reduction in expected loss, that is, if the employer was negligent.

agreeing *ex ante* to accept the risk of this particular sexual conduct loss in exchange for her wages. Once the loss she agreed to accept has occurred, the law should not compensate her for it again.

These very circumstances faced the Sixth Circuit in the now-infamous case *Rabidue v. Osceola Refining Co.*<sup>137</sup> The plaintiff, a salaried administrative assistant for an oil refining company,<sup>138</sup> alleged that a co-worker made vulgar remarks about women and occasionally directed those comments to her. She also alleged that the co-worker and other male workers displayed magazine pictures of partially nude women in offices and work areas.<sup>139</sup> The circuit court, applying what it termed a "reasonable person" test, concluded that a reasonable person would not have suffered a serious loss because of the challenged conduct.<sup>140</sup> The court held that the co-worker's "obscenities" were "not so startling as to have affected seriously the psyches of the plaintiff or other female employees."<sup>141</sup> The sexually oriented posters "had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica . . ."<sup>142</sup> Thus, the challenged conduct did not "unreasonably interfer[e] with the plaintiff's work performance and creat[e] an intimidating, hostile, or offensive working environment. . . ."<sup>143</sup>

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137. 805 F.2d 611 (6th Cir. 1986).

138. Rabidue began her employment as an hourly executive secretary and later was promoted to the position of administrative assistant. *Rabidue*, 805 F.2d at 614. With the promotion, she became responsible for numerous additional duties, including direct contact with customers of the firm. *Id.* at 614-15. Later, Rabidue took on the responsibilities of office and credit manager. *Id.* at 615. In this capacity she had the authority to assign work to other employees. *Id.*

139. *Id.*

140. *Id.* at 622. *Rabidue* was the Sixth Circuit's first hostile work environment case. It articulated a legal standard under which an employee, to prevail in a hostile work environment case, had to show:

(1) the employee was a member of a protected class;

(2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;

(3) the harassment complained of was based upon sex;

(4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [sic] well-being of the plaintiff; and

(5) the existence of respondeat superior liability.

*Id.* at 619-20 (citations omitted).

141. *Id.* at 622.

142. *Id.*

143. *Id.* at 619. The court apparently determined the average expected loss from the challenged conduct based on a group that undervalued or excluded the expected loss to women. It



The majority determined that a "reasonable person" would not have been affected significantly by the challenged conduct, based on its evaluation of "the totality of the physical environment of the plaintiff's work area" with reference to the norms of conduct before and after the plaintiff began working there.<sup>144</sup> In essence, the court held that the plaintiff's act of agreeing to work for the defendant provided evidence that she "welcomed" the negative sexual conduct and the consequent personal loss.

The idea that workers assume various levels of risk in return for incremental wage increases is nothing new.<sup>145</sup> However, the idea that women accept the risk of negative sexual conduct in return for a compensating wage differential is quite controversial. A worker will demand more compensation to work at a job she believes involves a higher expected loss from injury.<sup>146</sup> Because attitudes and susceptibilities to loss vary, the risk premium necessary to attract workers to a particular job will vary according to the worker. A firm will offer the lowest risk premium necessary to attract the workers it needs to fill its jobs.<sup>147</sup> Alternatively, the firm can reduce its wage costs by lowering the risk of loss to workers on the job.<sup>148</sup>

For example, suppose a particular job involves an expected loss from injury of twenty dollars. If the employer installs a particular safety device that costs ten dollars, it can reduce the expected loss by

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is not clear whether the Sixth Circuit's "reasonable person's" expected loss represented an average expected loss over all people (men and women) or only men. On a continuum from the highest to lowest expected cost, an all-women group would yield the highest expected cost, an all-people group would be intermediate, and an all-men group would yield the lowest expected cost, assuming that women generally view the challenged conduct negatively, whereas men generally do not. Judge Keith, in dissent, rejected the majority's use of a "reasonable person" to measure expected loss because it "fails to account for the wide divergence between most women's view of appropriate sexual conduct and those of men." *Id.* at 626 (Keith, J., dissenting). He argued, in essence, that had the majority determined the average expected loss over all people, including women, it would have found the average expected loss to be higher than that determined over all men and excluding women. See *id.* Determining the average expected loss over all women, excluding men, would have yielded a still higher figure.

144. *Id.* at 620, 622.

145. See generally Viscusi, *Risk by Choice* (cited in note 48). For an early discussion, see Adam Smith, *Wealth of Nations* 99, 100 (Random House, 1937) (claiming that "[t]he wages of labour vary with the ease or hardship . . . the honourableness or dishonourableness of the employment").

146. The additional compensation is not always cash, but may take the form of larger fringe benefits, shorter hours, or enhanced prestige.

147. Workers willing to accept the most risk for the lowest premium will accept the jobs. Other workers who require a larger premium to assume risk will choose other, less risky jobs. See Viscusi, *Risk by Choice* at 39 (cited in note 48).

148. In the case of physical injury to workers, the firm can install safety devices that will prevent the loss. A wealth-maximizing firm will invest in precaution until the reduction in wage costs no longer exceeds the cost of the precautions. *Id.*

fifteen dollars. Now assume that workers agree to accept a salary of five hundred dollars when the safety device is installed. Inducing a risk-neutral worker to take the job without the safety device would require a fifteen dollar risk premium, enough to compensate her for the increased expected loss. The firm would choose to install the safety device for ten dollars rather than pay fifteen dollars to attract the worker to the riskier job. The firm would not install the safety device, however, if it could hire workers willing to accept the risk for a premium of less than ten dollars, the cost of installing the safety device.

The notion of assumption of the risk as a bar to recovery enables a person who prefers risk to market that preference. Some workers, willing to tolerate greater risk, may agree to work for a wage that would not be acceptable to a risk-averse or risk-neutral person. By barring recovery to the worker who accepted a premium for the risky job, the court enforces a socially optimal allocation of loss between an employer and an employee under which a risk-preferring employee agrees to accept risk in exchange for a risk differential. If the employer knew *ex ante* it could not enforce the agreement with a risk-preferring employee, it would invest in safety and pay the worker less. Without the doctrine of assumption of the risk, or any other way of enforcing the *ex ante* allocation of risk, the employer would be worse off, but the employee would not be better off.<sup>149</sup>

The idea that workers trade risk for wages depends on an underlying assumption that workers have full information about risks and that the transaction costs between the worker and the employer are low.<sup>150</sup> When these conditions are satisfied, the worker's act of accepting the job provides reliable evidence that she willingly accepted risk for a wage differential. These assumptions are not always valid outside the world of theory, but they may not always be invalid, either.<sup>151</sup>

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149. This example is adapted from Posner, 1 J. Legal Stud. at 45 (cited in note 49).

150. See generally Friedrich Engels, *The Condition of the Working Class in England* (Oxford U., 2d ed. 1958).

151. Competition among employers for female workers may produce information regarding the level of sexual conduct at a particular workplace. Employers competing with each other for labor, or for the ability to pay lower pecuniary wages to the employees they have, might volunteer knowledge of their rivals' sexually offensive workplaces. Even if employees do not obtain *ex ante* information about the level of sexual conduct at a particular workplace, employers who tolerate harassment will be sued more frequently than employers who successfully prevent sexual conduct loss. The harassing employers will drop out of competition over time in favor of non-harassing employers.

In *Rabidue*, the plaintiff probably did not accept the risk of loss from the alleged sexual conduct in exchange for a compensating wage differential.<sup>152</sup> Judge Keith, in his dissent, arrived at this conclusion not because of the presence of high transaction costs or informational asymmetry, but based on common sense. He rejected the idea that the "prevailing work environment" before the plaintiff began working establishes the loss a female worker has agreed to endure by accepting the position.<sup>153</sup> The judge did recognize that in some cases, a woman can, by agreeing to accept wages for a particular job, assume the risk of certain sexual conduct loss.<sup>154</sup> According to Judge Keith, a woman assumes the risk of sexual conduct loss only when enduring the challenged conduct is part of her job description.<sup>155</sup> He wrote: "[T]he only additional question I would find relevant is whether the behavior complained of is required to perform the work."<sup>156</sup>

Judge Keith's limitation of the assumption-of-the-risk defense to those risks that are an explicit part of the employee's job description makes economic sense on the theory that an employee is better able to assess the risk of loss when the risk is part of the job description. If a prospective employee lacks information *ex ante* about the probability and magnitude of loss from non-job related sexual conduct, her willingness to take the job is not a reliable indication that she agreed to assume such loss.<sup>157</sup> Without reliable indication that the parties have reached a privately optimal allocation of risk, there is no efficiency justification for barring the plaintiff from recovery based on assumption of the risk.

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152. Nothing about Rabidue's job as an administrative assistant required that she be exposed to sexual conduct loss, other than the fact that her job involved working in close proximity with potential injurers, namely, men. Moreover, Rabidue almost certainly did not receive more compensation than her male counterparts to compensate her for the additional risk of sexual conduct loss she arguably assumed.

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

154. *Id.*

155. *Id.*

156. *Id.* Judge Keith further stated:

For example, depending on their job descriptions, employees of soft pornography publishers or other sex-related industries should reasonably expect exposure to nudity, sexually explicit language or even simulated sex as inherent aspects of working in that field. However, when that exposure goes beyond what is required professionally, even sex industry employees are protected under [Title VII] from non-job related sexual demands, language or other offensive behavior by supervisors or co-workers.

*Id.*

157. Kip Viscusi notes that an employee usually can gain information about job risks once on the job and can quit if the agreed wage is insufficient, taking into consideration the actual expected loss. Viscusi, *Risk by Choice* at 66-69 (cited in note 48). The so-called quit response raises a number of efficiency considerations beyond the scope of this Article.

Women can and do market their preference for risky sexual conduct, however. Some women, whose tastes vary from Catharine MacKinnon's, agree to work as "Laker Girls," models for the swimsuit edition, or cocktail servers in skimpy attire. Wholesale elimination of the assumption-of-the-risk defense for employers charged with hostile work environment harassment deprives women of the opportunity to market their risk preference, but it does not make them better off. This prohibition may appeal to feminists who reject the idea that a woman freely could agree to accept the risk of negative sexual conduct in exchange for money or other benefits, but there is no evidence that the increase in value to feminists would offset the decrease in value to risk-preferring women.

## 2. Employer Liability

In the case of hostile work environment harassment, the employment relationship does not fully cause the loss in the sense that it does when the challenged conduct is quid pro quo harassment. For example, suppose a female worker alleges that her co-workers tell sexual jokes and use vulgar language in her presence. Hypothetically removing the employment relationship between the offensive co-workers and the employer would not reduce the probability of loss to zero. Thus, according to the economic concept of probabilistic causation, the employer did not fully cause the loss. Imposing liability on the employer without regard to notice or fault would result in production inefficiency.<sup>158</sup>

In hostile work environment cases in which the injurer is not a supervisor, the employer generally is liable only if the employer knew or should have known of the challenged conduct.<sup>159</sup> Requiring the plaintiff to show that the employer knew or should have known about the negligent conduct of its employees in a hostile work environment case reduces the likelihood that the employer will be forced to internalize loss it did not "cause," thus reducing production inefficiency.<sup>160</sup>

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158. Nonetheless, numerous commentators urge strict liability for the employer for all instances of workplace "harassment" on the unsupported ground that the employer is "the party most able to control the work environment." See, for example, Merriman and Yang, 13 N.Y.U. Rev. L. & Soc. Change at 102 (cited in note 19).

159. See *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Higgins v. Gates Rubber Co.*, 578 F.2d 281, 283 (10th Cir. 1978).

160. The plaintiff can establish that her employer knew or should have known of the harassment directly, by showing that she complained to her supervisors, or indirectly, by showing that the conduct was so pervasive that a reasonable employer would have known. *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); *Henson*, 682 F.2d at 905.

The rule also creates an important incentive for employees to report risky situations to employers. When the employment relationship between the injurer and the employer does not fully cause the loss, a potential plaintiff may be able to detect risky situations more cheaply than the employer.<sup>161</sup> The rule thus provides an important incentive for prospective plaintiffs to bring risky situations to the attention of their employers.<sup>162</sup> This incentive is lacking if the potential plaintiff's supervisor is creating the risky situation. Some courts therefore find vicarious liability regardless of notice to the employer in hostile work environment cases in which a supervisor has engaged in the challenged conduct.<sup>163</sup> Moreover, when the supervisor is the injurer, the case begins to look more like quid pro quo harassment, regardless of the absence of express conditioning of employment benefits. Under these conditions, the effect of the employment relationship between the injurer and the employer on the probability of loss is likely to be greater than in situations in which the injurer is a co-worker or subordinate.

#### IV. RESPONSE TO THE CRITICS

The criticisms of the emerging law of sexual harassment are varied, but share the theme that the standard does not do enough to compensate women.<sup>164</sup> Unlike most loss allocated by tort law, sexual conduct loss lends itself to political manipulation by private interest groups. The probability of suffering sexual conduct loss is higher

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161. Catharine MacKinnon and others have observed that victims of sexual harassment do not report the offensive conduct or otherwise complain because they are embarrassed, intimidated, and demeaned by the conduct. MacKinnon, *Sexual Harassment* at 27 (cited in note 1); Jill Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 Cap. U. L. Rev. 445, 454-58 & nn.60-82 (1981); Merriman and Yang, 13 N.Y.U. Rev. L. & Soc. Change at 99 (cited in note 19). The presence of reactions in a given case raise the cost of reporting but do not support a general conclusion that plaintiffs' costs are always greater than defendants'.

162. Under the common law, this rule limiting an employer's liability was known as the "fellow servant rule." William L. Prosser, *Handbook of the Law of Torts*, 528-30 (West, 1971); Posner, 1 J. Legal Stud. at 44 (cited in note 49).

163. See, for example, *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979). See also Joan Vermeulen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employers*, 10 Cap. U. L. Rev. 499, 508 (1981).

164. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 Harv. L. Rev. 517 (1993) (proposing legal remedies for women harassed on public streets); Merriman and Yang, 13 N.Y.U. Rev. L. & Soc. Change at 87 (cited in note 19) (arguing that "the level of proof required by the courts in co-worker sexual harassment cases is unreasonably high. Second, the relief permitted these plaintiffs under [Title VII] is inadequate.").

among working women than among other participants in society, creating a natural, identifiable interest group. In essence, but not in form, activists claiming to represent this group have argued, through feminist scholarship and other fora, for a loss allocation rule that redistributes wealth from employers to female workers.<sup>165</sup>

Commentators call for an unspecified reworking of loss allocation that evaluates behavior "through a global lens which encompasses gender hierarchy as part of the totality of the circumstances."<sup>166</sup> They discuss the relative merits of "equality" and "privacy" as legal strategies for achieving "justice" for women.<sup>167</sup> Underlying the debate is the fundamental, and fundamentally political, assertion that feminists speak for all women and that all women want what feminists want.<sup>168</sup> Because justice so conceived is axiomatic, it is hopelessly elusive as a public policy goal. Nonetheless, under the cloak of feminism, activists pass judgment on policy based only on its conformity to an undefined and undefinable concept of justice.<sup>169</sup> Thus, evaluation of policy becomes axiomatic—a result is good because it is just. Because only the players know the rules, only the players know the winner. This "closed game" is frustrating because it condemns inconsistent views without reason or argument against them. Worse, because it stands on emotion and instinct, it cannot tolerate challenge based on reason.<sup>170</sup>

165. See generally MacKinnon, *Toward a Feminist Theory of the State* (cited in note 1). See also Kathryn Abrams, *Ideology and Women's Choices*, 24 Ga. L. Rev. 761 (1990) (arguing that MacKinnon's rejection of liberal notions of autonomy can alienate women who desire to exercise individual choice in the conduct of their lives); Martha A. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* 146-56 (Cornell U., 1990) (claiming that the neutrality of the state toward outcomes that underlies liberal legal thought is not truly neutral, but rather advantages those already privileged and marginalizes the disadvantaged).

166. Pollack, 13 Harv. Women's L. J. at 61 (cited in note 2).

167. Stein, 77 Minn. L. Rev. at 1153-55 (cited in note 6).

168. Pollack characterizes the modern women's movement as a leap from the "consciousness-raising" that establishes a connection among individual women to a political connection among all women. See Pollack, 13 Harv. Women's L. J. at 40 (cited in note 2).

169. See, for example, Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. Pa. L. Rev. 1461, 1476 (1986) (concluding that "[c]onsequently, traditional tort theories continue to produce unsatisfying results when courts attempt to find grounds on which to grant relief").

170. John Stuart Mill observed this immutable resistance to reason in connection with men's attitudes toward the civil rights of women. He wrote:

So long as an opinion is strongly rooted in feelings, it gains rather than loses in stability by having a preponderating weight of argument against it. For if it were accepted as a result of the argument, the refutation of the argument might shake the solidity of the conviction; but when it rests solely on feeling, the worse it fares in argumentative contest, the more persuaded its adherents are that their feeling must have some deeper ground, which the arguments do not reach; and while the feeling remains, it is always throwing up fresh entrenchments of argument to repair any breach made in the old.

For example, Margaret Jane Radin rejects the application of efficiency analysis in the context of interpersonal relations.<sup>171</sup> She contends that even thinking about human, and in particular sexual, relationships in economic terms is "inferior"<sup>172</sup> because "market discourse itself might be antagonistic to interests of personhood."<sup>173</sup> Valuing bodily integrity "implicitly conceives of as fungible something that we know to be personal, in fact conceives of as fungible property something we know to be too personal even to be personal property."<sup>174</sup>

Radin's criticism reveals a pervasive normative objection to economic analysis as a policy-making tool. Economic analysis requires a fundamental assumption about the ability of individuals to make personally wealth-maximizing decisions.<sup>175</sup> It is not oblivious to social externalities, both negative and positive, arising from the exercise of individual, self-interested choice. Unlike feminist thinking, however, economic analysis does not necessarily eradicate individual choice in favor of group norms.

For example, a group's outrage when a person values her dignity less than the group's norm is itself a cost to be taken into account, or internalized, in allocating loss. Of course, another group's satisfaction is a benefit that similarly must be included in the reckoning. What offends Radin is that economic analysis assumes that an individual can value her dignity differently than the group norm, and that negative social externalities might not overwhelm her individual choice.<sup>176</sup>

John Stuart Mill, *The Subjection of Women in Three Essays* 427 (D. Appleton, 3d ed. 1975).

171. Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987). Radin considers the phenomenon of "market-inalienability," which she defines as the condition under which things may be given away but not sold, such as sex, babies, or reproductive capacity. *Id.* at 1850.

172. *Id.* at 1885-86. In reaction to Posner's analytical focus on the cost of rape to the victim and the benefit to the rapist, Radin states: "Only an inferior conception of human flourishing would regard rape as benefiting the rapist." *Id.* at 1884. She argues that the concept of human flourishing underlying market analysis is distinct from and inferior to one that "we can accept as properly ours." *Id.*

173. *Id.* at 1879. But see Richard Posner, *Sex and Reason* 118 (Harvard U., 1992) (claiming that "love can be given a precise economic meaning . . . it is a preoccupation with the unique particulars of another person, particulars for which there is, by definition, no substitute to be found in any other person. . . . Rational choice and economic decision making are not synonyms for commercial exchange.").

174. Radin, 100 Harv. L. Rev. at 1880 (cited in note 171).

175. See note 23 and accompanying text.

176. Radin would view sexual harassment law not as a loss allocation rule but rather as an effort "to take into account workers' . . . personhood." Radin, 100 Harv. L. Rev. at 1920 (cited in note 171).

Thus, feminists advocate sexual harassment law that defines "reasonable" not by way of social consensus, but rather by fiat. The reasonable woman is who they say she is, without regard to the individual women who do not think, feel, or behave as she does.<sup>177</sup> Moreover, feminists utterly disregard the social cost of policy that would accommodate infinite sensitivities.

Perhaps because it is inconsistent with their construct of the "reasonable woman," feminists either reject or simply have not considered the fact that women can, and in certain circumstances should, protect themselves from sexual conduct loss. This contrived helplessness forces women into the role of victim, but also relieves them of responsibility.<sup>178</sup>

The Court's "unwelcomeness" requirement has incited a hailstorm of criticism from feminist scholars who believe that it is an "ostensibly neutral rule of evaluation to discredit women."<sup>179</sup> Wendy Pollack apparently contends that *no* inquiry into the plaintiff's participation in or response to the challenged conduct is appropriate.<sup>180</sup> She sarcastically criticizes the inquiry into whether the plaintiff welcomed the challenged conduct as an evaluation of "a woman's success in controlling the 'animal nature' of men, from which women must protect themselves."<sup>181</sup>

Pollack's criticism is valid in part, but goes too far. An evaluation of the plaintiff's speech and dress to determine whether it provoked, and thereby excused, a sexual attack perpetuates the dual myths that women are seductive sexual objects, and that when suffi-

177. For example, Wendy Pollack begins her article on sexual harassment with a first-person account of her experience as a union carpenter from 1978 through 1986. Pollack, 13 Harv. Women's L. J. at 36-38 (cited in note 2). She observes without citation to authority a "trend nationwide of women with several years of experience entering the trades, often for lower-paying jobs." *Id.* at 37. She concludes that all women reflected in this so-called "trend" left the trades fundamentally for the same reason she did—"the refusal and inability to tolerate the hostile work environment." *Id.* at 38. No doubt the ranks of union carpenters, especially in the late seventies and early eighties, were inhospitable to women, but Pollack's broad conclusion about the experience and motivation of women generally goes well beyond her capacity to observe. But see Cahn, 77 Cornell L. Rev. at 1402 (cited in note 8); Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon, 1988).

178. Susan Wendell, *Oppression and Victimization: Choice and Responsibility*, in Debra Shogun, ed., *A Reader in Feminist Ethics* 277, 287 (Can. Scholars', 1992).

179. Pollack, 13 Harv. Women's L. J. at 56 (cited in note 2).

180. Pollack writes, "If Vinson's speech or dress was inappropriate for the work environment, she should have been told, not raped." *Id.* Inscrutably, however, Pollack acknowledges "putting an arm around a woman's shoulder may be considered a friendly gesture or an offensive and threatening one, depending upon the woman's view of the initiator, his intentions, and the situation." *Id.*

181. *Id.* at 56-57 (citing Jane Aiken, *Differentiating Sex from Sex: The Male Irresistible Impulse*, 12 N.Y.U. Rev. L. & Soc. Change 357 (1983-84)).



ciently provoked, men lose control of themselves and cannot be held accountable for their actions.<sup>182</sup> These myths about human sexuality are rooted deeply in our society and our law.<sup>183</sup> But totally eliminating the woman's participation in the challenged conduct from the calculus is equally, if not more, degrading to women. It invokes yet another stereotype—that women are incapable of taking steps to protect themselves from sexual loss and, therefore, must be excused from any failure to do so.<sup>184</sup>

This construct of the context in which sexual conduct loss occurs replaces the human plaintiff with a monolithic suffering woman who endures her environment but does not interact with it. Because this woman has no capacity to protect herself from loss, she becomes a pain sponge, at the mercy of some exogenous protector.<sup>185</sup> This stereotype invokes the stifling paternalism that excluded women from "dangerous, unwholesome" working conditions in the early twentieth century.<sup>186</sup> It is at work today, fueling both overt and covert barriers to the entry and advancement of women in the workplace.

Armed with this type of reasoning, feminists oppose the notion that a woman can voluntarily and in her right mind assume, in exchange for wages, the risk of what they deem negative sexual

182. See Aiken, 12 N.Y.U. Rev. L. & Soc. Change at 365-67 (cited in note 181).

183. See, for example, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded, 562 F.2d 55 (9th Cir. 1977) (stating that "Mr. Price's conduct appears to be nothing more than a personal proclivity, peculiarity, or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge."); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Warshafsky v. The Journal Co.*, 63 Wis. 2d 130, 216 N.W.2d 197 (1974). See also Phyllis Schlafly's testimony before the Senate Labor Committee reprinted in part in the New York Times: "When a woman walks across the room, . . . she speaks with a universal body language that most men intuitively understand. Men hardly ever ask sexual favors of women from whom the certain answer is 'No'. Virtuous women are seldom accosted by unwelcome sexual propositions or familiarities, obscene talk, or profane language." *Aide Calls Sexual Harassment "Tip of the Iceberg"*, N.Y. Times C8 (Apr. 22, 1981).

184. For a rare criticism of feminist polemics on rape, especially acquaintance rape, see Katie Roiphe, *Date Rape's Other Victim*, N.Y. Times Mag. 26 (June 13, 1993). Roiphe observed an unflattering parallel between women depicted as victims of sexual harassment and rape and "that 50's ideal my mother and other women of her generation fought so hard to leave behind." *Id.* She wrote:

They didn't like her passivity, her wide-eyed innocence. They didn't like the fact that she was perpetually offended by sexual innuendo. They didn't like her excessive need for protection. She represented personal, social and intellectual possibilities collapsed, and they worked and marched, shouted and wrote to make her irrelevant for their daughters. But here she is again, with her pure intentions and her wide eyes. Only this time it is the feminists themselves who are breathing new life into her.

*Id.*

185. See Cahn, 77 Cornell L. Rev. at 1416 (cited in note 8) (criticizing the "reasonable woman" standard as reinforcing an image of women as victims who need protection).

186. See, for example, *Muller v. Oregon*, 208 U.S. 412 (1908) (limiting hours women could work).

conduct. This view reinforces another degrading and debilitating stereotype, that women cannot be accountable *ex post* for decisions they make *ex ante* regarding their own conduct.<sup>187</sup> Because she is a woman, the argument goes, words or conduct that communicated her acquiescence before or at the time of the challenged conduct should be voidable at her option.<sup>188</sup>

Although even the most radical feminist would dispute that a woman is incapable of entering into a binding contract on grounds of incapacity, the same feminist would contend that as to sex, the rules should be different. As to sexual conduct, at work or anywhere else, the very act is so inherently coercive, so fraught with domination and submission, that consent to it by a woman is impossible.<sup>189</sup>

This invocation of coercion to eliminate the effectiveness of a woman's objective consent is no more than an escape hatch from the "problem" of the woman with a mind of her own. Like it or not, women attach value to their own sexual attractiveness to men. Using sexual harassment as a legal tool to close the market for sexual attractiveness is likely to be as effective as the Eighteenth Amendment was at eliminating the consumption of alcohol.

The criticisms of various scholars eschewing the "reasonable woman," or embracing a particular embodiment of her, are really observations about line drawing. They are comments on the accuracy and value of the search for the average costs of precaution and average expected loss. Our society simply has yet to reach a complete consensus on sexual conduct in the workplace. Under the proposed paradigm, the search for consensus would proceed with honest consideration of the attitudes and tastes of individual men and women, excluding or emphasizing none.

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187. See generally Roiphe, N.Y. Times Mag. at 26 (cited in note 184).

188. See Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 Law & Soc. Inq. 69, 80 (1989) (arguing that a woman's belief as to whether she has consented to intercourse is an unreliable indicator of consent because her beliefs are "invaded by social power and dominant notions"); MacKinnon, *Toward a Feminist Theory of the State* at 177 (cited in note 1) (claiming that "[w]omen are socialized to passive receptivity"); Dworkin, *Intercourse* (cited in note 20) (claiming that sexual intercourse is by nature coercive and perpetuates the subordination of women).

189. See note 188 and accompanying text.

## V. CONCLUSION

Congress's mandate in Title VII left to the courts the task of devising a loss allocation rule that bridges the perception gap between men and women regarding appropriate sexual conduct at the workplace. On the subject of sexual conduct, individual attitudes and tastes vary widely. The shape the law takes will affect conditions in every workplace and the life of every citizen. Thus, the search for social consensus on what conduct is "reasonable" is and will no doubt continue to be controversial.

The paradigm proposed in this Article directs courts to allocate sexual conduct loss with the goal of maximizing social wealth. Using economic efficiency to infuse meaning into the emerging law honestly recognizes that both men and women can take action to reduce loss from sexual conduct at the workplace. Moreover, it recognizes that reducing such loss is costly. Because our resources are scarce, the best we can hope for is a sexual harassment policy that encourages investment in precaution against sexual harassment to the extent the results are worth the cost.