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Directions in Sexual Harassment Law

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DIRECTIONS IN SEXUAL HARASSMENT LAW

CATHARINE A. MACKINNON*

The large arc of sexual harassment law, from thirty-years' distance, has been as much influenced by political events, and media coverage of those events, as by litigation and legislation. Particularly influential in crystallizing, shaping, and advancing legal developments in this area were the Hill-Thomas hearings in 1991 and the Clinton-Jones affair of the late 1990s. Both situations revolved around a crucial dynamic that sexual harassment law substantially strengthened: men with power—varying amounts but nonetheless substantial—being challenged for sexual mistreatment by women with less power, often far less. On my reading, the repercussions of those two events profoundly affected the trajectory of sexual harassment law in the United States.

My concern—you will decide if you agree—is that what Professor Hill's challenge did for the sexual harassment claim, the national and international consciousness that developed in the wake of those hearings,¹ is being partly reversed, surely undermined, by the Clinton and Jones events and their unrolling aftermath and undertow. Those who took courage from Professor Hill's example to challenge sexual power were discouraged by the treatment of Paula Jones and her claim. Those who experienced sexual harassment at least as serious as what Professor Hill said was done to her, especially women who identified with her and her experience—both her credibility in articulating the injury and its harm and the dignity and presence she brought to the process—even if they couldn't meet her standard, thought if she could go through that and survive it, they could too. Women wanted to be with her, on her side of the line. She inspired survivors with self-respect

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* Elizabeth A. Long, Professor of Law, University of Michigan Law School. Until giving the Goodwin Lecture, of which this is an edited transcript, I thought the notion of Southern hospitality was another overdone regional myth. Dean Linda F. Harrison and Professor Olympia Duhart gave my visit to Nova special warmth and substance, as did Dean Joseph Harbaugh, with his efficient and generous arrangements and beautiful Florida flowers, and the faculty and students as a whole, with their welcoming reception and intelligent engagement. The volume edited by Reva B. Siegel and me, *DIRECTIONS IN SEXUAL HARASSMENT LAW* (2004), celebrating the original publication of C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979), was very helpful in preparing for this lecture, as was research by Maureen Pettibone.

1. See *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 102d Cong., pt. 4, 36-41 (1991).

to complain in public about their own abuse. Thousands did; the claims at the Equal Employment Opportunity Commission (EEOC) and locally skyrocketed.² This happened even though Professor Hill did not say she was sexually harassed, the hearings were not a lawsuit, and Justice Clarence Thomas might be said to have won because he was placed on the Supreme Court by the Senate. By contrast, Paula Jones' claims against President Bill Clinton were an actual lawsuit for behavior that was termed sexual harassment.³ Many women saw that what was done to them at work was nowhere near as serious as what Paula Jones claimed Bill Clinton did to her. Although Clinton was eventually impeached, Paula Jones lost in that the courts told her the facts of her situation were legally insufficient to state a claim for hostile environment sexual harassment.

Will those who took heart from Professor Hill's challenge be disheartened by how the legal system and the media treated Paula Jones and give up before they even start fighting back? Has *Clinton v. Jones* made victims think they will not be treated as credible, will not be taken seriously, will not get relief? It would be small wonder if they did.⁴ At the very least, the issues framed by this concern, with others no less important but less noticed because they were not squarely invoked in these watershed experiences, have contributed to the social and legal image of what real sexual harassment looks like. This image has precursors and consequences.

Neither of these events would have produced the political firestorm they did, far less had the long-term impact they had, if sexual harassment had not previously been recognized as a legal claim. In 1976, Paulette Barnes, an African-American woman, first successfully claimed in an appellate court that being sexually harassed at work was a practice of sex-based discrimination.⁵ Mechelle Vinson, also an African-American woman, who said that she had been raped for two-and-a-half years by her supervisor,⁶ had her experience recognized as stating a claim for a sexual harassment hostile environment in violation of her rights as a woman to sex equality in the workplace by the U.S. Supreme Court a decade later.⁷ Without them, the term sexual harassment would likely not have existed; it would have had no legal

2. See EEOC, Harassment Charges, available at <http://www.eeoc.gov/stats/harassment.html> (last visited June 14, 2007).

3. *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).

4. On why most sexual harassment is not reported, see Louise Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 119-21 (1995).

5. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

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

7. *Id.*

clout, even in the background. Recognition of unwelcome sexual pressure *because* one is a woman or a man, often a woman or a man of particular race or ethnicity or sexual orientation salient to the abuse, puts the treatment in a collective context, with ground, human rights resonance, and links to other forms of unequal treatment. Had sexual harassment not been framed as a form of sex-based discrimination—that is, as a violation of equality rights, situated on that more potent social, political, and legal level—neither event would have resonated politically and socially in the ways they did. Had these women and others not sued and won, it is doubtful that the Hill-Thomas hearings or the Clinton-Jones episode would have developed as they did, if indeed they had surfaced in public at all.

Equally evident, the idea of sexual harassment as sex discrimination did not exist until woman lawyers existed. As this legal claim continues to fight for its life as a sex equality claim rather than being made piecemeal into a tort or a crime, it is worth noting that both of these other approaches date from a time when not only were there no women lawyers; women were not even allowed to vote. Both tort and criminal approaches still tend not to be adapted to the realities of women's group inequality to men, yet continue to be attempted to be used to drag sexual harassment law back to a time before women had a voice in the legal system. Putting sexual harassment on legal equality ground—calling it in law what it is in life—continues to be important for principled and practical reasons alike. In reality, people *are* sexually harassed because they are women or men. Proof of their claims is facilitated by legal recognition of this fact at the point at which principle and practicality converge. Many of the developments in sexual harassment law's direction that are least favorable to plaintiffs are accordingly throwbacks or attempts to reroute the law backwards to a time when legal equality claims did not exist.

Both Hill-Thomas and Clinton-Jones centrally alleged hostile environments. The core of the account was that, due to unwanted sexual pressure or attention (Clinton-Jones also alleged physical contact), life at work was unequal; it was hostile and unbearable. What distinguishes the hostile environment cases is that no particular index of the job is disturbed: You still have the job, have not lost a promotion, have not been fired. Both settings were taken to pose the question of whether the alleged behavior was sufficiently serious to be illegal under existing legal standards for hostile environment sexual harassment. In this context, although Professor Hill did not sue, it is worth asking whether what she said Justice Clarence Thomas did to her was legally actionable. Did her allegations that she was pressured for dates, subjected to intrusive sexual discussions by her superior at work that included particularly humiliating graphic descriptions of pornography, state a hostile environment claim? At the time, her decision not to sue was well

taken. The hostile environment claim had barely been recognized—it was new, fragile, and untested.⁸ After her testimony and for a considerable period of time, however, and recognizing divergences between circuits and judges, in my view she would have had a colorable claim that her harassment was sufficiently sex-based and abusive to be actionable. I think her testimony had something to do with this change. During that period, a hostile environment did not have to be the years of rape that Mechelle Vinson was subjected to, for example.

Since the late 1990s, however, the abusiveness that hostile workplace environment cases are required to allege to survive summary judgment has observably become more extreme, generally speaking. In my view, whether cited or not (usually not), the Clinton-Jones affair has strongly contributed to this reversal of direction, although it had started before that ruling. Not only was then Governor Clinton said to say sexual things to Paula Jones and to have asked for a sexual interaction with her; he was also described as locking the door, engaging in indecent exposure, touching her thigh and neck, asking her to kiss his penis, and when she refused (“I’m not that kind of girl.”), suggesting she better keep this to herself. That single incident, as it has been termed, was found insufficiently severe to constitute a hostile working environment. One wonders, if he did each of these things on separate days, would that have been several incidents, hence potentially sufficient? Given that there is no severity meter out there to provide an objective standard of gravity, and no fixed number of incidents or density requirement to say how much or how often makes for pervasiveness, I think that that result, given the high visibility and strong salience of the case, has strongly contributed to the desensitized climate within which hostile environment cases are evaluated.

Thankfully, *Clinton v. Jones*⁹ did not make what I call “the and mistake,” common now in several circuits that requires sexual harassment be *both* severe *and* pervasive to constitute a hostile working environment.¹⁰ The United States Supreme Court, by contrast, has only required that it be *either* severe *or* pervasive.¹¹ The change from the disjunct to the conjunct substantially elevates the threshold and virtually precludes a single incident,

8. See Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 830 (2002) (citing *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) as “the closest controlling case in the D.C. Circuit”).

9. 990 F. Supp. 657 (E.D. Ark. 1998).

10. See, e.g., *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005); *Hockman v. Westward Comm’n*, 407 F.3d 317, 326 (5th Cir. 2004) (citing *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999)); *Singleton v. Dep’t of Corr. Educ.*, 115 Fed. App’x 119, 122 (4th Cir. 2004) (unpublished) (emphasis added).

11. *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993).

regardless of severity, from being enough, even as the Supreme Court clearly permits a disjunctive standard. For examples of this problem: “the conduct [complained of], though boorish and offensive, is more comparable to the kind of rude behavior, teasing, and offhand comments that we have held are not sufficiently severe *and* pervasive to constitute actionable sexual harassment.”¹² At the same time, much judicial language has hastened to distinguish the “boorish” and “offensive” behavior in *Clinton* from abusive language and gender-related jokes that are considered actionable.¹³ More and more, courts seem to be asking whether behavior is bad enough by moral standards, or some meter in judges’ heads, requiring that harassment be worse and more frequent, rather than measuring the behavior by equality standards, asking whether the treatment is unequal on the basis of sex.

During the same period, the question of point of view entered the jurisprudence. We were told by the Supreme Court that the treatment alleged, to be a sexually harassing hostile environment, had to disturb the working place for the reasonable person.¹⁴ Why victims suddenly had to be reasonable was not explained. Not to say that they should be able to be unreasonable, but whether the victim is reasonable is the wrong question—whether their treatment is unequal is the question. Usually, it is perpetrators who have to be reasonable. After the reasonable victim requirement was invented, putting the victim on trial, much litigation followed concerning whose standards for reasonableness would control. Eventually, after several cases in the circuits explicitly turning on the issue,¹⁵ the Court appears to have more or less resolved it in dictum.¹⁶ In *Oncale v. Sundowner Offshore Services, Inc.*,¹⁷ in which a man accused several men of sexual aggression against him on an oil rig, the Supreme Court simply said that the perspective of a reasonable victim in the position of this particular victim was the perspective from which reasonableness would be assessed.¹⁸ This injected particularity of perspective into the assessment, bringing the inequality context into the cases.

My sense is that more and more aggression in working places is being found insufficiently severe to be actionable. Just to give you a flavor of a few of these: supervisor stroking a plaintiff’s leg on one occasion, grabbing her buttocks on a separate occasion, telling her he found her attractive, twice

12. *Singleton*, 115 Fed. App’x at 122 (emphasis added).

13. *See id.* at 122–23.

14. *See Harris*, 510 U.S. at 20.

15. *See, e.g., Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986).

16. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

17. *Id.* at 75.

18. *Id.* at 81.

asking her out on dates—not actionable;¹⁹ calling a subordinate a “dumb blonde,” placing “I love you signs” in the work area, asking her for dates, putting his hand on her shoulder and attempting to kiss her—not actionable;²⁰ making inappropriate sexual remarks, kissing the plaintiff repeatedly, touching the plaintiff and chasing her around a forest reserve—not actionable;²¹ employee attempting to kiss plaintiff, making lewd remarks about her appearance, following her around the office, giving unsolicited neck rubs, hand holding—insufficiently severe or pervasive;²² supervisor asking plaintiff about her interest in a romantic relationship, for a kiss, staring at her, and following her around—not actionable;²³ supervisor touching plaintiff’s breast and hair, kicking her in the buttocks, and making lewd remarks directed specifically at her—not actionable.²⁴ The general drift in these cases actually decided after *Hill and Thomas* and before *Clinton and Jones*—cases that, I think, would likely have been actionable in the late ’80s—also shows how mistaken the assertion is that sexual acts at work are readily found illegal just by virtue of being sexual. After a while, lawyers just won’t file these cases. And if your ultimate superior at work can then walk into your office any day and take out his penis and jump you, and that is not seen as severe, a lot of sexual aggression is acceptable at work.

The quid pro quo claim has been affected as well. In addition to a hostile environment, Paula Jones alleged a quid pro quo—an exchange of sex for something at the job, this for that, where the ‘this’ is the sex and the ‘that’ is the workplace benefit.²⁵ Although it was not well-argued, in my opinion, Paula Jones’ quid pro quo claim was that, had she accepted the sexual conditions that then Governor Bill Clinton imposed on her in that so-called single incident, she would have received favorable job consideration. She would not have been transferred to a position with no window, doing boring work that led nowhere, or no work at all, as she was after the incident. Support for her theory could have been found in Gennifer Flowers’ deposition, who said she had a sexual affair with Bill Clinton and her job was enhanced. The recognition of this kind of sexual harassment claim, the tacit quid pro quo, has gone nowhere since that case.

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19. *Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 709 (7th Cir. 1995).
 20. *Weiss v. Coca Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993).
 21. *Saxton v. Am. Tel. & Tel.*, 10 F.3d 526, 534 (7th Cir. 1993).
 22. *Stoeckel v. Emtl. Mgmt. Sys., Inc.*, 882 F. Supp. 1106, 1114 (D.D.C. 1995).
 23. *Ballou v Univ. of Kan. Med. Ctr.*, 871 F. Supp. 1384, 1387 (D. Kan. 1994).
 24. *Gearhart v. Eye Care Ctrs. of Am., Inc.*, 888 F. Supp. 814, 825 (S.D. Tex. 1995).
 25. *Jones v. Clinton*, 990 F. Supp. 657, 664, 666 (E.D. Ark. 1998).

Indeed it eroded further since the ruling in Kim Ellerth's case in 1998.²⁶ Kim Ellerth was told by her superior, in the course of various intrusive sexual advances, verbal and physical, that "I [can] make . . . life . . . hard or . . . easy [for you] at Burlington."²⁷ She rejected him sexually and he made things hard for her at Burlington.²⁸ Again, the claim was not well-argued. The Supreme Court saw this situation not as a quid pro quo, but as a threat of a quid pro quo.²⁹ Unlamented by most commentators, *Ellerth* wrote submission cases out of the canon and eliminated what, at least since 1980s EEOC Guidelines,³⁰ has been a quid pro quo in itself. Saying if you deliver sexually, I will make life good for you at work, proposes a quid pro quo, i.e. it is a quid pro quo incident. Because the Supreme Court majority saw it as a threat that was not carried through on, not a threat that is harm in itself (even though it actually was, in addition, carried through upon) this kind of incident became either sufficiently severe or pervasive to constitute a hostile environment, or nothing. As a single incident, by Clinton-Jones standards, do you think it would be sufficiently severe? Again, the workplace was not measured by equality standards.

Ellerth was centrally litigated as an employer liability case. Once the fighting stopped in the mid-eighties over whether sexual harassment would be actionable as sex-based discrimination, and it was accepted that sexual harassment is an equality claim, the conflict shifted to whether, and by what standard, anybody was going to be held responsible for it. With discrimination law generally, say hiring, if you are not hired for a discriminatory reason, the company, not the person who does the hiring, is liable. Sexual harassment was initially treated that way too—like discrimination. Then liability for it started being called "vicarious liability," referring to something someone else did for which the employer was then arguably liable. Most discrimination does not occur on a majority vote of the Board of Directors, so virtually all discrimination, under a legal structure that does not yet permit individuals to be sued for discrimination, is for acts that someone in the company does, as the company. But it was with sexual harassment that this was considered "vicarious," rather than just liability, resulting in a whole separate set of employer liability standards only for harassment cases. In-

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

27. *Id.* at 748.

28. *Id.*

29. *Id.* at 751, 772.

30. See 29 C.F.R. § 1604.11 (2006). "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 . . ." *Id.*

stead of employer liability flowing directly from a finding of sexual harassment, as occurs with every other kind of discrimination, the upshot is that a person can be sexually harassed as a matter of law and no one will be held liable for it: back to sexual harassment as personal, as private, as individual.

In *Faragher*,³¹ the companion employer liability case to *Ellerth*, the Court did not explicitly distinguish between hostile environment and quid pro quo for employer liability purposes,³² as some earlier cases in lower courts and EEOC approaches did that had made employer liability automatic for quid pro quo and contingent for hostile environment. Instead, they distinguished between situations in which what they called a tangible job detriment occurred and when it did not. With sexual harassment where the target is not hired, is fired, is demoted, is paid less, is not promoted and so on, employer liability is assumed. Where there is no such tangible job loss, there are further hurdles for the plaintiff before the employer will be held liable, including an affirmative defense if the employee bringing the claim unreasonably failed to use available avenues of complaint. This *Faragher/Ellerth* approach builds on one view of the agency relation; that is, it comes from tort law. It supposes that, with hostile environment sexual harassment, it is not known if the employer is involved so a form of notice is built in. But it draws the identical line that distinguishes quid pro quo from hostile environment, just in different words, since the tangible job detriment is what distinguishes the quid pro quo from the hostile environment, least until constructive discharge occurs. Then the *Suders*³³ case treated constructive discharge as not a tangible employment action, even though the job is very tangibly lost.³⁴ The real issue is what employers are going to be considered to have actually done, hence be held responsible for. In this process, quid pro quo is made to be the real sexual harassment, for which employers are liable, and hostile environment without more, to be something less, even if workers lose their jobs because of it. With hostile environment, it is as if the Court sees the effect as not on work but just on her, when equality law is interested not only in the job but in equality for people in and at work.

Most of the cases that have received focused public attention have involved heterosexual harassment, producing little judicial theorizing of the connection between sexuality and gender in the “based on sex” dimension of these cases. They have largely contented themselves with asking, if it is sexual, what other than sex could it be based on? If this man is doing something sexual to this woman, if it has nothing to do with the fact that she is a woman

31. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

32. *See id.* at 788–92.

33. *Pa. State Police v. Suders*, 542 U.S. 129 (2004).

34. *See id.*

that is up to him to prove. Enter the presumption of heterosexuality, here to the benefit of the conclusion that sexual harassment is based on sex, which in fact is almost always is, even if it is not always heterosexual. Cases of harassment based on gender that is not sexual have rarely produced problems being recognized as actionable for that reason, although it has happened. Nonsexual gender-based harassment has been covered by the courts under Title VII³⁵ almost since its inception, although some courts are under the misimpression that if treatment of an employee is not sexual in the way it was in *Thomas-Hill* or *Clinton-Jones*, it is not covered, just as they sometimes do not recognize the severity of harassment when it is sexual. Usually the source of the problem is the lack of application of equality standards, not a more serious approach to gender-based treatment that is sexual than to gender-based treatment that is not sexual.

But the under-theorization of the sexuality-gender connection does produce difficulties in same-sex cases, where courts flail around trying to figure out how abusive treatment can be sex-based when it is not heterosexual. Where so-called bisexual harassment is alleged, equal opportunity sexual harassment imagined to be a defense to harassment being sex-based, courts have seen through the ruse. The man who calls himself “just a handsy guy”—saying he puts his hands all over everyone without regard to sex—is usually seen through handily. In few cases is the treatment actually equal. It is also usually based on the sex of the parties. In *Oncale*, the Supreme Court did understand that men attacking another man could be based on sex. Football player fanny-patting had to be protected at all costs from the perception that anything sexual is involved, however. Lower courts still tend to wrongly assimilate men-on-men claims to gay claims, whether or not those subject to the advances are gay, finding them not actionable, although some such claims have been allowed.³⁶ Many courts want to make such harassment sexual orientation harassment, rather than sex-based harassment, as if sexual orientation is not sex-based. If sexual orientation is not based on sex, what is it based on? Same-sex orientation is an orientation toward people of

35. Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (2000).

36. Compare *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), and *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), with *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), and *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002). Under California state law, see *Mogilefsky v. Superior Court*, 26 Cal. Rptr. 2d 116 (Ct. App. 1993).

the same sex: it is based on sex. Perhaps this is too simple for courts to get their minds around, although, again, a few have.³⁷

Similarly, race-and-sex combined claims, although recognized, are often not treated appropriately. Many people are sexually harassed based on a combination of their race/ethnicity and sex. A lot of the most common epithets directed against women of color in particular are inseparably both race and sex-based. Many courts still disaggregate them, even though there are solid precedents in some circuits against that.³⁸ This problem reminds me of the approach to understanding the nature of life that begins with killing the frog: To see if there is inequality inside, cut it apart, dissect it, put the race here, the sex there. The method of answering the question eliminates the very thing it's asking about., then wonders why it doesn't find it. Plaintiffs often lose on both grounds because the inequality to which they were subjected inheres in the symbiotic inseparability of the two, something that does not appear, does not even exist, when they are separated.

In neither Clinton-Jones nor Hill-Thomas was it directly said that these men had a free speech right to say what they allegedly said. That did not pass the "straight face test." Here, the equality frame on the issue, as opposed to the First Amendment frame, has held up reasonably well. Pornography at work has, amazingly, been encompassed in sexual harassment prohibitions,³⁹ although the hostile environment standards mean that the pornography has had to be increasingly violent to get their attention. But the fact that pornography at work is seen as actionable inequality rather than protected speech is a major miracle, given that there are two First Amendments, one for adult pornography, which is protected almost entirely, and another for any other kind of speech that does harm, which is not axiomatically protected. What this has meant is that the only place in law that pornography is effectively able to be addressed is sexual harassment law, in the limited equality settings of work and school where it applies.

There have been a lot of increasingly close calls on this issue. The closest call yet is the case of Aamani Lyle.⁴⁰ A writer on *Friends*, Ms. Lyle is an African American woman who was hired to take notes at writers' meetings.

37. See, e.g., *Rene*, 305 F.3d at 1063–64; *Centola*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (“[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”).

38. See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551 (9th Cir. 1994); *Jefferies v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025 (5th Cir. 1980).

39. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

40. *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211 (Cal. 2006). For prior excellent analysis, see *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846 (Cal. 1999).

According to Warner Brothers' defense, the men who wrote *Friends* had to express sexual fantasies about the actresses by name, engage in simulated masturbation by gyrating in their chairs to get their creative juices flowing so they could think and write their episode. Warner Brothers termed theirs a "creative workplace," giving rise to an absolute First Amendment defense to this and all the other sexual language and abusive interaction to which Ms. Lyle was subjected. The Supreme Court of California held that the fact that this is a creative workplace had to be taken into account as part of the "totality of the circumstances" in which the sexual harassment claim is assessed under California law.⁴¹ Granted, the kind of workplace it is, is part of the totality of the circumstances, but whether that should permit it to be unequal is the question. The full-on First Amendment defense registered in a strong dissent. We have not heard the last of this defense, I suspect, under which there would be no equality standards for sexual treatment in "creative" workplaces.

So, in the last thirty years, the experience of sexual harassment has been named. Injuries have been given the status of a civil rights violation, raising the human status of its survivors. A lot of people who are subjected to unwanted sexual advances and propositions under unequal conditions feel able to express them more openly and are given some more public respect. A lot of women feel more valid and powerful when they turn down sex that they don't want in unequal settings. Where sex discrimination law applies—and there are many places it does not apply—there is often someone to go to, to complain. The law may respond, whether the person refuses a sexual bargain and resists the sexualized environment or complies with sexual demands they cannot avoid. But nothing in sexual harassment law's direction is addressing the facts that sexual harassment is still not actionable in a lot of places where it happens; that resistance to it is not safe and is far from costless; that women subjected to it are often not believed; and that perpetrators often protect one another. Institutions are often reluctant to take responsibility and are often absolved of liability—particularly when they can say that they were oblivious to what was going on, which is astonishing. See no evil, hear no evil, incur no liability. This encourages not knowing what is happening in one's own shop. Victims seldom receive the support they deserve. Even if complaining about sexual harassment can be more self-respecting than suffering with it in silence, complaining can be more injurious than trying to ignore it, which is what most women do.

There is a lot of hope as sexual harassment law has gone international. General Recommendation 19 of the CEDAW Committee in 1992 recognized

41. *Lyle*, 132 P.3d at 228–29.

sexual harassment at work as gender specific violence under the Convention on the Elimination of All Forms of Discrimination Against Women, with hostile work environment and retaliation claims.⁴² Many parts of the world are developing their own sexual harassment jurisprudence based on indigenous experience drawing on international developments, for example, the Supreme Court of India in the *Vishaka*⁴³ and *Chopra*⁴⁴ cases. In Japan, where sexual harassment began as a tort, it is now understood as sex-based.⁴⁵ In France, where it was originally a crime of quid pro quo only, the idea has morphed into *harcèlement morale*, a prohibition on anyone harassing anyone on any ground.⁴⁶ Israel has passed and applied a detailed civil code provision against sexual harassment.⁴⁷

But the biggest move in the history of this claim was taking the injury from the private to the public, from the personal to the legal, from just life to civil rights violation. That change, women lawyers both participated in and benefit from. For many individuals, women and many men, and for many dimensions of politics as a whole, that change has made all the difference in the world.

42. See generally Comm. on the Elimination of Discrimination Against Women (CEDAW), Violence Against Women, *General Recommendation 19*, U.N. Doc. A/47/38 (1992).

43. See generally *Vishaka v. State of Rajasthan* (1997) 6 S.C.C. 24 (India).

44. *Apparel Export Promotion Council v. Chopra*, (1999) 1 LRI 13 (India).

45. For tracing of this history, see Yukiko Tsunoda, *Sexual Harassment in Japan*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 618 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

46. Code Pénal [C. Pén.] art. 222-33-2 (Fr.) is the original provision. "Serious pressure" was added in 1997. *Id.* The provision was further modified to apply to coworkers as well as hierarchical superiors in 2002. *Harcèlement morale* was added at C. Trav., Art. L. 122-29 (Fr.).

47. Prevention of Sexual Harassment Law, 5758-1958 (1998) (Isr.).