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## Dignity and Discrimination: Toward A Pluralistic Understanding of Workplace Harassment

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# ARTICLES

## Dignity and Discrimination: Toward A Pluralistic Understanding of Workplace Harassment

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### TABLE OF CONTENTS

INTRODUCTION . . . . .	3
I. CONFUSION AND CONTROVERSY . . . . .	6
A. POPULAR CONFUSION . . . . .	6
B. SCHOLARLY UNHAPPINESS WITH TITLE VII JURISPRUDENCE: WHY IS SEXUAL HARASSMENT SEX DISCRIMINATION? . . . . .	7
1. The Formal Equality Argument . . . . .	8
2. The Subordination Argument . . . . .	10
3. The “All Sex Subordinates Women” Argument. . . . .	11
C. FEMINIST EFFORTS TO RESOLVE THE CONTRADICTIONS . . . . .	11
II. TOWARD A PLURALISTIC UNDERSTANDING OF WORKPLACE HARASSMENT . . . . .	14
A. TAKING UP THE CHALLENGE . . . . .	14
B. DIGNITARY HARMS IN A CONTEXT OF DISCRIMINATION . . . . .	16
C. “INDIVIDUAL” VERSUS “GROUP” HARMS . . . . .	19
D. THE IMPORTANCE OF DISAGGREGATION . . . . .	20
III. LOOKING TO THE COMMON LAW . . . . .	22
A. THE CONCEPT OF DIGNITARY HARM . . . . .	22

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B.	THE RELEVANCE OF THE TORT NOTION OF DIGNITARY HARM TO WORKPLACE HARASSMENT . . . . .	27
1.	Relevance to Sexual Harassment in the Paradigmatic Sense . . . . .	27
2.	From Sexual Harassment to an Expansive Concept of Workplace Harassment . . . . .	30
C.	THE ROAD NOT TAKEN . . . . .	32
1.	Early Feminist Arguments Against a Tort-Based Approach . . . . .	32
2.	Turning to Title VII . . . . .	33
D.	A SECOND LOOK AT TORT REMEDIES FOR “CLASSIC” CASES OF SEXUAL HARASSMENT . . . . .	36
1.	<i>Stockett v. Tolin</i> . . . . .	39
2.	<i>Godfrey v. Perkin-Elmer</i> . . . . .	40
3.	<i>Priest v. Rotary</i> . . . . .	41
4.	<i>Kanzler v. Renner</i> . . . . .	42
E.	TORT REMEDIES FOR WORKPLACE HARASSMENT, BROADLY CONCEIVED: THE WORKPLACE AS AN INHERENTLY AGGRAVATING FACTOR IN DIGNITARY HARMS . . . . .	44
IV.	POTENTIAL OBJECTIONS TO THE TORT APPROACH . . . . .	53
A.	THE “GROUP HARM” OBJECTION . . . . .	53
B.	THE “RIGID COURTS” OBJECTION . . . . .	55
C.	THE “LIABILITY AND PREEMPTION” OBJECTION . . . . .	56
D.	THE “CIVILITY CODE” OBJECTION . . . . .	57
V.	CONCLUSION: WHY A PLURAL APPROACH TO WORKPLACE HARASSMENT IS BETTER THAN AN EXCLUSIVE FOCUS ON TITLE VII . . . . .	60
A.	PROVIDING A POTENTIAL LEGAL REMEDY FOR WORKPLACE HARASSMENT VICTIMS WHO CANNOT ASSERT SUCCESSFUL CLAIMS UNDER TITLE VII . . . . .	61
B.	KEEPING TITLE VII’S FOCUS WHERE IT BELONGS: ON REMEDYING WORKPLACE DISCRIMINATION . . . . .	61
C.	EMPHASIZING THAT WOMEN ARE FULL AND EQUAL HUMAN BEINGS . . . . .	63

## INTRODUCTION

Twenty years after the publication of Catharine MacKinnon's pathbreaking book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*,<sup>1</sup> the concept of "sexual harassment" remains deeply controversial. The number of workplace sexual harassment claims filed annually with the Equal Employment Opportunity Commission has risen by more than fifty percent since the beginning of the 1990s.<sup>2</sup> But while many Americans have come to accept the principle that men should not make crude or threatening sexual advances to female subordinates at work, even this basic principle is fraught with uncertainty.

Since the publication of MacKinnon's book in 1979, hundreds of law journal articles have addressed the issue of workplace sexual harassment. Recent scholarly discussion of harassment, however, has focused almost exclusively on Title VII of the Civil Rights Act of 1964,<sup>3</sup> which prohibits workplace discrimination based on sex.<sup>4</sup> This near-exclusive focus on Title VII as a means of understanding and redressing workplace harassment is deeply misguided, as scholars have turned doctrinal somersaults in order to claim that virtually every form of sexual harassment, including same-sex sexual harassment, is discrimination on the basis of sex. Such attempts to shoehorn all forms of sexual harassment into Title VII have failed to diminish noticeably the public confusion about sexual harassment and have led to a distorted definition of sex discrimination.

The excessive reliance on Title VII has also led scholars to overlook the fact that workplace harassment, sexual or nonsexual, is fundamentally a dignitary harm: an affront to the victim's dignity and personality interests. As a result, despite the explosion of scholarship on sexual harassment, a coherent and robust account of what is wrong with *all* forms of workplace harassment, both sexual and nonsexual, is lacking.

Scholarly discussion of sexual harassment tends to conflate two very different things: the *nature of the harm of harassment*, which is a dignitary harm, and the *context in which the harm of harassment occurs*, which is a context of discrimination. The excessive focus on the discriminatory context in which the workplace harassment of women occurs, which results from the heavy emphasis on Title VII, has tended to foster an essentialist conception of sexual harassment as a special "women's injury"; this conception, in turn, has fueled an antifeminist

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1. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

2. See Equal Employment Opportunity Commission (EEOC), *Sexual Harassment Charges* (visited Feb. 25, 1999) <[www.eeoc.gov/stats/harass.html](http://www.eeoc.gov/stats/harass.html)>; see also Katherine M. Franke, *Gender, Sex, Agency, and Discrimination*, 83 CORNELL L. REV. 1245 (1998) (claiming that "sexual harassment is the fastest growing area of employment discrimination").

3. 42 U.S.C. § 2000e-2 (1994). Title VII also prohibits discrimination on the basis of race, color, religion, or national origin.

4. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

backlash against the very notion of sexual harassment.<sup>5</sup> It is important to realize that workplace harassment, sexualized or nonsexualized, injures the dignitary interests of individual harassment victims, regardless of their sex and regardless of the sex of their harassers. The workplace harassment of women is wrong not because women are *women*, but because women are human beings.

Now is the time for a fundamental change in how harassment in the workplace is considered. This article argues for a comprehensive re-examination of how workplace harassment is conceptualized. Title VII should maintain an important place, because discrimination against women remains a grave societal problem. However, a focus on Title VII—with its emphasis on sex discrimination—must be balanced by an equal focus on the dignitary harm aspects of harassment. Only a dignitary harm focus permits the development of a robust legal theory that allows simultaneous recognition of the ongoing problem of workplace discrimination against women and, at the same time, permits the development of broad, tort-based remedies for the many kinds of nondiscriminatory and non-sexual dignitary harms that injure both men and women in the workplace.

Part I of this article briefly examines some of the drawbacks and inconsistencies of Title VII sexual harassment jurisprudence and shows that Title VII does not provide an adequate framework for understanding many common forms of workplace harassment. Title VII is unquestionably a critical means of fighting against workplace discrimination; however, by emphasizing *discrimination* at the expense of *dignity*, the Title VII workplace harassment paradigm provides an incomplete understanding of the wrongs of workplace harassment.

Part II of this article asserts the importance of an approach to sexual harassment that distinguishes between *the nature of the harm* of workplace sexual harassment (a dignitary harm) and *the context in which the harm occurs* (a context of discrimination against women). A pluralistic understanding of workplace harassment permits the provision of legal remedies for workers of any sex or sexual orientation who suffer from abusive treatment (whether sexual or nonsexual in nature), while still recognizing that workplace harassment occurs in patterned ways and has historically operated to exclude women, in particular, from equal access to social, political, and economic power. While Title VII highlights the discriminatory—and often sexist—motives and patterns in many cases of workplace harassment, harassment is not a matter of concern only when “sexual.” Further, the claim that workplace harassment is a “group

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5. For a recent example of this backlash, see Dr. Vernon Coleman, *Dr. Vernon's Casebook: Hairdo Compliment Got Me Real Wiggling*, THE PEOPLE, Feb. 7, 1999, at 41: “Most sexual harassment cases are nonsense. Such politically correct madness is making life dull and miserable for most sane and healthy human beings. It is one of the great tragedies of the 20th century that most men are now afraid to compliment—let alone flirt with—women in case they find themselves accused and convicted of the often absurd and frequently over-valued modern crime of sexual harassment.” Cf. Robert L. Steinback, *'Reverse PC' Becomes Self-Centeredness Chic*, THE AUSTIN AM.-STATESMAN, June 22, 1997, at H3 (“Speak about sensitivity to any American demographic group, and you'd better brace yourself for a torrent of peeve and ridicule.”).

harm” that only affects women is too simplistic. First, as Vicki Schultz has eloquently argued, not all discriminatory workplace harassment of women is “sexual” in nature.<sup>6</sup> Second, men as well as women can be subjected to harassment and abusive treatment at work. A pluralistic understanding of workplace harassment must reflect these insights.

Part III of this article contends that common-law tort causes of action provide a promising way to address the dignitary harm element of “classic” cases of sexual harassment, those involving male harassers and female victims. Twenty years ago, feminist scholars such as MacKinnon considered—and rejected—this approach.<sup>7</sup> Dismissing a tort approach in this manner, while understandable in 1979, now does a disservice to women and other harassment victims. Moving beyond “classic” cases of sexual harassment, Part III of this article also argues that common-law tort causes of action contain the germ of a more general right to be free of severe dignitary harm in the workplace and that the changing social meaning of work should be deemed to create special duties for employers in protecting all workers from workplace harassment, sexual and nonsexual.

Part IV defends this approach against several possible objections. These objections include the “group harm” objection, “the rigid courts” objection, the “liability and preemption” objection, and the “civility code” objection.

Finally, Part V demonstrates why a pluralistic understanding of workplace harassment would benefit all workers while strengthening feminist efforts to protect women from workplace discrimination. A pluralistic approach to workplace harassment—one that combines the use of Title VII, where appropriate, with tort causes of action—has three important benefits. First, such a pluralistic approach allows for legal remedies for the many workers who experience severe

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6. Schultz distinguishes nonsexual, gender-based discriminatory workplace harassment from that resulting from sexual motives:

[M]uch of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content. Indeed, many of the most prevalent forms of harassment are actions that are designed to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority. Every day, in workplaces all over the country, men uphold the image that their jobs demand masculine mastery by acting to undermine their female colleagues’ perceived (or sometimes even actual) competence to do the work. The forms of such harassment are wide-ranging. They include characterizing the work as appropriate for men only; denigrating women’s performance or ability to master the job; providing patronizing forms of help in performing the job; withholding the training, information, or opportunity to learn to do the job well; engaging in deliberate work sabotage; providing sexist evaluations of women’s performance or denying them deserved promotions; isolating women from the social networks that confer a sense of belonging; denying women the perks or privileges that are required for success; assigning women sex-stereo-typed service tasks that lie outside their job descriptions (such as cleaning or serving coffee); engaging in taunting, pranks, and other forms of hazing designed to remind women that they are different and out of place; and physically assaulting or threatening to assault the women who dare to fight back.

Schultz, *supra* note 4, at 1686–87.

7. See, e.g., MACKINNON, *supra* note 1, at 88; see also Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 516 (1998).

harassment on the job, but who would be hard-pressed to assert that their harassment was "because of sex," as required by even the most expansive reading of Title VII. Second, a pluralistic approach keeps the primary focus of Title VII where it should be: on addressing the problem of widespread workplace discrimination against members of less powerful groups, such as racial, ethnic, and religious minorities, and, of course, women. Third, grounding understanding of the sexual harassment of women in a notion of dignitary harm as well as in a discrimination paradigm makes a critical political and philosophical point: The workplace harassment of women is wrong not because women are *women*, but because women are human beings and share with all other human beings the right to be treated in the workplace with respect and concern.

## I. CONFUSION AND CONTROVERSY

### A. POPULAR CONFUSION

The hundreds of articles on sexual harassment published in American newspapers and magazines each year testify to the ongoing cultural confusion about sexual harassment.<sup>8</sup> Just what is it?<sup>9</sup> If wrong, why is it wrong? What can you say at work without getting into trouble? Can you tell a dirty joke? Put up a picture of your girlfriend (or boyfriend) naked or in a skimpy bathing suit? Ask your secretary out on a date? Ask your coworker out on a date? Ask your boss out on a date? Comment on your secretary's clothes? Should a construction-site sign that reads "Men Working" be deemed to violate federal antidiscrimination law?<sup>10</sup> Has, as one commentator charges, "bad taste . . . become a federal offense"?<sup>11</sup> Did Clarence Thomas sexually harass Anita Hill? Did Bill Clinton harass Paula Jones? Did he harass Monica Lewinsky? Can a woman sexually harass a man? Can a woman sexually harass a woman,<sup>12</sup> or a man sexually harass a man?<sup>13</sup>

Sexual harassment often partakes, at least to some degree, of "I-know-it-when-I-see-it-ness."<sup>14</sup> The average person can likely distinguish between a tentative,

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8. See, e.g., Editorial, *Tougher, Clearer Rules on Sexual Harassment*, SEATTLE TIMES, July 7, 1998, at B4 ("ASK the man or woman on the street to explain sexual harassment, and they'll ramble on in the vagaries that have defined this area of workplace misconduct for years."); see also Kenneth Lasson, *Professors Feel PC Chill*, DENVER POST, Feb. 18, 1996, at E-01; Herbert London, *Defining Harassment Beyond Rationality*, WASH. TIMES, Oct. 2, 1996, at A19.

9. See, e.g., Editorial, *What is Sexual Harassment?*, ST. LOUIS POST DISPATCH, June 28, 1998, at B2 ("For months the country has been . . . wondering out loud about what constitutes sexual harassment.").

10. See Vince J. Scbodolski, *Harassment Suits Curb Workplace Freedom of Speech: Groups Admit Rights Are Being Trampled*, CHICAGO TRIB., June 23, 1997, at 1.

11. Linda Chavez, *Sexual Harassment Game is Getting Out of Hand*, MILWAUKEE J.-SENTINEL, Aug. 3, 1996, at 10.

12. See generally Aimee L. Widor, *Fact or Fiction?: Role-Reversal Sexual Harassment in the Modern Workplace*, 58 U. PITT. L. REV. 225 (1996).

13. See, e.g., *Oncala v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998) (male employee alleged male coworkers picked on him, called him names suggesting homosexuality, and instilled fear of being raped).

14. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (claiming, about obscenity, "I know it when I see it").

but unwanted, sexual overture or a clumsy compliment on the one hand and a hostile and demeaning series of sexual threats and mockeries on the other. Nonetheless, to the extent that talk of sexual harassment tends inevitably to generate some hostile comments and questions, some of the ridicule and hostility may arise out of a deeply felt sense that sexual harassment doctrine is filled with vagueness and contradictions.<sup>15</sup>

B. SCHOLARLY UNHAPPINESS WITH TITLE VII JURISPRUDENCE: WHY IS SEXUAL HARASSMENT SEX DISCRIMINATION?

When lawyers, judges, and scholars speak of sexual harassment, Title VII of the federal Civil Rights Act, which prohibits discrimination in hiring, firing, and compensation, or in the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin,<sup>16</sup> is generally presumed to be the applicable legal provision. Several major feminist articles about sexual harassment, most of which are explicitly motivated by a desire to restore some of Title VII's doctrinal integrity, have evolved during the past year or two. Take, for instance, the recent work of Kathryn Abrams, Katherine Franke, and Vicki Schultz.<sup>17</sup> Although these writers differ substantially in their understanding of the proper role of Title VII in regulating workplace behavior, they all accept a basic premise: that Title VII sexual harassment jurisprudence is rife with contradictions and apparent paradoxes and must be significantly reconceptualized. Thus, Franke asks:

What exactly is wrong with sexual harassment? Why is it sex discrimination? . . . While our intuitions may lead us to conclude that when a man directs offensive sexual conduct at a female colleague, sexual discrimination is afoot, the Supreme Court has not offered a theory as to why this is the case. . . . [Major feminist theories] of the wrong of sexual harassment don't do the work they purport to. When pressed, they provide indeterminate and unprincipled outcomes. . . .<sup>18</sup>

Abrams echoes this lament, observing that after "almost two decades of litigation," sexual harassment doctrine is filled with "inconsistencies, exclusions and misunderstandings."<sup>19</sup> Schultz further critiques Title VII jurisprudence, arguing that the dominant "desire-based" paradigm for understanding sex discrimina-

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15. The Supreme Court has done little to clarify this murky area of the law. In 1998, the Supreme Court decided several cases about sexual harassment under Title VII, but each decision was quite narrow: *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), dealt primarily with the issue of determining employer liability for hostile environment sexual harassment by supervisory employees, while *Oncale* determined only that same-sex sexual harassment suits are not per se barred by Title VII.

16. 42 U.S.C. § 2000e-2 (1994).

17. See Abrams, *supra* note 4; Franke, *supra* note 4; Schultz, *supra* note 4.

18. Franke, *supra* note 4, at 691-93.

19. Abrams, *supra* note 4, at 1171.



tion under Title VII “has compromised the law’s protection. Principal among its drawbacks, the paradigm is underinclusive, omitting—and even obscuring—many of the most prevalent forms of harassment that make workplaces hostile and alienating to workers based on their gender.”<sup>20</sup>

Abrams, Franke, and Schultz are all inheritors of the same feminist legal tradition, and a concern about the same apparent problems in Title VII jurisprudence permeates their recent work.<sup>21</sup> First and foremost, they each note that the reasons why sexual harassment is a form of sex discrimination are not intuitively obvious: Is it because a man who propositions a female employee would presumably not have propositioned a male employee, and thus, the propositioned woman has been treated differently than her male colleagues because of her sex? Is it because sexual harassment is motivated by hostility to the presence of women in the workplace? Is it because, in a context of patriarchy and sexual violence against women, the mere presence of sexuality in the workplace, however motivated, is inherently threatening to women, and prevents them from enjoying their work and succeeding on the same basis as men?<sup>22</sup> As many commentators have noted, none of these three common explanations is trouble-free,<sup>23</sup> therefore making instructive a brief discussion of the most commonly cited problems.

### 1. The Formal Equality Argument

The first explanation—the notion that sexual harassment of women by men is sex discrimination because it violates formal equality principles—faces the

20. Schultz, *supra* note 4, at 1689.

21. It should be noted that in addition to its doctrinal problems, Title VII presents a number of practical barriers to recovery for those who believe they have been harassed in a discriminatory fashion. For instance, Title VII applies only to workplaces with more than 15 full-time employees, leaving employees in smaller workplaces with no federal statutory remedy. *See* 42 U.S.C. § 2000-e. Title VII also requires plaintiffs to exhaust administrative remedies before litigating; they must go through a cumbersome process of submitting their claims to the Equal Employment Opportunity Commission for approval before being given permission to sue on their own, and they may be deprived of the ability to go to court and forced into mandatory arbitration. *See id.* Finally, Title VII places a cap (currently \$300,000) on the amount of punitive damages employees can recover from their employers. *See* 42 U.S.C. § 1981a.

22. For this typology of the prevailing explanations, see generally Franke, *supra* note 4.

23. *See, e.g., id.*; Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375, 376 (1998) (arguing that “discrimination law as an anti-harassment weapon is morally and legally confused, dubious in effectiveness, and deeply troubling in its unintended consequences”); Schultz, *supra* note 4. Bernstein has noted:

[S]exual harassment [is] now a legal wrong and a cultural colossus. But as doctrine the phrase remains elusive, connoting no specific type of harm. . . . The gap between competing perspectives on sexual harassment, so indicative of confusion and disagreement, has never been satisfactorily bridged. Meanwhile, the topic expands in notoriety. While judges and scholars try to define and explain [it], its meaning—a nimble Houdini of legal doctrine—continues to escape their chains.

Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 446–48 (1997); *see also* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333 (1990).

problem of “the equal opportunity harasser”: the person who harasses both men and women. If a male employer is bisexual, for instance, and propositions both his female employees and his male employees, one may logically say that no one has been treated differently on the basis of sex, and therefore, no discrimination has occurred within the meaning of Title VII.<sup>24</sup> This conclusion is troubling, however, for regardless of what Title VII has to say about this issue, a crude and threatening sexual proposition should not cease to be legally actionable because both men and women have to put up with it.

Considering same-sex sexual harassment, a similar problem emerges with the formal equality justification for treating sexual harassment as sex discrimination: if the male harasser is gay, for instance, and harasses another man, it makes sense, in a wholly formal way, to say that the victim would not have been harassed had he not been male (though to many feminists, permitting such male victims of homosexual harassment to recover under Title VII obscures the basic point that women, not men, have historically suffered from sex discrimination).<sup>25</sup> This premise is complicated if a straight man harasses another man—perhaps a gay or “effeminate” coworker—by taunting him, threatening to rape him, or insulting him using sexualized language.<sup>26</sup> The courts have made clear that Title VII does not protect against discrimination on the basis of sexual orientation.<sup>27</sup> If a man singles out another man for abuse, sexualized or not, the

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24. It should be noted that in practice, very few alleged harassers have sought to raise this defense. See, e.g., Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. (forthcoming 2000) (“Such defendants appear to be the subjects of fiction or hypotheticals rather than actual litigation—the defense has been raised in only two cases and has been rejected in both.”) (citations omitted).

25. Cf. Schultz, *supra* note 4, at nn.43 & 50.

26. See, e.g., *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1001 (1998) (male employee alleged male coworkers picked on him, called him names suggesting homosexuality, and instilled fear of being raped); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1193 (4th Cir. 1996) (male employee alleged male coworkers teased him about his sexual activities, exposed themselves to him, placed condom in his food, and physically assaulted and fondled him); *Dillon v. Frank*, No. 90–2290, 1992 U.S. App. LEXIS 766, at \*1 (6th Cir. Jan. 15, 1992) (male employee alleged fellow employees called him a ‘fag,’ told others he ‘gives head,’ and physically assaulted him); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1046 (N.D. Ala. 1996) (male employee alleged male coworkers groped him and tried to kiss him, told him he was ‘pretty’ and ‘cute,’ insulted his girlfriend, and offered to expose their genitals to him); *Goluszek v. Smith*, 697 F. Supp. 1452, 1454 (N.D. Ill. 1988) (male employee alleged male coworkers harassed him for not being married, teased him about women, accused him of being gay, and poked him in buttocks with stick).

27. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); see also *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1994). For a fuller discussion of these and other cases with similar holdings, see WILLIAM RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 461 (1997).

In this article, I am rather critical of the attempts that have been made to understand same-sex harassment as “sex discrimination” within the meaning of Title VII. I argue that these attempts do violence to the concept of discrimination based on sex, contribute to a growing backlash against people who claim to be victims of sexual harassment, and weaken women’s protection against workplace discrimination. Although a fuller discussion of the issue of harassment based on sexual orientation is beyond the scope of this article, I should make it clear that my objection to shoe-horning same-sex harassment into Title VII is based on a belief that we should keep our concept of “discrimination based

victim in most cases appears to have little likelihood of prevailing under Title VII.<sup>28</sup>

## 2. The Subordination Argument

The second commonly offered explanation—that sexual harassment is discriminatory because it is motivated by hostility toward women in the workplace—assumes too much, for some sexual harassment may in fact be motivated by sexual desire, by a personal dislike of the victim, or by some other motive, which, however regrettable, is not the same as a general hostility to the presence of women in the workplace. Further, the notion that sexual harassment is wrong because motivated by a desire to prevent women from working in traditionally male settings also poses problems in addressing situations of same-sex harassment. If a male employer fires his male subordinate for refusing to respond to his sexual advances, it makes little sense to say that his action discriminates against women—at least if one uses the term “discriminate” in the colloquial sense of the word—or, indeed, against men.<sup>29</sup> Concluding that the firing dis-

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on sex” as straightforward and intelligible as possible, rather than on a belief that workplace discrimination against gays, lesbians, or bisexuals is not a serious problem.

I would be entirely in favor of amending Title VII to prohibit workplace discrimination based on actual or perceived sexual orientation. Claiming that discrimination based on sexual orientation is a form of sex discrimination, however, does a disservice both to women and to gays and lesbians: far better, I think, to keep our concept of sex discrimination clear, and at the same time, push for laws prohibiting discrimination on the basis of sexual orientation. Also, as I argue later in this article, a tort regime for addressing workplace harassment would allow victims of same-sex harassment to recover without jeopardizing the concept of discrimination based on sex.

28. The Supreme Court addressed the issue of same-sex harassment in *Oncale*, 118 S. Ct. at 1002–03. *Oncale* holds that same-sex harassment is actionable under Title VII if it is “sex discrimination,” but implicitly holds out only two possibilities for showing that sex discrimination exists: (1) the plaintiff could show that he (or she) was harassed because of homosexual desire on the part of the same-sex defendant, or (2) the plaintiff could show that the harasser was motivated by a “general hostility” to members of the plaintiff’s sex in the workplace. In practice, plaintiffs are likely to find proving either of these things difficult.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that a plaintiff who was discriminated against because she failed to meet her employer’s stereotyped view of how a woman should look and behave was held to have stated a claim under Title VII. An expansive reading of *Price Waterhouse* suggests that male-on-male harassment should be actionable if the harasser is victimized because he fails to behave in stereotypically “masculine” ways; in theory, this approach might enable a gay man harassed because of his sexual orientation to file a valid Title VII claim, arguing that his harassment was motivated not by his sexual orientation per se but by his failure to comply with “appropriate” gender stereotypes. But the Court’s narrow holding in *Oncale* and its failure to make any reference to the reasoning in *Price Waterhouse* suggests that in practice this argument won’t succeed in the current political and judicial climate.

29. Relying in part on *Price Waterhouse*, discussed *supra* note 28, Franke, Abrams, and Schultz all accept some variant of the argument that male harassment of “effeminate” men can be seen as part of what Franke labels a “technology of sexism”: in other words, effeminate men are harassed by male colleagues out of the same reliance on restrictive gender stereotypes that causes men to harass women. Construed broadly, such incidents of same sex harassment could plausibly be seen as discriminating against women. These arguments strike me as having a great deal of force, but it should be noted that they require going well beyond the popularly understood concept of discrimination. See Franke, *supra* note 4, at 767–68; Abrams, *supra* note 4, at 1226; Schultz, *supra* note 4, at 1789.

criminate against men is similarly ludicrous because the action appears unlikely to be motivated by a generalized hostility to men in the workplace.<sup>30</sup>

### 3. The “All Sex Subordinates Women” Argument

The third common justification for treating sexual harassment as sex discrimination—that in a violent and patriarchal society, any sexual words or behavior in the workplace act to intimidate women—is greatly overinclusive, demeaning to women as agents, and likely to lead to the chilling of innocuous and healthy forms of sexual expression.<sup>31</sup> As Schultz notes, “Just as gender-based oppression occurs outside the realm of the sexual, so too does the sphere of sexuality encompass more than simply oppression. Sexual relations—heterosexual or otherwise—do not inherently enact male dominance over women.”<sup>32</sup> To the extent that all sexual words and behavior are viewed as oppressive in the workplace, employers may fear that permitting such sexual expression will render them vulnerable to sexual harassment suits. This “invites companies to discipline or discharge workers for the wrong reasons,” observes Schultz.<sup>33</sup> She asserts, “In my view, it is misguided to attempt to banish all hints of sexuality from the workplace. For one thing, it will not work. . . . [S]exuality permeates organizations and, so long as organizations are made up of human beings, will continue to flourish in one form or another.”<sup>34</sup>

#### C. FEMINIST EFFORTS TO RESOLVE THE CONTRADICTIONS

Responding to these tensions in common accounts of Title VII doctrine, recent feminist scholarship has sought to clarify the ways in which sexual harassment might be viewed as constituting sex discrimination. Franke, Ahrams, and Schultz, for instance, each provide accounts of Title VII that place sexism and gender stereotyping at the center of the problem of sexual harassment.<sup>35</sup>

To Franke, sexual harassment is part of a “technology of sexism”: it reaffirms oppressive and discriminating gender stereotypes that harm both women and men and, in so doing, constitutes a form of sex discrimination.<sup>36</sup> In Franke’s view, Title VII should permit same-sex harassment actions brought by men or women who were harassed for failure to conform to sexist gender stereotypes and should also permit more traditional actions from women who have been harassed by men.<sup>37</sup> Abrams shares Franke’s basic conception that sexual harassment is about subordination, but insists that the central focus of Title VII should

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30. This possibility is raised by the Court in *Oncale*, 118 S. Ct. at 1002, but it is quite unlikely, in practice, that plaintiffs could prove this.

31. See Schultz, *supra* note 4, at 1689.

32. *Id.* at 1790.

33. *Id.* at 1793.

34. *Id.* at 1794.

35. Schultz also argues that work, and its social meaning, is central to the problem of sexual harassment. See *id.* at 1790–99.

36. See Franke, *supra* note 4, at 693, 762–71.

37. See *id.* at 693–94.

remain on remedying the workplace oppression of women because women, not men, are disproportionately harmed by sexual harassment.<sup>38</sup> Schultz agrees with Franke, arguing that the purpose of Title VII is to dismantle workplace segregation by integrating women into jobs traditionally dominated by men.<sup>39</sup>

Recent feminist scholarship on Title VII has also been animated significantly by a desire to “fit everything in” beneath the Title VII umbrella, making room for as many kinds of objectionable workplace sexual behavior as possible. In particular, scholars have been anxious to find ways to view the sexual harassment of men and same-sex sexual harassment as sex discrimination under Title VII. This temptation is natural; after all, if a male employer should be barred from linking a female employee’s job benefits to her compliance with his sexual demands, then a female employer similarly should be barred from making quid pro quo sexual demands of a male employee, and any employer should be barred from making sexual demands of someone of the same sex. Similarly, if a man may not create a hostile sexual environment for female employees—by subjecting them to crude sexual jokes, commenting ceaselessly upon their bodies, or using demeaning sexual epithets to speak to them—a woman, too, should be prohibited from doing the same to a man in her workplace, as should someone who acts this way toward a member of the same sex.

Several feminist scholars, however, have viewed these dilemmas as serious challenges to Title VII doctrine. Franke, speaking of quid pro quo same sex harassment cases and cases in which gay men create a hostile environment for straight men, notes, “These cases raise that uncomfortable, yet inevitable, intellectual moment when grand theory fails to provide a unifying and totalizing approach to a problem . . . [and these cases] present the most difficult challenge

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38. See Abrams, *supra* note 4, at 1172.

39. Schultz, *supra* note 4, at 1758 (“The major purpose of Title VII was to dismantle sex segregation by integrating women into work formerly reserved for men.”). Schultz goes even further than Abrams, noting that the predominant “desire-based paradigm” for understanding sexual harassment often leads the courts to trivialize certain kinds of sex-based, but nonsexual, forms of harassment of women. Courts, she charges, have become overly accustomed to understanding sexual harassment primarily in terms of actions that result from male sexual desire for women. See *id.* at 1689–92. As a result, if an employer constantly criticizes female employees, or refuses to provide them with adequate training or opportunities for advancement, but does not explicitly raise the issue of sexuality, courts are often slow to interpret the harassment as discriminatory, even though it may be motivated solely by hostility to women in the workplace. Similarly, if both sexualized harassment and nonsexual forms of harassment are present in the same claim, courts are apt to disaggregate the two kinds of harassment, treating the former under sexual harassment doctrine and subjecting the latter to disparate treatment analysis, instead of considering the two kinds of harassment as two different, but related, tools by which men try to keep women out of the workplace.

In practice, Schultz observes, treating the two kinds of harassment separately tends to trivialize both: taken together, the two kinds of harassment may be severe and pervasive enough to alter working conditions unreasonably, but taken apart, neither may strike myopic judicial eyes as rising to that level. To Schultz, actions that tend to maintain workplaces as stereotypically “masculine” domains all constitute sex discrimination. As a result, a man who is harassed by male coworkers because he fails to conform to masculine gender stereotypes is as much a victim of sex-based discrimination as a woman whose biological sex makes her unable to conform.

to . . . any theory of sex discrimination."<sup>40</sup> On the one hand, excluding male-on-male harassment from the ambit of Title VII creates an apparent asymmetry and the impression of arbitrariness. On the other hand, treating this kind of harassment as functionally equivalent to male harassment of women seems, in some deep way, to do violence to the historical reality in which Title VII is rooted.<sup>41</sup> the reality is that most workplace sexual harassment is perpetrated by men against women not by coincidence, but as part of a centuries-old pattern of the subjection and exclusion of women from positions of economic and political power.<sup>42</sup>

Franke would allow Title VII claims from men (and, presumably, women) who face quid pro quo harassment from homosexual members of their own sex, though she suggests that these cases be brought under the disparate treatment

40. Franke, *supra* note 4, at 767.

41. As this statement suggests, I favor an antisubordination approach to equal protection rather than a formal equality approach. A full defense of this position is beyond the scope of this argument; for a good recent summary of the debate as it intersects with sex discrimination issues, see Amy Nemko, *Single Sex Public Education after VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19 (1998).

Despite Title VII's formal equality language, several courts have refused to find instances of male-on-male harassment actionable under Title VII, finding that the male plaintiff was not a member of the kind of "discrete and vulnerable group" Title VII was intended to protect. *See, e.g.,* Ashworth v. Roundup, Co., 897 F. Supp. 489, 493-94 (W.D. Wash. 1995) (approvingly quoting *Goluszek v. Smith*, 697 F. Supp. 1452, 1546 (N.D. Ill. 1988) ("The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.")); *see also* Benekritis v. Johnson, 882 F. Supp. 521, 525-26 (D.S.C. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834-35 (D. Md. 1994) (dismissing case because male plaintiff failed to state an actionable claim under Title VII, as intended by Congress); *Ficenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793, at \*2 (S.D. Ohio 1994). *But see* *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (reversing lower court decision barring same sex harassment claims). The Court's 1998 decision in *Oncala v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998), discussed *supra* note 26, however, seems to bring an end to this line of cases.

42. While the language of Title VII is the language of formal equality, it is nonetheless true that Title VII was enacted (and subsequently amended) out of a desire to protect *women* from discriminatory workplace behavior. For example, *see* Schultz, *supra* note 4, at 1758 n.403:

Those who spoke in favor of the amendment adding the prohibition against sex discrimination to the original 1964 Civil Rights Act focused primarily on the injustice of sex segregation of work. *See, e.g.,* 110 CONG. REC. 2579-80, 2580-81 (1964) (statement of Rep. Griffith); *id.* at 2580-81 (statement of Rep. St. George). Moreover, when Congress amended Title VII in 1972, *see* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j) (1994)), both the House and the Senate made clear that they considered such sex segregation to be the primary evil for the statute to address. *See* H.R. REP. NO. 92-238, at 4-5 (1971) ("Women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964."), *reprinted* in 1972 U.S.C.A.N. 2137, 2140; S. REP. NO. 92-415, at 7 (1971) (including similar statements).

At note 50, Schultz acknowledges that "a number of sources have characterized [the Title VII] prohibition against sex discrimination as a joke—a last-ditch effort by opponents to defeat the legislation," but cites, for a contrary view, Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457-69 (1981) (arguing that, even if the members of Congress who introduced the amendment adding sex did so in an effort to defeat the bill, the majority of Congress did not have that motivation when it approved the amendment).

prong of Title VII. She also favors allowing claims from men who have been subjected to sexualized “rough-housing,” but only if they protest about the workplace and then face retaliatory harassment.<sup>43</sup> Abrams, too, would permit Title VII claims from men targeted by other men for workplace harassment for failure to conform to appropriately masculine sexual stereotypes and would likewise permit claims from men who have not been specifically singled out for harassment, but who can nonetheless make plausible claims that “sexualized talk or practices,” as a form of “roughhousing or horsing around,” have unreasonably interfered with their work performance.<sup>44</sup> Like Franke and Abrams, Schultz would allow same-sex harassment claims where the harassment is linked to gender stereotyping and the maintenance of a gender-stratified workplace.<sup>45</sup>

Franke acknowledges her doubts about trying to fold too much into Title VII: “Title VII cannot and should not be the vehicle by which we dismantle every hypermasculine or hyperfeminine microculture.”<sup>46</sup> Franke suggests that “[w]orkplace sexual misconduct that does not play a role in the regulation and enforcement of hetero-patriarchal gender norms, while not actionable under sex discrimination laws, should still be actionable under appropriate state tort, contract, or even racketeering laws.”<sup>47</sup> However, while she notes that “it may make sense for states to enact statutes providing remedies for workplace sexual misconduct,” she leaves the problem “for another day.”<sup>48</sup> Abrams, too, shares the concern about trying to fit too much into Title VII. Ultimately, Abrams notes ruefully:

[O]ne size cannot fit all, theoretically speaking: it is crucial to see women’s inequality as the product of many intersecting motives, constructions, and modes of treatment. Because sexual harassment has captured public attention to perhaps a greater degree than any other gender-based injury, an understanding of sexual harassment that is explicitly, paradigmatically plural will be a tremendous resource in this effort.<sup>49</sup>

## II. TOWARD A PLURALISTIC UNDERSTANDING OF WORKPLACE HARASSMENT

### A. TAKING UP THE CHALLENGE

Title VII, then, has proved to be a Procrustean bed:<sup>50</sup> the only way to jam all

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43. Franke, *supra* note 4, at 767–68; *cf. Oncale*, 118 S. Ct. at 1003 (stating that Title VII requirements “ensure that courts and juries do not mistake ordinary socializing in the workplace—such as *male-on-male horseplay* or intersexual flirtation—for discriminatory ‘conditions of employment’ ” (emphasis added)).

44. Abrams, *supra* note 4, at 1226.

45. *See* Schultz, *supra* note 4, at 1789.

46. Franke, *supra* note 4, at 769.

47. *Id.* at 769–70.

48. *Id.*

49. Abrams, *supra* note 4, at 1217.

50. According to Greek myth, Procrustes was a bandit who preyed upon travelers to Athens. He tied all the travelers he could catch to an iron bed. If they were too tall to fit into the bed, he cut off their feet. If they were too short to fit, he stretched them until they were the right length. Procrustes was eventually killed by Theseus. *See* EDITH HAMILTON, MYTHOLOGY 210–11 (1942).

forms of workplace harassment into its framework involves doing violence to the basic concept of workplace discrimination. This article seeks to avoid the perils of a "one-size-fits-all" theory by taking up the challenge posed by scholars such as Franke, Abrams, and Schultz, and indeed, by going a step further in proposing a pluralistic understanding of workplace harassment. A pluralistic understanding emphasizes the patterned ways in which workplace harassment differentially affects members of discrete and vulnerable groups, particularly emphasizing the ways in which workplace harassment contributes to the systematic exclusion of women from positions of economic and political power. Further, this pluralistic understanding also accounts adequately for the negative nature of all workplace harassment, regardless of the gender<sup>51</sup> or sexual orientation of the harasser and the harassed and regardless of whether the harassing behavior is sexual in nature.

The argument for a pluralistic understanding of harassment begins with two basic premises. First, it assumes that every person has a right to be free from abusive treatment in the workplace. The term "every person" is used advisedly: a person's race, sex, religion, or national origin (or, for that matter, sexual orientation, disability, height, weight, physical attractiveness, accent, eye color, or other distinguishing characteristic) does not affect his or her basic humanity, and no human being should be treated abusively at work. Moreover, "abusive treatment" is used in its broad sense: treatment that—whether through intent or through reckless or negligent disregard of the consequences—tends to humiliate, torment, threaten, intimidate, pressure, demean, frighten, or injure the person toward whom it is directed.<sup>52</sup>

The second premise is that societal discrimination against members of certain historically less powerful groups is a real and serious social phenomenon that calls out urgently for legal and policy intervention. Women have historically faced discrimination in the workplace, this discrimination continues today, and the workplace harassment of women is often motivated by hostility to their presence in the workplace.<sup>53</sup> Even when harassment of women at work is not directly motivated by discriminatory impulses, it may still have a disproportion-

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51. In this article, I use the word "sex" and the word "gender" loosely and more or less interchangeably. There is an extensive feminist debate about the meaning and utility of these terms. For a short summary of this discussion, see Schultz, *supra* note 4, at 1686 n.8. For the limited purpose of this article, however, I see no reason to wade into that debate, and I use the terms in their most colloquial sense.

52. Like other similar concepts, this notion of harassment hinges on notions of severity and reasonableness. My understanding of harassment is greatly influenced by the work of Carroll Brodsky. See generally CARROLL M. BRODSKY, *THE HARASSED WORKER* (1976).

53. Cf. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981) (plaintiff making prima facie case shifts burden of proof to defendant to demonstrate lawful reasons for adverse employment action); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (Title VII does not permit use of conduct as pretext for discriminatory firing); *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1518 (11th Cir. 1990) (evidence that defendant said lower positions were sufficient for women and blacks sufficient to show gender played role in plaintiff not being hired).



ately adverse impact on the workplace advancement of women.<sup>54</sup>

#### B. DIGNITARY HARMS IN A CONTEXT OF DISCRIMINATION

In order to achieve such a pluralistic understanding of workplace harassment—one that permits us both to see why *all* workplace harassment is wrong regardless of the gender of the harasser or the harassed, but that still allows us to emphasize the patterned and discriminatory ways in which workplace harassment occurs—we must first avoid falling into the category confusion so common in sexual harassment doctrine. To avoid this confusion, the *nature of the harm* of sexual harassment, on the one hand, must be distinguished from the *context in which the harm occurs*, on the other.

The most fundamental harm of sexual harassment is a *dignitary harm*: by humiliating, intimidating, tormenting, pressuring, or mocking individuals in their places of work, sexual harassment is an insult to the dignity, autonomy, and personhood of each victim; such harassment violates each individual's right to be treated with the respect and concern that is due to her as a full and equally valuable human being.<sup>55</sup> The harm of sexual harassment, then, is a dignitary harm, closely akin to other, nonsexual, dignitary harms. But is this the end of the story? No—for dignitary harms do not occur in a vacuum: the *context* in which those dignitary harms take place is also critical to an ultimate understanding of the harm. The Twentieth Century has seen an unprecedented flow of women both into the workforce and, in particular, into jobs previously dominated by men.<sup>56</sup> Men have resisted, often aggressively and sometimes violently, this massive influx of women into "men's jobs."<sup>57</sup> To a significant extent, when a woman is harassed at work, her harassment needs to be seen as part of a discriminatory backlash: a last-ditch effort by men to preserve the playgrounds of male power from female competitors.<sup>58</sup> Not *all* workplace harassment of women is motivated by a desire—explicit or implicit—to keep women out of male-dominated jobs. However, failure to recognize that much—perhaps most—workplace harassment of women is motivated by discriminatory male attitudes would be to miss the forest for the trees. The *harm* of workplace sexual harassment is a dignitary harm, but the *context* in which the harm occurs is a context of discrimination against women in the workplace.

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54. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

55. Cf. Bernstein, *supra* note 23, at 450 (arguing that "hostile environment sexual harassment . . . is a type of incivility or—in the locution that I prefer—disrespect"). See also Hager, *supra* note 23, at 377 (arguing that "sexual harassment [should] be viewed as an offense to personal dignity and autonomy").

56. In 1900, fewer than 20% of American women were employed. In 1997, 60% were employed. See Bureau of Labor Statistics (visited Feb. 25, 1999) <<http://stats.bls.gov>>.

57. See, e.g., Lynn Darling, *Feminism 20 Years Later*, NEWSDAY, Feb. 10, 1987, at 4; see also Tracey L. Adams, *Gender and Women's Employment in the Male-Dominated Profession of Dentistry: 1867-1917*, CANADIAN REV. OF SOC. & ANTHROPOLOGY, Feb. 1, 1998, at 21, 23-25 (citing studies documenting male attempts to exclude women from a variety of occupations); Johanna Brenner, *On Gender and Class in U.S. Labor History*, MONTHLY REV., Nov. 1998, at 1.

58. See generally Schultz, *supra* note 4.

Two analogies may help to clarify this distinction. Consider, first, violent sexual assault: rape, attempted rape, and so on. The nature of the harm is clear: such assaults are violent attacks upon the person—crimes of violence that may cause both physical and psychological harm. In American society, the vast majority of sexual assaults are perpetrated by men against women,<sup>59</sup> and ample evidence links the prevalence of violent sexual assaults against women to more generalized cultural denigration and objectification of women.<sup>60</sup> Here the harm of sexual violence occurs within a particular context of long-standing discrimination against women.

From a policy perspective, this context is of tremendous significance. When crafting programs designed to raise the status of women or prevent sexual violence, speaking of the harm of sexual assault without reference to its broader context—recognizing that most perpetrators are men and most victims women—would be absurd.

Nonetheless, the context of the harm is not identical to the nature of the harm. Although widespread societal denigration and objectification of women may lead to a high number of violent sexual attacks on women,<sup>61</sup> violent sexual assault is wrong because it is a violent and invasive attack upon a *human being*, not because such assaults usually happen to women and usually are inflicted by men.<sup>62</sup> Indeed, men, too, are sexually assaulted, but to say either that when men are raped it is because of societal denigration of women<sup>63</sup> or that a man who is raped suffers less than a woman who is raped hardly makes sense.<sup>64</sup> A man's

59. See, e.g., Lawrence O. Gostin et al., *HIV Testing, Counseling, and Prophylaxis after Sexual Assault*, 271 JAMA 1436 (1994) (noting that in 1991, there were 683,000 forcible rapes of adult women and only about 10,000 sexual assaults on males aged 12 or older); see also U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIM. JUSTICE STATISTICS—1991, at 275, 756–59 (Timothy J. Flanagan & Kathleen Maguire eds., 1991) (noting that 1.0 women out of every 1000 were victims of completed or attempted rape, compared to only 0.2 in every 1000 males).

60. See MAKING VIOLENCE SEXY: FEMINIST VIEWS ON PORNOGRAPHY (Diana Russell ed., 1993); Jennifer Gaffney, *Amending the Violence Against Women Act: Creating Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL'Y 247 (1997); Kim Archer, *Rapists in Today's Society Often Have a Familiar Face—And Researchers Agree Our Culture is to Blame*, TULSA WORLD, May 30, 1989, at C1.

61. And may also lead society, police, and the courts to further harm female victims of violent sexual assault by blaming or stigmatizing them.

62. *But cf.* Elaine Herscher, *Campaign Focuses on Abused Lesbians: Ads Deal With Usually Taboo Subject*, SAN FRANCISCO CHRON., July 13, 1998, at A11 (noting that female-female rape is a significant problem within the lesbian community).

63. Though, arguably, sexual assault on “effeminate” men by “in masculine” men may be due to gender stereotyping (this is parallel to the argument that effeminate men are harassed by more “masculine” male colleagues who harass based on sexist gender stereotyping). See generally MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* 57–85 (1997).

64. There is, on the contrary, some evidence that male rape victims may suffer as much or even more than female rape victims. See, e.g., *People v. Richard Yates*, 215 N.Y.L.J. 26 (N.Y. County, First Judicial Dep't, Jan. 4, 1996) (citing studies showing that “men are likely to be abused more violently and by multiple attackers, to sustain more serious injuries, [and] to feel more stigmatized” than female rape victims); see also Craig L. Anderson, *Males as Sexual Assault Victims: Multiple Levels of Trauma*, in *HOMOSEXUALITY AND PSYCHOTHERAPY: A PRACTITIONERS HANDBOOK OF AFFIRMATIVE MODELS* 145, 148–55 (1982).

suffering may, indeed, be “different” from a woman’s in that his understanding of what has happened to him will be filtered through his perceptions of the social meaning of rape and masculinity. Thus, although the same context may affect his suffering in different ways, there is no basis for claiming that he suffers less than a woman, so any “theory” that purports to explain the harms of sexual violence needs to take into account the fact that men as well as women can be victims. Violent sexual assault is wrong, then, because no human being, regardless of gender, should be violently attacked or compelled to have sexual relations against his or her wishes.

As another example, consider the Second World War, during which an estimated six million Jews were murdered in Nazi concentration camps. Since the Holocaust, the world has struggled to come to terms with the murder of so many millions and to characterize the colossal wrongness of the death camps. Some have emphasized that the Holocaust was primarily “about” anti-Semitism because it involved a deliberate policy of murdering all Jews who could be found.<sup>65</sup> Characterizing the Holocaust as “about” anti-Semitism captures a deep, and important, truth: the Holocaust cannot be understood without also understanding the history of the Jews in Europe, the rise of European anti-Semitism, and the deliberate exploitation and fomenting of anti-Semitic sentiment by Adolph Hitler. An understanding of the Holocaust relies on an understanding of anti-Semitism, and an understanding of Europe’s shameful history of anti-Semitism (replete with near-constant discrimination and episodic pogroms) likewise is necessary to prevent future discrimination or atrocities against people of Jewish origin.<sup>66</sup>

Characterizing the Holocaust as primarily “about” anti-Semitism captures one deep truth, but it misses another. The Holocaust involved the systematic brutalization and slaughter of millions of human beings—mostly Jews, but also Poles, communists, homosexuals, dissidents, persons with mental and physical disabilities, and assorted other “undesirables.” The Nazis cast a wide net; they murdered Jews because they were Jews, but they also murdered many other people, some because they were members of an “undesirable” group, others for almost any reason, or for no reason at all.<sup>67</sup>

Because the Nazis systematically ignored the value of human life and dignity, the death camps may be characterized as representing a “crime against humanity.” This phrase emphasizes two things. First, the phrase emphasizes the fact that the millions murdered were not all Jews, even though most of them were.

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65. Cf. Gunter Remmling, *Discrimination, Persecution, Theft, and Murder under Color of Law: The Totalitarian Corruption of the German Legal System, 1933–1945*, in GENOCIDE AND THE MODERN AGE 185 (Isidor Wallimann & Michael N. Dobkowski eds., 1987).

66. See generally Robert Waite, *The Holocaust and Historical Explanation*, in GENOCIDE AND THE MODERN AGE, *supra* note 65, at 163.

67. In other words, simply because they were “inconvenient” or a threat. See generally Waite, *supra* note 66; Ronald Aronson, *Social Madness*, in GENOCIDE AND THE MODERN AGE, *supra* note 65, at 123.

Second, and most important, it emphasizes that the death camps were wrong not because brutalizing and killing *Jews* is wrong, but because Jews, along with communists, Poles, homosexuals, and other persecuted individuals, are all human beings and because the systematic devaluing and murder of human beings is a deep wrong.

An analytic distinction can therefore be drawn between the nature of the harm of the death camps and the context in which that harm occurred. The nature of the harm, of course, has to do both with violence and with the denial of human dignity. The context in which the harms occurred was a context of virulent anti-Semitism. Consideration of both the nature of the harms and their context is necessary to an understanding of the Holocaust and necessary to prevent future events like it. Both are important, and each gets at important truths; however, considered in isolation, neither tells the whole story.<sup>68</sup>

### C. "INDIVIDUAL" VERSUS "GROUP" HARMS

The often facile distinction between "individual harms" and "group harms" must be problematized and broken down.<sup>69</sup> This distinction is, by now, a hoary one and, for many early feminists, a valuable one. But at times—particularly in the context of workplace harassment—the distinction can nevertheless obfuscate as much as it enlightens.

If a woman is harassed at work, it may be that she was targeted for sexual harassment because her harasser bore a general animosity toward women in the workplace and that her harassment was not, in this sense, "personal"; that is, she was targeted because of the characteristics she shares with all other women, not because of characteristics that are entirely individual and unique to her. Nonetheless, she suffers as an individual and feels degraded or frightened or outraged as an individual. The quality of her suffering is not altered, in some easily predictable way, by the fact that she is a woman and that she was targeted for harassment because of her gender.

If the victim understands that she was targeted for discriminatory reasons, her individual suffering may worsen, for she may feel doubly undermined and attacked, both as an individual and as a woman. Her suffering may be compounded if she feels trapped—condemned always to be targeted for an attribute she cannot change. On the other hand, her awareness of having been targeted

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68. Indeed, I would argue that an exclusive tendency among some Holocaust scholars to focus on the harm's context (anti-Semitism) rather than the harm's nature (violence and systematic dehumanization) has been detrimental to attempts to understand and prevent the conditions that give rise to genocide and mass killings in other circumstances. Many Holocaust scholars have insisted that the Holocaust was *sui generis* in nature, a moral wrong so unique to the Jews that we cannot attempt to compare it to other mass killings. See, e.g., Alan Rosenberg, *Was the Holocaust Unique?: A Peculiar Question*, in *GENOCIDE AND THE MODERN AGE*, *supra* note 65, at 145; Waite, *supra* note 66. As a human rights advocate, I find this view shortsighted, because it tends to discourage people from trying to draw lessons from the Holocaust, lessons that, if drawn, might have helped the world prevent the atrocities in Bosnia, Rwanda, and elsewhere.

69. See generally MACKINNON, *supra* note 1.

for discriminatory reasons may, instead, diminish her individual suffering, because she may feel better able to brush off the harassment precisely because she knows that nothing she did or could have done would have prevented it; she may feel empowered by her awareness that she is integral to a broader struggle to demand that all women be treated as full persons.

Distinguishing between “individual” and “group” harms has a certain analytic convenience, but in the context of workplace harassment, at least, this distinction can conflate very different things to the detriment of doctrinal clarity and practical advancement. More specifically, in much of the discussion of Title VII antidiscrimination doctrine, the tendency to conceptualize sexual harassment as a “group harm” has conflated the nature of the harm of sexual harassment, a dignitary harm, with the context in which that harm occurs: a context of discrimination against women.

#### D. THE IMPORTANCE OF DISAGGREGATION

The harm of sexual harassment must be disaggregated from its context. Otherwise, no clear and nonarbitrary basis exists for permitting some claims, but not others, under Title VII. Moreover, disaggregating the harm and its context points the way to a clearer vision of the wrong of all workplace harassment, sexual or nonsexual, regardless of whether the motive for harassment is discriminatory or not. Disaggregation also permits movement away from an essentialist paradigm of workplace harassment, which places primary emphasis on women’s differences from others, and toward an approach that acknowledges the realities of gender-based discrimination while simultaneously offering a dignity and equality-based paradigm for understanding harassment; this paradigm emphasizes that women have the right to be free from workplace harassment simply because they are human beings.

The fact that much male workplace harassment of women arises out of hostility to the presence of women in traditionally male domains has deep implications for policy and prevention. Nonetheless, we need an understanding of workplace harassment that can encompass both discriminatory harassment of women, by men, and all other kinds of workplace harassment as well—whether the harassment is directed at women or men, by women or men, whether motivated by discriminatory animus or not,<sup>70</sup> and whether sexual in nature or not.

Disaggregating the nature of the harm of workplace harassment from the context of the harm allows for an articulation of what is wrong with instances of

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70. One could argue, of course, that all workplace harassment of women should be seen as per se discrimination, because the workplace harassment of any woman makes it harder for women—as a historically disadvantaged class—to advance in the workplace. This question is about adverse impact: does the cumulative effect of many instances of workplace harassment of women—even if none of the instances is motivated by hostility to women as a group—add up to de facto discrimination, because even such facially nondiscriminatory harassment occurs in a context in which women have long faced discrimination? This is a complex question and, again, one that is beyond the scope of this discussion.

harassment that do not fit into the classic paradigm, specifically instances of harassment that do not involve men harassing women.<sup>71</sup> Focusing on the dignitary harms of workplace sexual harassment also allows for movement beyond a narrow focus on sexualized harassment. Understanding sexual harassment as a dignitary harm that insults the dignity, autonomy, and personhood of the victim makes easier a view that sexualized harassment is not the only way a harasser can insult his victim's dignity and personhood: many nonsexualized behaviors can also degrade, frighten, and torment.<sup>72</sup>

Disaggregation is important for another reason, as well; when faced with the classic sexual harassment paradigm, in which a woman is sexually harassed by a man, disaggregating the harm from its context reveals a critical moral and political point, one that emphasizes what all humans, male and female, have in common, rather than emphasizing an essentialist vision in which men and women are forever different and opposed.<sup>73</sup>

Male sexual harassment of women is, indeed, part of a broad problem of societal discrimination against women. However, male sexual harassment of women is not wrong because women are uniquely vulnerable to men, because men are always vulgar and loutish, or because women have "special" sensitivities and rights that men do not share. These essentialist assumptions are fostered by the tendency of many commentators to emphasize the context of sexual harassment over the nature of harms (or, put differently, to emphasize that it is a "group harm" rather than an "individual harm").

Such essentialist misunderstandings of the wrong of sexual harassment have contributed to a growing societal backlash against women who complain of sexual harassment.<sup>74</sup> Emphasizing the dignitary nature of the harm of sexual harassment instead of focusing exclusively on its discriminatory context can do a great deal to diminish the strength of this backlash. By focusing on the nature of the harm of sexual harassment, sexual harassment is viewed as wrong not because it wrongs women, but because such treatment would deeply wrong any human being, regardless of sex.<sup>75</sup>

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71. It may be helpful to imagine two circles, one contained by the other. Label the outside circle, "actions that cause dignitary harm," and label the inside circle, "discriminatory actions." In some sense, all discriminatory actions involve the infliction of dignitary harms, making discrimination a subset of dignitary harm. However, not all actions that cause dignitary harm are discriminatory.

72. Cf. Schultz, *supra* note 4 (discussing the dangers of what she calls the "desire-based paradigm" for understanding the workplace harassment of women).

73. Cf. Franke, *supra* note 4, at 760 (critiquing MacKinnon's "subordination theory" of sexual harassment on grounds that it relies "too heavily on the premise that [sexual harassment] is something that men, as a biological category, do to women, as a biological category").

74. Consider, for instance, David Mamet's successful play *Oleanna*, which depicts a female student who falsely accuses a male professor of sexual harassment. See Nelson Pressley, "*Oleanna*" Deals a One-two Punch Right to PC's Glass Jaw, WASH. TIMES, Apr. 1, 1996, at C11; cf. Abrams, *supra* note 4, at 1176 (warning of dangers of "reinforcing the all-too-prevalent belief that [sexual harassment] is a women's injury that cannot be apprehended by the rest of the population").

75. Cf. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2367 (1997) (arguing that "when we interpret civil rights in terms of status groups, we replace the inquiry into discrimination

### III. LOOKING TO THE COMMON LAW

#### A. THE CONCEPT OF DIGNITARY HARM

The common law of tort poses a promising way to understand and address the many forms of workplace harassment. Modern tort law embraces the concept of “dignitary harm,” a harm that injures “personality interests” rather than one’s physical well-being.<sup>76</sup> While the common-law notion of harm to one’s dignity or personality interests may not bear intense philosophical scrutiny, its core assumptions are clear enough: all individuals share in “personhood,” are autonomous and unique, and are entitled to be treated with respect. Actions that would humiliate, torment, threaten, intimidate, pressure, demean, frighten, outrage, or injure a reasonable person<sup>77</sup> are actions that can be said to injure an individual’s dignitary interests and, if sufficiently severe, can give rise to causes of action in tort.

The application of modern tort law to workplace harassment is probably best understood by a brief description of some of the torts currently recognized as having to do with dignitary harms.<sup>78</sup> Consider, first, the intentional torts: assault, battery, false imprisonment, and intentional infliction of emotional distress, all of which are designed to provide redress for mental disturbances such as “fright, revulsion [and] humiliation.”<sup>79</sup>

A “battery” is “a harmful or offensive contact with a person,” made with intent.<sup>80</sup> The *Restatement of Torts* comments that for the purposes of this tort, “a bodily contact is offensive if it offends a reasonable sense of personal dignity” and is “unwarranted by the social usages prevalent at the time and place at which it is inflicted.”<sup>81</sup>

“Assault,” which, according to Prosser and Keeton, goes together with battery “like ham and eggs,” is “an act of such a nature as to excite an

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based on immutable traits with an inquiry into systems of social meaning and status hierarchy”); Bernstein, *supra* note 23, at 455 (arguing, somewhat analogously, that using her concept of “respectful person” to assess Title VII hostile environment sexual harassment claims is beneficial in part because it “comes close to gender neutrality”). *But see* Abrams, *supra* note 4, at 1185–86 (critiquing dangers of overly gender-neutral standard).

76. *See generally* Bernstein, *supra* note 23; Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

77. I am aware of the extensive feminist debate about the concept of “reasonableness,” but I see that debate as beyond the scope of this article. For a feminist critique of the concept, see Bernstein, *supra* note 23, at 453–87.

78. Because my argument in this article is general, rather than focused on the law of any particular state, I do not attempt to go beyond those paradigmatic torts discussed in the RESTATEMENT (SECOND) OF TORTS (1965) [hereinafter RESTATEMENT]. Needless to say, not all states accept the *Restatement* in its entirety, and states vary greatly in the torts they recognize and their willingness to develop “new” torts or to read new meanings into existing tort causes of action.

79. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 40 (5th ed. 1984) [hereinafter PROSSER].

80. *Id.* at 39.

81. RESTATEMENT, *supra* note 78, § 19 cmt. a.

apprehension of a battery.”<sup>82</sup> Prosser and Keeton regard the torts of assault and battery as entitling plaintiffs to “protection according to the usages of decent society, and offensive contacts, or those which are contrary to all good manners, need not be tolerated.”<sup>83</sup>

The tort of false imprisonment also involves emotional distress and dignitary harm, creating a cause of action when a person is confined against her will. In application, the tort is fairly broad; it protects plaintiffs who have been forced to stay in a room by a person who physically bars their exit, even if only for a relatively short period, just as it protects plaintiffs who literally have been wrongly confined in a prison cell.

The tort of intentional infliction of emotional distress is equally broad.<sup>84</sup> According to the *Restatement of Torts*, “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.”<sup>85</sup> At the time of the *Restatement of Torts*, most jurisdictions applied different standards to agents of common carriers, inns, and public utilities on the one hand and to ordinary defendants on the other. For an ordinary defendant to be liable for the intentional infliction of emotional distress, the distress induced had to be severe, beyond “mere insult, indignity, annoyance, or even threats . . . lacking in other circumstances of aggravation.”<sup>86</sup> For agents of common carriers and the like, however, who are deemed to have “special obligations to the public,” language which is “merely profane, or indecent, or grossly insulting to people of ordinary sensibility” is enough to give rise to liability.<sup>87</sup>

The intentional torts are not the only tort causes of action that protect dignitary interests. The torts of invasion of privacy and defamation do so as well. “Invasion of privacy” is usually deemed to consist of four distinct sub-torts: the wrongful appropriation of an individual’s name or image, unreasonable intrusion upon an individual’s seclusion (“seclusion” here applies to an individual’s body as well as his or her home or private concerns), the public disclosure of private facts about an individual, and publicity that places an individual in “a false light” in the public eye.<sup>88</sup> The tort of defamation has to do with “an invasion of the interest in reputation and good name” and consists of two sub-torts: libel and slander. Both libel and slander involve the communication to third parties of information that would tend “to injure ‘reputation’ in the popular sense; to diminish the esteem, respect, goodwill, or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or

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82. PROSSER, *supra* note 79, at 46.

83. *Id.* at 42.

84. See, e.g., *Pease v. Alford Photo Indus.*, 667 F. Supp. 1188 (W.D. Tenn. 1987) (female employee entitled to compensatory and punitive damages on claims of assault and battery, intentional infliction of emotional distress, invasion of privacy, and outrageous conduct for quid pro quo harassment).

85. RESTATEMENT, *supra* note 78, at § 46.

86. PROSSER, *supra* note 79, at 59 (citations omitted).

87. *Id.* at 58 (citations omitted).

88. See generally *id.* at 849–69.



opinions against him.”<sup>89</sup> Libel is the “publication of defamatory matters” in writing or other permanent form; slander is essentially spoken defamation.<sup>90</sup>

All of these tort causes of action rest on certain underlying assumptions about human dignity, privacy, and personality—assumptions that the courts rarely seek to justify or even articulate, but that they make nonetheless. These assumptions are familiar to us from constitutional jurisprudence: in *Goldberg v. Kelly*,<sup>91</sup> the Supreme Court declared, “From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”<sup>92</sup> Abortion cases generally fall back upon notions of human dignity as well: thus, in *Planned Parenthood v. Casey*,<sup>93</sup> the Court noted that decisions relating to marriage and procreation are “choices central to personal dignity and autonomy.”<sup>94</sup> In the realm of criminal justice, the Court has also insisted that human dignity is an essential concept; each individual must “be evaluated as a unique human being,” the dissent declared in *McCleskey v. Kemp*.<sup>95</sup> In *Miranda v. Arizona*,<sup>96</sup> the Court spoke of the government’s obligation to respect “the dignity and integrity of its citizens.”<sup>97</sup>

In First Amendment jurisprudence, the concern is the same: “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty,” commented Justice Stewart in *Rosenblatt v. Baer*.<sup>98</sup> The Court has been equally clear that “human dignity” implies an individual’s right to control the boundaries of the self. In *United States v. White*,<sup>99</sup> the Court noted, “The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and what must remain unspoken.”<sup>100</sup>

In U.S. constitutional jurisprudence, these assumptions about personhood and dignity are, perhaps, best understood as imports from a centuries-old common-law tradition; within the common-law tradition, they can be best understood as norms about how individuals should behave and how communities should

89. *Id.* at 773 (citations omitted).

90. *Id.* at 785–87.

91. 397 U.S. 254 (1970).

92. *Id.* at 264–65.

93. 505 U.S. 833 (1992) (plurality opinion).

94. *Id.* at 851.

95. 481 U.S. 279, 336 (1987) (Brennan, J., dissenting); *see also* *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

96. 84 U.S. 436 (1966).

97. *Id.* at 460.

98. 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

99. 401 U.S. 745 (1971).

100. *Id.* at 763; *cf.* BRUCE ACKERMAN, *Temporal Horizons of Injustice*, in *THE JOURNAL OF PHILOSOPHY* 306 (1999) (“We require a new idea—that justice requires us to respect each others’ right to tell stories of a certain kind about our ongoing relationships.”).

function. To articulate and defend a philosophically coherent notion of “personhood” or “dignity” may or may not be possible. However, the application of tort conceptions of “dignity” to workplace harassment rests not on an argument that courts *should* adopt a particular conception of human dignity and personality, but instead rests on a recognition that courts simply *do* assume that human beings have a certain inherent dignity and that this dignity may not be violated, either by the state or by other private individuals.<sup>101</sup> Further, a real connection exists between the assumptions about human dignity made by the courts and the assumptions about human dignity that most Americans hold.<sup>102</sup>

This project of discussing the assumptions inherent in the tort causes of action mentioned above is descriptive; indeed, in a deep sense, the project of the common law itself is descriptive.<sup>103</sup> As Robert Post observed, “the common law attempts not to search out and articulate first ethical principles, as would a certain kind of moral philosopher, but instead to discover and refresh the social norms by which we live.”<sup>104</sup> The common law assumes both that there is such a thing as human dignity and that human dignity requires that each individual have substantial control over what may be called the “boundaries of the self.”<sup>105</sup> Most obviously, human dignity requires that people be able to control other people’s access to their physical selves. The boundaries of their physical selves, of course, are protected by the existence of causes of action for assault and battery (and, to some extent, by the tort of invasion of privacy).

Human dignity in the common-law sense, however, also requires the mainte-

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101. For a discussion of the common law heritage of the closely related concept of “respect,” see Bernstein, *supra* note 23. Bernstein also argues that the common law acknowledges a general “duty not to humiliate,” which “requires the agent to consider the dignity of the other and refrain from injuring that dignity.” *Id.* at 490; see also Jeremy Waldron, *On Humiliation*, 93 MICH. L. REV. 1787, 1792 (1995).

102. I do not seek here to put forth a general theory about the relationship between the common law and social norms, although I take it for granted that the common law both reflects widely held norms and, in turn, can foster changes in widely held norms. See generally Post, *supra* note 76. For a discussion of the ways in which law interacts with social norms, see LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT (Paul Bohann ed., 1967) and Lawrence J. Friedman, *The Concept of Legal Culture: A Reply*, in COMPARATIVE LEGAL CULTURES 33–35 (David Nelke ed., 1987).

103. By saying that the common law’s project is descriptive in a deep sense, I do not mean to dispute the notion that judges do “make law” as well as describe it. As noted in note 102, I agree fully that the common law both reflects social norms and can alter social norms, and creative judges go about this process in a self-conscious fashion. Again, I do not pretend to have a full-fledged theory of how law reflects and changes social norms. Intuitively, however, I assume that even when judges try self-consciously to alter social norms through progressive opinions, they cannot simply pluck their reasoning out of thin air: to have any long-term effect, it needs to be linked, at least, to social norms that are already emerging.

104. Post, *supra* note 76, at 970; see also Jane E. Larson, “Imagine Her Satisfaction”: *The Transformative Task of Feminist Tort Work*, 33 WASHBURN L.J. 56, 69 (1993) (noting that the common law is “built upon social custom and experience rather than upon abstract ideals”); cf. 2 JOEL FEINBERG, ON HARM AND THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985).

105. Cf. Bernstein, *supra* note 23, at 491 (noting that concepts of personhood have to do with “the boundaries that separate individuals from one another”). For a discussion of the notion of boundaries and inviolability, see Linda McClain, *Inviolability and Privacy: The Castle, The Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995).

nance of control over "personality," the intangible, nonphysical aspects of the self. From this common-law notion of "inviolable personality," Warren and Brandeis derived the tort of invasion of privacy, which they saw as "part of the general right to the immunity of the person—the right to one's personality."<sup>106</sup> To another commentator, the common law notion of privacy (in the broad sense, rather than in the narrow sense of the tort) is "control over when and by whom the various parts of us can be sensed by others."<sup>107</sup>

The tort causes of action discussed above contain a cluster of associated ideas: dignity, autonomy, personhood and personality, selfhood, privacy, decency, respect, and so on. In the common law, these ideas tend not to be defined abstractly; their contours become most apparent in their breach. Opposed to the notions of dignity and personhood are notions of invasion, intrusion, outrage, affront, insult, incivility, humiliation, and degradation. To Robert Post, the common law allows recovery for violations of the "rules of decency" acknowledged by reasonable people, because it recognizes that such violations "damage a person by discrediting his identity and injuring his personality."<sup>108</sup> Similarly, Prosser and Keeton, discussing the tort of intentional infliction of emotional distress, note that "[s]o far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society."<sup>109</sup>

It is tempting to try to define and clarify the fuzzy notion of the "boundaries of the self." Such a definition might begin with a statement that certain kinds of issues—sexuality, intimate family relationships, personal character flaws, deeply held religious beliefs, personal finances, and personal appearance—are all "private" and should be off limits to all but intimate associates at all times. However, exceptions are easily imagined; there are situations in which probing in these areas is not merely accepted but approved. To state the obvious, "rules of decency" are context-dependent. Few kinds of behavior are "always" an affront to human dignity,<sup>110</sup> and efforts to map out the private territory that is "off limits" generally fall down when confronted with context-specific examples. Behavior that is appropriate at a party or a singles bar might be deeply inappropriate and offensive to a reasonable person at a funeral—or in the workplace. A question that is not intrusive when asked by a close friend or even

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106. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205, 207 (1890).

107. Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974).

108. Post, *supra* note 76, at 963.

109. PROSSER, *supra* note 79, at 60.

110. In this discussion, I use the notion of "affront to human dignity" in the civil, rather than the quasi-criminal sense. As students of human rights law know, certain particularly egregious behaviors will be deemed always to violate human dignity, regardless of context: the use of torture, for instance, is proscribed by customary international law, and is considered to be so deeply violative of human dignity that "no exceptional circumstance whatsoever" (including wartime threats, etc.) can justify it. *See, e.g.*, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I, Art. 2(2), U.N. Doc. A/RES/39/46 (1984).

by a new social acquaintance might reasonably be deemed offensive when asked by a stranger at the bus stop or by one's boss at work.

In Post's formulation, then, common-law cases involving dignitary harms are not about delineating abstract boundaries, but about "characterizing social norms"; a plaintiff is entitled to relief if the defendant "has transgressed the kind of social norms whose violation would properly be viewed with outrage and affront . . . [for] the integrity of individual personality is dependent upon the observance of certain kinds of social norms."<sup>111</sup>

#### B. THE RELEVANCE OF THE TORT NOTION OF DIGNITARY HARM TO WORKPLACE HARASSMENT

##### 1. Relevance to Sexual Harassment in the Paradigmatic Sense

When we think about sexual harassment cases, the relevance of these common-law notions of human dignity—and therefore tort causes of action like assault, battery, invasion of privacy, false imprisonment, defamation, and intentional infliction of emotional distress—should be obvious at once. The harm of sexual harassment is in many ways a quintessential dignitary harm:<sup>112</sup> paradigmatic cases of sexual harassment involve the transgression of social norms involving the boundaries of both the physical self and the "personality."<sup>113</sup> Sexual harassment subjects an individual to behavior that violates basic standards of decency and privacy; rather than choosing the people with whom she will become intimate, the victim of sexual harassment has sexual intimacies forced upon her by her harasser.<sup>114</sup> This distinction is true whether the intimacies are physical or verbal because sexual harassment, by its nature, takes from the victim the right to be "sole judge as to what must be said and what must remain unspoken."<sup>115</sup>

If the harm of sexual harassment is a dignitary harm, then these torts offer potential remedies, above and beyond any that might be offered by Title VII.

111. Post, *supra* note 76, at 962.

112. Numerous judicial opinions have noted that sexual harassment humiliates the victim. See, e.g., *Ascolese v. Southeastern Penn. Transp. Auth.*, 925 F. Supp. 351, 360–61 (E.D. Pa. 1996); *Williams v. Saxbe*, 413 F. Supp. 654, 655–56 (D.D.C. 1976), *vacated sub. nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978); *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995).

113. Cf. *Abrams*, *supra* note 4, at 1220 (noting that sexual harassment "interferes with the capacity to both define oneself as a subject and seek less stereotypic and confining roles").

114. Cf. *Bernstein*, *supra* note 23, at 450 ("Hostile environment sexual harassment . . . is a type of incivility or—in the locution that I prefer—disrespect."). *Bernstein* is concerned primarily with Title VII, but she argues that creating a "respectful person" standard for assessing hostile environment sexual harassment claims under Title VII also gives "content to the . . . ideal of individual autonomy behind dignitary tort law." *Id.*

115. *United States v. White*, 401 U.S. 745, 763 (1971); cf. *Ackerman*, *supra* note 100 (noting that "we should look to the way the work environment suppresses a fundamental human capacity—the capacity to project the meaning of one's life over time by telling a story that includes meaningful participation in relationships. Without such a capacity, it would simply be impossible to live a human life. A social environment that denies a woman this possibility strikes at a crucial dimension of human dignity. . .").

Consider, for example, a hypothetical:

Jane works at Big Boy Industries, a diversified company that manufactures guns, race cars, cigars, and whisky. Her supervisor, Ed, comes to her one day as she is leaving the supply closet and says, "I sure like your dress, gal! Are you wearing a bra?" Jane tries to step past Ed, but he blocks the way. "I just want to see if you have a bra on," chortles Ed. "And undies—you got them on?" Jane tries again to step past Ed, who again blocks the way. "Cut it out, Ed—leave me alone!" says Jane. "Oh no," says Ed. "If you won't tell me if you're wearing underwear, I'll just have to look for myself." With that, he pushes Jane back into the supply closet and grabs at her clothes, trying to push them aside. Jane yells, loudly, and a passerby calls out, "Anything wrong?" Ed abruptly lets go of Jane, and she manages to rush past him.

In the days and weeks that follow, Ed launches a vendetta against Jane. He follows her around at work, mocking her. He rifles through her belongings and leaves pornographic materials on her desk. She overhears him telling coworkers that she's "an ugly, man-hating bitch, and she'll say anything to get a man in trouble." He informs coworkers that Jane has been married—and divorced—four times, which is not true, and theorizes that this fictitious disastrous marital history is because "she can't keep a man." Jane soon finds that many of her coworkers avoid her or, worse, also begin to sneer at her.

Although Jane repeatedly asks Ed to stop, he pays no attention, even though his persecution often leaves her angry and upset. Jane also complains repeatedly to another member of the supervisory staff at Big Boy Industries, who promises to look into the situation, but nothing changes at all. One day, after complaining vociferously about Ed's actions, Jane arrives at work to find that Ed has taken a photo of a nude woman, put a picture of Jane's head on top of it, and posted copies of this on all the company's bulletin boards, with the caption, "Sluts shouldn't tell lies."

The hypothetical may sound exaggerated, but compared to the facts of many real sexual harassment cases, it is not a particularly extreme example of what many women endure in the workplace.<sup>116</sup> And "Jane," were she real, could assert multiple tort-based causes of action against Ed and Big Boy Industries.

Consider, as background, assumptions made about the kinds of behavior that are expected in the workplace. When going to work, employees expect to enter a realm in which their treatment will be based on their job descriptions.<sup>117</sup> To

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116. See cases discussed *infra* Part III.D.

117. It could be said that we assume a particular "role" when we go to work, and the contours of that role are defined by our job descriptions. In a deep sense, we rarely expose our "full selves" to others; we are always assuming one role or another. Some would say, in fact, that the notion of a full, or "true," self is nonsense, because the self simply *is* a collection of roles and relations: in this sense, having our "selfhood" or "personhood" respected simply involves having others respect our right to choose *which* role we will assume on any given occasion. If we alter our persona, or role, depending upon the circumstances and the nature of our relations with others, it is clear that another person's refusal to respect our choice of roles is, in the deepest possible way, an attack upon our "selfhood."

the extent that employees are judged by others, they expect to be judged based on whether or not they are doing their jobs well, not on attractiveness, sex or race, or willingness to discuss the most intimate aspects of their lives. While we may expect to make friends—and perhaps even form intimate relationships—with people we meet in the workplace, we assume that they have no more right to query us on non-work-related issues than any stranger standing next to us at the bus stop, unless and until we signal to them that a different kind of behavior would be acceptable.<sup>118</sup>

Returning to the facts given in the hypothetical, Ed's demand to look for himself to determine whether Jane wore underwear, accompanied by his gestures, might reasonably be viewed as assault by a jury. A jury could certainly take the view that Ed's actions would have "[offended] a reasonable sense of personal dignity," in the sense of the *Restatement of Torts* and were clearly "unwarranted by the social usages prevalent at the time and place at which [they were] inflicted."<sup>119</sup> Ed's subsequent pushing and grabbing would likely be seen by a court as constituting battery and, probably, invasion of privacy—an intrusion into the physical boundaries of the self. Ed's refusal to let Jane out of the supply closet could constitute false imprisonment. Rifling through Jane's belongings could also be said to constitute invasion of privacy, and telling false stories about Jane's marital history might be seen as constituting "false light" invasion of privacy as well as slander, because it could have—and apparently did—damage Jane's "reputation and good name." Ed's posting of the nude photo with Jane's face above it might similarly constitute "false light" invasion of privacy as well as the wrongful appropriation of her image and libel.

In whole, Ed's actions can also be said to constitute intentional infliction of emotional distress: his actions might well be viewed by a reasonable person as extending far beyond "mere insult, indignity or annoyance."<sup>120</sup> Jane would likely have a strong cause of action against Ed, and also against Big Boy Industries, because whether an agency standard or a negligence standard is applied, Big Boy is likely to be deemed liable for Jane's dignitary injuries.

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118. This notion of signaling is of course critical and merits more attention than I can give it in this article. Obviously, we cannot and do not expect coworkers simply to announce one day, "I consider you a friend as well as a coworker, and from now on you should feel free to ask me about my most intimate relationships." Most relationships—at work and elsewhere—are far more fluid than that, and the signals sent are far more subtle. This subtlety naturally leads to a great many innocent misunderstandings: one person may genuinely, but wrongly, believe that greater intimacy would be welcomed by a coworker.

This makes assessing tort claims extremely fact-dependent, and, on the margins, extraordinarily difficult. Nonetheless, although cases on the margins may be difficult to assess, the typical workplace sexual harassment scenario presents us with far more clear cut examples of behavior that a reasonable person would deem inappropriate. As I will discuss later, of course, "inappropriate" behavior does not always (and should not always) give rise to liability; assessing liability involves complex judgments about the degree of inappropriateness and harm, given the context.

119. RESTATEMENT, *supra* note 78, § 19 cmt. a.

120. PROSSER, *supra* note 79, at 59; *see also, e.g.*, *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987).

## 2. From Sexual Harassment to an Expansive Concept of Workplace Harassment

The language of the *Restatement of Torts* does not privilege sexual harms over nonsexual harms. In fact, much, if not most, of the case law on these torts concerns nonsexual harms. While the applicability of these common-law causes of action to “classic” situations of workplace sexual harassment is self-evident, the causes of action would be equally applicable both to less common kinds of sexual harassment (for instance, same-sex sexual harassment) and to workplace harassment that is not sexual in nature. Consider another hypothetical:

Albert, a white male, works as a busboy in a restaurant. One day, he drops a tray. His supervisor, Bill—also a white male—shouts at him in front of several coworkers and customers, saying, “Albert, you stupid moron! You’re an ugly, fat slob and don’t deserve this job! I’ve never had anyone this stupid and incompetent work here before!”

From that day on, Bill singles Albert out for abuse. Although Albert’s coworkers tell him that he does his job as well as—or better than—any other busboy, Bill repeatedly shouts at him in the presence of others, always making negative comments about his intelligence, coordination, physical appearance, and body odor and shouting that Albert is lazy, greedy, obese, and weak. When Albert’s girlfriend comes to pick him up one day, Bill tells her (in front of the other busboys), “Too bad you’re involved with such a smelly, pathetic, incompetent, mewling moron!” Bill’s taunts often reduce Albert to near tears.

When Albert protests to Bill about his treatment, Bill curses at him, grabs him by the shirt-collar, and says, “I do as I goddamn please, and you keep your mouth shut about it or I’ll kick your fat ass!” Looking Albert up and down, he says, “You’re so fat, it’s disgusting! I bet you have ugly rolls of fat all over you—let’s see!” Saying that, he tears open Albert’s shirt, looks him over, scornfully, and says, “Yup, too greedy and stupid to figure out how to diet.” Albert complains to Bill’s superiors, who refuse to discipline Bill or transfer Albert. Eventually, Albert quits.

This, like the earlier hypothetical, may seem extreme. Empirical research indicates, however, that this scenario too is hardly atypical.<sup>121</sup> Indeed, a recent survey by the International Labour Organization found that “bullying—targeting an employee for intimidation—and mobbing—ganging up on an employee—are among the fastest growing complaints of American work-

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121. It is difficult to state the frequency of such workplace harassment—a recent Bureau of Labor Statistics Survey suggested that up to 58% of harassment and 43% of threats in the workplace are never reported to management—but what evidence there is suggests that workplace harassment is widespread. See, e.g., Jennifer LeClaire, *Psychological Violence Threatens Workplace Performance*, OFFICE.COM/DAILY NEWS AND TRENDS (Dec. 22, 1998) <[www.bullybusters.org/home/twd/bb/press/of\\_fice.html](http://www.bullybusters.org/home/twd/bb/press/of_fice.html)>; BEVERLY H. PATRICK, *UNCIVIL WARS: MEN, WOMEN, AND OFFICE ETIQUETTE IN THE 1990S* (1997); Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 52 (1998) (arguing that workplace abuse is “sufficiently concrete, widespread, systemic, destructive, and avoidable to warrant political and judicial reform”).

ers.”<sup>122</sup> Even serious physical violence is hardly unknown in the workplace. The Department of Labor reported that there were 912 workplace homicides in 1996, and the Center for Disease Control declared workplace homicide a “serious public health epidemic.”<sup>123</sup> For many workers, especially, but not exclusively, blue-collar and service workers,<sup>124</sup> going to work involves checking one’s dignity at the door—subjecting oneself to a daily round of taunts and abuse about issues unrelated to legitimate questions of work performance. Although the workplace may be thought of as a site of liberation and growth, for many Americans the workplace is a site of daily humiliation and misery, endured out of economic necessity.

Obviously, Albert might assert numerous common-law causes of action against Bill. Bill’s comments about his stupidity, laziness, greed, and so on might be considered defamatory by a jury: “they could certainly be deemed to diminish the esteem, respect, goodwill or confidence” in which Albert is held and “excite adverse, derogatory or unpleasant feelings or opinions against him.”<sup>125</sup> Bill grabbed Albert by the shirt collar and threatened to kick his “fat ass” unless Albert stopped complaining of his abusive treatment, and Bill then ripped open Albert’s shirt buttons. A jury could certainly find this action to be an “offensive contact . . . contrary to all good manners.”<sup>126</sup> Bill could be said to have committed assault and battery, as well as invasion of privacy. In whole, Bill’s behavior might well be viewed by a jury as constituting intentional infliction of emotional distress.<sup>127</sup> To the extent that Bill’s acts were within the

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122. Jessica Gynn, *Hostility at Work: Couple Launches Campaign to Stop Incivility On the Job*, AUSTIN AM.-STATESMAN, Nov. 5, 1998, at D1; see also Stephanie Armour, *Running of the Bullies: Trampling Workplace Morale and Productivity, Offenders Can Spread Ill Will From the Top Down*, USA TODAY, Sept. 9, 1998, at 1B.

123. *New Prevention Program Targets Rise in Workplace Violence*, BUS. WIRE, Oct. 16, 1997.

124. Cf. Austin, *supra* note 121, at 3–5 (noting that when we consider the work experiences of “black and Latin employees of both sexes, and female workers . . . all of whom occupy the lower tiers of the labor force . . .” we find that “[m]embers of these groups share a historical experience of abusive supervision. For them, it is not isolated and sporadic rudeness, but a pervasive phenomenon that causes and perpetuates economic and social harm as well as emotional injury”); see also *id.* at 13 (“Status group characteristics can sometimes increase the amount of abusive behavior a worker must tolerate. More endurance is expected from males in general and from blue-collar workers in particular.”). To the extent that certain workplaces (i.e., blue-collar workplaces) are more routinely abusive than others, employers faced with tort claims involving worker harassment might be tempted to argue that a “tough” climate is standard in that industry, for all or most workers, and their behavior therefore conforms to accepted industry custom or practice. It seems to me that such a claim should be deemed to have little relevance: as we know from other areas of tort law (i.e., negligence), the fact that an unsafe or negligent practice is standard in an industry does not let a defendant off the hook.

125. PROSSER, *supra* note 79, § 112 at 785–797.

126. *Id.* at 42.

127. Cf. Austin, *supra* note 121, at 3–4. Austin argues that employers routinely make use of behaviors intended to induce emotional distress in order to control subordinates belonging to disempowered but threatening ethnic and gender groups (e.g., African-Americans, Latin workers, and women). See *id.* She examines the tort of intentional infliction of emotional distress as a potential remedy for such employer behavior. She notes that courts have been reluctant to construe this tort flexibly in the employment context, but argues for its broad application. I think Austin casts her net too broadly: many of the workplace behaviors Austin would like to prevent are relatively mild forms of unpleasantness



scope of his employment or that his employer knew or should have known of the harassment but failed to intervene, Albert's employer might also be liable for Bill's tortious acts.

### C. THE ROAD NOT TAKEN

Using tort causes of action appears to offer a promising way to approach workplace harassment. One might wonder, then, why most commentators instead made Title VII the sole focus of the debate about sexual harassment.<sup>128</sup>

#### 1. Early Feminist Arguments Against a Tort-Based Approach

Catharine MacKinnon considered the possibility of common-law tort remedies for sexual harassment in her 1979 book, *Sexual Harassment of Working Women*, but she quickly rejected the idea.<sup>129</sup> At the time MacKinnon wrote, "sexual harassment," as a concept, barely existed outside of feminist circles; to the extent people thought about it, it was considered an isolated problem analogous to other forms of rudeness.

MacKinnon's book, more than any other single work, helped establish that the behaviors now thought of as sexual harassment occurred in patterned ways—that is, most of the time, men harassed women—and that sexual harassment of women in the workplace was part of a broader pattern of male attempts to dominate women and prevent them from gaining access to social and economic power: sexual harassment "perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market."<sup>130</sup> To MacKinnon, sexual harassment "makes of women's sexuality a badge of servitude"<sup>131</sup> and "limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions."<sup>132</sup>

MacKinnon viewed as critical an understanding of sexual harassment as something that was done to women by men, not as something that occasionally happened to be done to a particular woman by a particular man. Sexual harassment happens "because one is a woman, rather than [because one is] a person who just happens to be a woman."<sup>133</sup> Thus, MacKinnon distinguished between individual harms and group harms; to MacKinnon, sexual harassment was the quintessential group harm.

To MacKinnon, traditional tort law, almost by its very nature, was ill-suited

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that should not, in my view, be actionable, however regrettable we may find them. Cf. PROSSER, *supra* note 79, at 56 (noting that "it would be absurd for the law to seek to secure universal peace of mind, and many interferences with it must of necessity be left to other agencies of social control").

128. In part, the preference for Title VII may reflect a scholarly bias in favor of federal law.

129. See MACKINNON, *supra* note 1. For a discussion of MacKinnon's reasons for rejecting tort approaches to sexual harassment, see Chamallas, *supra* note 7, at 516.

130. MACKINNON, *supra* note 1, at 174.

131. *Id.*

132. *Id.* at 193.

133. *Id.* at 192.

for recognizing such “group harms.” As MacKinnon commented, “[B]y treating the incidents [of sexual harassment] as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.”<sup>134</sup> With its emphasis on individual behavior—individual intent or negligence, and individual suffering—tort law seemed poorly equipped as a means of pointing out that sexual harassment was part of large-scale male backlash against women in the workplace. To the typical judge, such arguments smacked of paranoid feminist conspiracy theories and had little relevance to proving the elements of a cause of action.

For instance, torts such as the intentional infliction of emotional distress required plaintiffs to show that the conduct that led to their emotional distress was truly “outrageous” and would be so to a reasonable person. Early attempts to litigate using this tort met with little success: what was so outrageous about a dirty joke or a crude proposition, judges and juries tended to wonder?<sup>135</sup> Early plaintiffs who complained about such behavior tended to be viewed as abnormally thin-skinned by male judges who could not see why come-ons, however crude, should not be seen as compliments and who could not understand why women should not just have to put up with dirty jokes if they wanted to participate in a male world. The common law showed little ability to take into account broad socio-historical changes like the massive influx of women into the workplace and showed less ability to understand that while one crude proposition to one woman on the job might not be earth-shattering, when thousands of women faced this in the workplace everyday, the series of comments could become a significant bar to the workplace happiness and advancement of women as a group.

As many commentators have noted, the mythical “reasonable person” of the common law changes his (usually his) mind only very slowly,<sup>136</sup> and in 1979, little reason seemed to exist to think that tort law would ever be progressive or flexible enough to compensate women for sexual harassment. As MacKinnon ruefully noted, common-law remedies seemed inadequate to address “the social reality of men’s sexual treatment of women[;] . . . although the facts of sex discrimination have a long history in women’s suffering, the prohibition on sex discrimination as such lacks a common law history.”<sup>137</sup>

## 2. Turning to Title VII

To many feminists, a statutory approach to sexual harassment seemed more promising. But early attempts to litigate sexual harassment cases under Title VII met with as little success as tort approaches, because judges tended to view

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134. *Id.* at 88.

135. *Cf. Reed v. Maley*, 74 S.W. 1079 (Ky. 1903).

136. *See, e.g.,* Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN’S L.J. 37 (1993) (citing a number of feminist critiques of the “reasonableness” standard).

137. MACKINNON, *supra* note 1, at 161.

sexually harassing behavior as arising out of the "personal proclivities" of the harasser, rather than out of the discriminatory policies of the employer. Thus, in *Corne v. Bausch & Lomb*,<sup>138</sup> decided in 1975, the court declared that "[b]y his alleged sexual advances," the harasser "was satisfying a personal urge. Certainly no employer policy is here involved."<sup>139</sup> The following year, in *Tomkins v. Public Service Electric & Gas Co.*,<sup>140</sup> the judge found that the sexual advances complained of by the plaintiff were the result of "natural sexual attraction" and noted that "if plaintiff's view were to prevail . . . an invitation to dinner could become an invitation to a federal lawsuit."<sup>141</sup>

Nonetheless, Title VII continued to seem, to feminists, an appropriate tool for sexual harassment test cases, and the end of the 1970s saw the beginning of a sea change in judicial attitudes toward sexual harassment. Between 1975 and 1979, when MacKinnon's book was published, several major feminist studies of sexual harassment appeared. Although many lower courts, like those in *Corne* and *Tomkins*, required plaintiffs to show that quid pro quo sexual harassment formed part of an official employer policy in order to prevail under Title VII—a standard that was virtually impossible to meet—appeals courts began increasingly to overrule the lower courts, using arguments similar to those made in the feminist literature. In 1977, *Corne* and *Tomkins* were both reversed on appeal.<sup>142</sup> In 1980, the Equal Employment Opportunity Commission (the federal agency charged with overseeing Title VII), perhaps influenced by this outpouring of feminist scholarship, changed its guidelines to clarify the appropriate standard for Title VII employer liability. As of 1980, the EEOC declared:

[An employer] is responsible for its acts and those of its agents or 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 . . . [W]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.<sup>143</sup>

By the early 1980s, courts had begun to hold that hostile-environment harassment also violated Title VII.<sup>144</sup> And in 1986, the Supreme Court finally

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138. 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977).

139. Franke, *supra* note 4, at 699 (quoting *Corne*, 390 F. Supp. at 163).

140. 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3rd Cir. 1977).

141. *Id.* at 557.

142. See Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1467 n.38 (1986).

143. 29 C.F.R. § 1604.11(c)-(d) (1980). In Part III, I discuss employer liability issues under a tort regime.

144. See Schoenheider, *supra* note 142; see also Franke, *supra* note 4, at 701 n.29.

weighed in with a unanimous decision. In *Meritor Savings Bank v. Vinson*,<sup>145</sup> Justice Rehnquist said firmly that “without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”<sup>146</sup>

As Franke has noted, Justice Rehnquist “treat[ed] the legal conclusion as entirely self-evident”<sup>147</sup> and made no effort to justify or explain it. Justice Rehnquist’s blithe comment suggested that he saw Title VII as a statute that was fundamentally gender-neutral—one that would protect men being harassed by women as much as it would protect women harassed by men. To Justice Rehnquist, Title VII was about formal equality—not about correcting a centuries-old pattern of discrimination against women. But in the celebratory mood that prevailed in the wake of the Court’s decision in *Meritor*, this undoubtedly seemed a minor quibble. The feminists had, it seemed, won the battle, and, for better or for worse, sexual harassment litigation and debate would center around Title VII from then on.

Today—twenty years after MacKinnon concluded that tort law could not provide an adequate remedy for sexual harassment and thirteen years after the Court’s landmark decision in *Meritor*—Title VII has created as many doctrinal puzzles as it has solved.<sup>148</sup> As noted in the preceding sections, cases involving same-sex sexual harassment have baffled the courts, leading to a wide variety of approaches in different jurisdictions,<sup>149</sup> and cases in which men have allegedly been harassed by women have also proven troublesome, in a political sense.<sup>150</sup>

In an ironic twist, feminists focused their energies on Title VII precisely because they saw it as the only way to raise public and judicial awareness of the discriminatory context in which most workplace sexual harassment takes place. To MacKinnon and many others, failing to understand that sexual harassment was a problem, faced, above all, by *women* was to miss the most fundamental point of all. Yet in the years that followed the initial feminist successes with Title VII, the statute has been used, more and more often, to protect people other than women sexually harassed by men.<sup>151</sup>

On the level of purely formal equality, universal protection is, of course, fair enough—Rehnquist’s words in *Meritor* paved the way for such efforts, and few would suggest that men who are harassed by men, or women harassed by women, or men harassed by women, should have no remedy. But, from a

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145. 477 U.S. 57 (1986).

146. *Id.* at 64.

147. Franke, *supra* note 4, at 704.

148. See discussion *supra* Part II.

149. Although *Oncale* added some clarity to the issue of same-sex harassment, its holding was narrow and left several major issues unaddressed. See *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998); see also discussion *supra* note 26.

150. For a discussion of some of these cases, see Widor, *supra* note 12.

151. Between 1992 and 1998, for instance, the percentage of sexual harassment charges filed with the EEOC by men went from 9.1% to 12.9%. See Equal Employment Opportunity Commission (visited Feb. 25, 1999) <[www.eeoc.gov/stats/harass.html](http://www.eeoc.gov/stats/harass.html)>.

feminist perspective, these cases may appear to dilute, even betray, Title VII's promise.<sup>152</sup> Formal equality, as feminists know well, can be a Trojan horse.

Women who have been harassed by men are not the only "real" victims of sexual harassment. Many of the cases involving male-to-male sexual harassment, for instance, involve facts that shock the conscience, and a man who is sexually harassed by a woman may endure humiliation and fear that is both real and worthy of sympathy. But if the purpose of Title VII was to protect individuals who are also members of discrete and vulnerable groups from abuses by those with more power,<sup>153</sup> these may not be the kinds of cases feminists want brought under Title VII.

Let us revisit, for a moment, the distinction drawn earlier between the nature of the harm of sexual harassment—a dignitary harm—and the context in which the harm occurs—centuries of discrimination against women. All cases of workplace sexual harassment damage the victim's dignitary interests regardless of the victim's gender or the harasser's gender. However, not all cases of sexual harassment plausibly can be seen as connected, in any proximate way, to discrimination against women in the workplace.<sup>154</sup>

#### D. A SECOND LOOK AT TORT REMEDIES FOR "CLASSIC" CASES OF SEXUAL HARASSMENT

A tort approach to sexual harassment would seem to offer a route around these conundrums. Nonetheless, of the hundreds of serious scholarly articles about sexual harassment, only a handful attempt to examine the issue of applying tort law to sexual harassment in the workplace.<sup>155</sup> MacKinnon's

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152. See discussion of formal equality paradigm versus antisubordination paradigm, *supra* note 41; see also discussion of the legislative history of Title VII, *supra* note 42.

153. Cf. *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) ("The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.").

154. A look, again, at the analogy to violent sex crimes, is helpful. If a man is raped by another man—or, indeed, if he is sexually assaulted by a woman—he has just as much claim on our sympathies as a woman raped by a man. Beyond that, however, the similarities end. The sexual assault of women by men undoubtedly occurs in a context of societal subordination and objectification of women, and it makes a great deal of sense to argue that the sexual assault of women is, among other things, a form of sex discrimination and gender subordination—but it would make very little sense to say the same of all violent sex crimes against men. (To be precise—one *could* say this, but the argument becomes tenuous).

155. Interestingly, although a tort approach to sexual harassment has been given short shrift by most serious scholars, practitioners have aggressively sought in recent years to use tort law to remedy workplace sexual harassment. Indeed, until 1991, when Congress amended Title VII to permit the recovery of punitive damages, practitioners had a strong incentive to focus on possible tort remedies for sexual harassment. For several practitioner-oriented discussions of tort remedies for sexual harassment, see Christine Whitesell Lewis, *The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment*, 55 ALA. LAW. 33 (1994); Clay Mahaffey, *Extreme and Outrageous Conduct: Wyoming Recognizes Workplace Sexual Misconduct as the Basis for an Intentional Infliction of Emotional Distress Claim*, 33 LAND & WATER L. REV. 731 (1998); Peter G. Nash & Jonathan R. Mook, *Employee Tort Actions for Sexual Harassment in Virginia: Negotiating the Liability Mine Field*, 1 GEO. MASON. U. CIV. RTS. L.J. 247 (1990); Pamela J. White & Susan R. Matluck, *Conduct Unbecoming a Lawyer:*

dismissal of tort law was sharp and effective, and, perhaps unsurprising, few scholars in the two decades since then have been willing to try to resuscitate a tort approach to sexual harassment.<sup>156</sup> The authors of two student notes written in the mid-1980s were the first to make the attempt, but though provocative and well reasoned, the notes had little influence.<sup>157</sup> More recently, Ellen Paul and Mark Hager have re-examined the idea of a tort approach to sexual harassment, but they have done so from a perspective that is, in many ways, decidedly antifeminist.<sup>158</sup>

Hager and Paul both argue for the virtual evisceration of Title VII. They insist that it is more or less impossible to view sexual harassment as a form of sex discrimination and that, in general, employers should not be liable for workplace sexual harassment. They utterly reject the MacKinnonesque characterization of sexual harassment as a “group harm” and argue that such a characterization merely leads to essentialism and “victimology.”<sup>159</sup> Thus, Hager says, “My point in a nutshell is that harassment should be met with tort suits against actual perpetrators, not discrimination suits against employers . . . ‘hostile environments’ [should] not be viewed as employment discrimination, without proof of employer policy.” He states categorically that “[s]exual harassment [should] be viewed as an offense to personal dignity and autonomy, not as a

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*Expanding Tort Remedies for Sexual Harassment*, 24-SUM BRIEF 16 (1995); Bradley B. Wrightsel, *Kerans v. Porter Paint Co.: Ohio's New Tort of Sexual Harassment in the Workplace—the Beginning, But Not the End*, 18 OHIO N. U. L. REV. 733 (1992).

156. Practitioners, less immersed in the scholarly literature, may have been less deterred by MacKinnon's dismissal of a tort-approach than legal scholars were.

157. See Schoenheider, *supra* note 142; Mark D. Vhay, Comment, *The Harms of Asking: Toward a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988). At this point, both of these articles are rather dated, because both authors base much of their analysis of the flaws of Title VII on aspects subsequently altered by Congress in 1991 (i.e., until 1991, Title VII did not permit recovery of punitive damages).

Schoenheider argues that existing tort categories are inadequate for addressing cases of sexual harassment, and she proposes the creation of a new “tort of workplace harassment” which would make actionable “unreasonable interference with the right to work in an atmosphere free of sex-based discrimination.” Her argument is fairly narrow, and solely concerned with “classic” cases of male-female quid pro quo and hostile environment sexual harassment. She does not expand her argument to make use of existing tort categories, or to take on nonsexualized forms of harassment or address cases of same-sex harassment. Like Schoenheider, Vhay is concerned about classic sexualized male-female forms of harassment, but he grounds his argument more firmly in a conception of sexual harassment as conduct that “violates standards of decency.”

158. See Paul, *supra* note 23; Hager, *supra* note 23. Paul and Hager might dispute my characterization of their work as “antifeminist,” but I think it is a fair one.

159. Note, however, that while Paul and Hager differ enormously in perspective from Schoenheider and Vhay, they, too, take it for granted that it is “classic” forms of sexualized, male-female harassment that deserve our attention and concern. Paul proposes a new tort of “sexual harassment/misconduct” as a solution; she would require that harassing conduct be intentional and “outrageous” for a cause of action to exist. Hager would similarly require that sexually harassing behavior be “extreme” rather than merely “offensive” in order for it to be actionable; he proposes making use of a reconceptualized version of the tort of intentional infliction of emotional distress or creating a new tort of harassment (or, perhaps, using the *Restatement* catch-all, § 870).

species of gender discrimination”;<sup>160</sup> the Title VII approach “encourages a dependent . . . and passive form of feminism.”<sup>161</sup> Paul similarly argues that courts have “unwittingly imported philosophical assumptions from a radical agenda” into Title VII jurisprudence, which consequently promotes “victimology.”<sup>162</sup> She argues that a tort approach to sexual harassment is better than a Title VII approach because “it gets the federal courts out of what is essentially a personal matter between individuals . . . it places fault where fault truly lies—with the perpetrator.” Better still, a tort approach forces women to “take responsibility for their lives.”<sup>163</sup>

Turning to recent feminist scholarship, only Anita Bernstein has made a real effort to apply tort concepts to sexual harassment jurisprudence.<sup>164</sup> Bernstein argues that courts have relied excessively on a “reasonable person” standard (in some jurisdictions, a “reasonable woman” standard) in evaluating claims of hostile environment sexual harassment brought under Title VII.<sup>165</sup> She suggests replacing this reasonableness standard with what she terms a “respectful person” standard. Instead of asking whether the plaintiff “reasonably” felt that certain behaviors created a hostile environment, courts would ask whether a “respectful person” would have behaved in the ways alleged by the plaintiff.

Bernstein traces her concept of the “respectful person” to the deeply held assumptions about dignity and personhood that pervade the common-law tradition, and she makes no bones about her “enthusiasm for torts.”<sup>166</sup> But although she favors importing a standard with a long tort law pedigree into Title VII jurisprudence, she stops there. Bernstein does not make what would appear to

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160. Hager, *supra* note 23, at 377.

161. *Id.* at 424.

162. Paul, *supra* note 23, at 364, 349.

163. *Id.* at 364–65. To those who accept that male sexual harassment of women often involves discriminatory motives (or has an adverse impact amounting to discrimination), Hager and Paul’s hostility to Title VII does little to recommend them. But Hager and Paul point to some genuine anomalies and flaws in Title VII jurisprudence—the same flaws that have troubled feminist scholars like Franke, Abrams, and Schultz—and they also point out some potential advantages of a tort-based approach that should appeal to feminists.

As they note, a tort-based approach that emphasizes the dignitary harm aspects of sexual harassment would cut through the conundrums created by same-sex sexual harassment and by the hypothetical equal opportunity harasser. They also argue for the importance of seeing sexual harassment as an “individual” harm—although they overreach themselves here and acknowledge only grudgingly that women may be sexually harassed by men with discriminatory motives. But even Hager and Paul’s obvious (if misplaced) disdain for what they see as the “victim thinking” inherent in the Title VII discrimination paradigm is valuable, for it shows the degree to which that paradigm has generated an unsympathetic backlash.

164. See Bernstein, *supra* note 23.

165. Currently, Bernstein notes, most courts ask whether a “reasonable” plaintiff would have deemed the treatment complained of to be a hostile environment. She offers a feminist critique of the concept of “reasonableness” as applied to sexual harassment, which she views as fundamentally a tort-like dignitary wrong, an offense to dignity and personhood; notions of “reasonableness,” she argues, fail to understand that offended or humiliated states are “non-reasonable,” in the sense that they have to do fundamentally with the emotions. *Id.* at 453–87.

166. Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231 n.13 (1998).

be the obvious move: to argue that tort law could and should provide a supplement and an alternative to Title VII.

The time is ripe to re-examine the possibility of using tort law to understand and address cases of sexual harassment. If tort concepts can be successfully used as a means of responding to workplace sexual harassment, tort law offers a way out of the dilemmas of Title VII doctrine.<sup>167</sup> Cases of sexual harassment that do not seem to be motivated by sex discrimination could be brought using tort-based causes of action, while cases that are motivated by sex discrimination could continue to be brought under Title VII, accompanied, when appropriate, by supplemental tort claims.

This argument is most fundamentally one of principle, rather than pragmatics, and tort law, in its current state, may not offer a panacea for victims of workplace harassment. But tort law does offer a set of concepts and terms, rules and principles, that may help us break free from the Procrustean bed that Title VII has become. Tort law permits us to conceive of workplace harassment in a way that separates the *dignitary* nature of the harm from the *discriminatory* context of the harm. A review of several recent cases suggests that some courts are willing to be flexible in applying tort doctrine to situations of workplace harassment.<sup>168</sup>

### 1. *Stockett v. Tolin*

In *Stockett v. Tolin*,<sup>169</sup> the plaintiff alleged that her supervisor, Tolin, subjected her to repeated sexually harassing behavior, which included, "grabbing

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167. No less a personage than Justice Sandra Day O'Connor has noted the relevance of tort concepts to sexual harassment cases:

Writing separately in *Price Waterhouse v. Hopkins*, Justice O'Connor emphasized the value of tort concepts—causation, deterrence, compensation, and "evil"—in the adjudication of sex-discrimination actions brought under Title VII. In an earlier case, she wrote separately to insist on a fault-like intent standard for employment discrimination claims brought under Title VII. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 612 (1983) (O'Connor, J., concurring). In a third case, *United States v. Burke*, 504 U.S. 229 (1992), in which the majority characterized the plaintiff's sex-discrimination award as quasi-wages rather than personal injury damages for purposes of federal income taxation, Justice O'Connor dissented to insist that Title VII "offers a tort-like cause of action to those who suffer the injury of employment discrimination." Justice O'Connor asserted: "Functionally, the law operates in the traditional manner of torts: Courts award compensation for invasions of a right to be free from certain injury in the workplace. Like damages in tort suits, moreover, monetary relief for violations of Title VII serves a public purpose beyond offsetting specific losses."

Bernstein, *supra* note 23, at 496 n.390 (citations omitted).

168. I make no claim that the cases discussed in the following sections are either representative or particularly influential; I offer them simply to demonstrate the ways in which tort law can, given open-minded judges, provide a valuable tool for addressing workplace harassment. In addition to the cases discussed in the text, see, for example, *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1439 (10th Cir. 1997) (battery); *Rudas v. Nationwide Mut. Ins. Co.*, No. 96-5987, 1997 U.S. Dist. LEXIS 169, at \*12 (E.D. Pa. Jan. 7, 1997) (assault and battery); *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987) (intentional infliction of emotional distress).

169. 791 F. Supp. 1536 (S.D. Fla. 1992).



her breasts and nipples, running his fingers up her shirt and grabbing her from behind. . . . [Tolin] physically confined [Stockett] in her chair on at least two occasions during which he fondled her breasts and pinned her up against the wall with his body on at least one occasion."<sup>170</sup> Tolin also, on one occasion, followed Stockett into the women's hathroom.<sup>171</sup>

Stockett filed suit under Title VII, but she also asserted a range of state tort claims, including battery, invasion of privacy, intentional infliction of emotional distress, and false imprisonment. The case was tried in federal court in the Southern District of Florida. The parties waived the right to a jury trial, and the court found in favor of Stockett on both the statutory and common-law claims:

Tolin's groping and kissing of Stockett constituted both an offensive and unwelcome touching (i.e., battery) and an invasion of her physical solitude (invasion of privacy). Tolin's battery of Plaintiff—the repeated and offensive touching of the most private parts of Plaintiff's body—constitutes an intrusion into her physical solitude. Similarly, the act of entering the ladies bathroom constitutes an invasion of her privacy. In addition, the act of pinning Plaintiff against the wall and refusing to allow her to escape, even though only done for a short period of time, was false imprisonment. Further, the evidence establishes repeated physical attacks, as well as repeated verbal licentiousness. Tolin's conduct toward Stockett can only be characterized as being wanton, willful, and in total disregard of her rights. An ordinary prudent person, viewing his cumulative behavior, would be compelled to find this to be outrageous. The sum total of Tolin's conduct therefore also constituted an intentional infliction of emotional distress.<sup>172</sup>

The court also declared that punitive damages could be assessed against the corporation Tolin worked for because Tolin was a managing partner and part-owner.<sup>173</sup>

## 2. *Godfrey v. Perkin-Elmer Corp.*

In *Godfrey v. Perkin-Elmer Corp.*,<sup>174</sup> a New Hampshire court held that allegations of sexually harassing behavior that included frequent suggestive comments, demeaning language, insulting remarks made in front of coworkers, staring, and "sitting and standing inordinately close, often in a sexually suggestive manner" could, if proved, be viewed as constituting both intentional infliction of emotional distress and slander.<sup>175</sup> The court also noted that because Godfrey's employer, Perkin-Elmer, allegedly had been informed of the harassment and made no attempt to investigate or remedy it, Perkin-Elmer would be liable if a jury held in favor of the plaintiff.

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170. *Id.* at 1556.

171. *See id.* at 1542.

172. *Id.* at 1555–56.

173. *See id.* at 1560.

174. 794 F. Supp. 1179 (D.N.H. 1992).

175. *Id.* at 1183.

In reaching this conclusion, the court declared that the conduct alleged by Godfrey was “beyond the ordinary run of insult and offense which people are expected to encounter. . . .”<sup>176</sup> The court approvingly quoted *Prosser and Keeton on Torts*, noting that “[t]he extreme and outrageous nature of the conduct may arise not so much from what is done as the abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff’s interests.”<sup>177</sup>

The *Godfrey* court also held that the plaintiff had stated an actionable claim for slander. According to the plaintiff, the defendant told her, in the presence of several coworkers, “Your job isn’t important and doesn’t require brains.”<sup>178</sup> On another occasion, again in front of coworkers, he said, “You have a bad attitude. You have a lot of growing up to do. You should learn what you’re doing here. Who do you think you’re working for?”<sup>179</sup>

Assessing these remarks, the court disputed the notion that defendant’s comments were mere “opinion.” The standard, the court noted, is based upon “the average person”:

If that average . . . hearer could reasonably understand a statement as actionably factual, then there is an issue for the jury’s determination, precluding dismissal or summary judgment. . . . [T]he court is satisfied that such a remark as “your job isn’t important and doesn’t require brains” is easily susceptible of being verified as true or false and that an average hearer could thus reasonably hear those words to defame the plaintiff.<sup>180</sup>

In evaluating the second statement, the court observed that the statement had to be viewed with the recognition that the plaintiff had “suffered through more than a year of sexually-suggestive and demeaning comments and conduct, and her requests to have such behavior cease had been ignored.”<sup>181</sup> Given this context, “such comments, from a superior at one’s place of employment, after over one year on the job, quite reasonably could be understood to imply the existence of defamatory fact.”<sup>182</sup> The defendant’s statements “clearly imply plaintiff did not know what she was doing, also a matter capable of verification.”<sup>183</sup>

### 3. *Priest v. Rotary*

In *Priest v. Rotary*,<sup>184</sup> Evelyn June Priest alleged that she was sexually harassed by her employer, George Rotary, while working as a waitress at the

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176. *Id.* at 1189.

177. *Id.* at 1190 (internal quotation marks and citations omitted).

178. *Id.*

179. *Id.*

180. *Id.* at 1191 (citations omitted).

181. *Id.* at 1192.

182. *Id.*

183. *Id.*

184. 634 F. Supp. 571 (N.D. Cal. 1986).

Fireside Coffee Shoppe. She filed suit under Title VII and also asserted several tort causes of action: false imprisonment, assault and battery, and intentional infliction of emotional distress. The trial court made the following findings of fact:

During the first week of plaintiff's employment, while the plaintiff was in the kitchen doing the dishes, defendant came up behind plaintiff Priest, put his arms around her waist and placed his hands on her breasts and tried to kiss her on the neck. . . . On another occasion, defendant came up behind plaintiff as she was picking up a tray full of orders at the pick up station and placed his hands on her waist and breast. . . . On another occasion, Mr. Rotary came up behind Ms. Priest while she was in the hallway next to the Fireside kitchen and trapped her between himself and another male employee, pressing his body against her and preventing her from being able to move away. . . . Ms. Priest told Rotary on numerous occasions that his conduct was distressful and upsetting to her. . . . Defendant Rotary exposed his genitals to plaintiff [and another female coworker] as they were having a cup of coffee following the end of Ms. Priest's shift. Defendant did so by quickly pulling down his pants in such a way that [they] could see his genitals.<sup>185</sup>

Applying the law to these facts, the trial court had no hesitation concluding that Rotary's conduct inflicted on Priest "highly unpleasant mental reactions, including fright, humiliation, shock, surprise, sickness, nervousness, apprehension, disgust, emotional pain, intimidation, anger, worry, substantial sleeplessness, nausea, and anxiety."<sup>186</sup> The Court was careful to state that Rotary's actions were truly outrageous in the terms demanded by the *Restatement*: Rotary's actions consisted of "more than mere insults, indignities, threats, annoyances, and petty oppression. . . . [The Court finds that t]he conduct of defendant Rotary was of an extreme and outrageous nature, such that his conduct went beyond the bounds of decency, and no reasonable person could be expected to endure it."<sup>187</sup> The court also found Rotary liable for "unlawful and offensive touching,"<sup>188</sup> constituting assault and battery and for false imprisonment because he "intentionally confined, restrained, and detained plaintiff . . . without her consent and without lawful privilege."<sup>189</sup>

#### 4. *Kanzler v. Renner*

In *Kanzler v. Renner*,<sup>190</sup> a 1997 case, the Wyoming Supreme Court showed a similar willingness to interpret traditional tort categories broadly in order to compensate a victim of workplace sexual harassment. As the court recounts it,

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185. *Id.* at 574–75 (citations omitted).

186. *Id.* at 578.

187. *Id.* at 583.

188. *Id.* at 578.

189. *Id.* at 584.

190. 937 P.2d 1337 (Wyo. 1997).

plaintiff Kanzler, a police dispatcher, alleged that her coworker, Renner, engaged in harassing behavior: he repeatedly followed her home in a squad car, and at work, he would come to her work space and “sit close to her and stare at her for long periods of time while she was attempting to do her radio-dispatch job.” Renner also allegedly subjected Kanzler to repeated unwanted touchings: for instance, he asked her when she would, “Teach him to two-step,” and “later that night . . . Renner approached [Kanzler], grabbed her, pulled her body up to his, and started to slow dance. She told him to leave her alone and pushed him away.” Finally, he “followed her into the [utility] closet and pulled the door shut behind him. The light was not on. Renner grabbed Kanzler and pulled her to him. She pushed away from him and the door flew open . . . [he] pulled the door shut. Kanzler states that she was very scared and angry and that she attempted to call for help on a portable radio that was inside the closet. As she reached for the radio, Renner tried to grab it away from her, and she managed to escape from the closet.”<sup>191</sup>

Renner moved for summary judgment, arguing that his conduct did not amount to “intentional infliction of emotional distress.” The trial court agreed, and Kanzler, the plaintiff, appealed.<sup>192</sup>

In assessing Kanzler’s case, the Wyoming Supreme court noted that Wyoming adopted the *Restatement’s* definition of “outrageous conduct” and added that previous Wyoming cases had “recognized that certain conduct *in the employment context* may rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.”<sup>193</sup> Thus, “our first task is to determine whether the pattern of behavior alleged, when it occurs in the workplace, satisfies the outrageousness element of the tort.”<sup>194</sup> The court is implicitly stating that the workplace is different from other venues and that conduct that might not be “outrageous” elsewhere may become so when committed in the workplace:

We are in accord with numerous jurisdictions which have determined that inappropriate sexual conduct in the workplace can, upon sufficient evidence, give rise to a claim of intentional infliction of emotional distress. In reaching this decision, we find persuasive this pronouncement from the Utah Supreme Court: “It is worth stating forcefully that any other conclusion would amount to an intolerable refusal to recognize that our society has ceased seeing sexual harassment in the workplace as a playful inevitability that should be taken in good spirits and has awakened to the fact that sexual harassment has a corrosive effect on those who engage in it as well as those who are subjected to it and that such harassment has far more to do with the abusive exercise of one person’s power over another than it does with sex.”<sup>195</sup>

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191. *Id.* at 1339–40.

192. *Id.*

193. *Id.* at 1341 (emphasis added).

194. *Id.*

195. *Id.* at 1341–42 (citations omitted).

The *Kanzler* court noted that despite general agreement that workplace sexual harassment might constitute intentional infliction of emotional distress, different decisions “reveal widely varying and inconsistent attitudes regarding the severity of the sexual misconduct required for a showing of outrageousness . . . this disparity is due in large part to the vague, subjective and value-laden concept of ‘outrageousness.’”<sup>196</sup> Nonetheless, the *Kanzler* court found “several recurring factors that courts have used to assist in the determination of whether particular conduct in the workplace is sufficiently outrageous to survive a preliminary motion.”<sup>197</sup> These factors included: (1) “[a]buse of power,” defined as “an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests”;<sup>198</sup> (2) “[r]epeated incidents/pattern of harassment”; (3) “[u]nwelcome touching/offensive, non-negligible physical conduct”; and (4) “[r]etaliation for refusing or reporting sexually-motivated advances.”<sup>199</sup>

Looking at these factors, the *Kanzler* court had little difficulty concluding that Renner’s alleged acts might indeed be considered tortiously “outrageous”: “*Kanzler* has alleged conditions and circumstances which are beyond mere insults, indignities, and petty oppression and which, if proved, could be construed as outrageous.”<sup>200</sup>

These four cases are not atypical; other cases, too, demonstrate the willingness of some courts to permit plaintiffs to assert common-law causes of action for workplace sexual harassment.<sup>201</sup> Of course, not all courts have been so flexible—many cases reaching contrary holdings could also be cited, and in many jurisdictions, this is still a contested issue. Again, tort law offers no panacea. Nonetheless, on a pragmatic level, tort law may offer a promising avenue for some plaintiffs. More importantly, on the level of principle, tort law offers a way to fundamentally reconceptualize one’s understanding of workplace harassment. The flexibility of the courts in *Stockett*, *Godfrey*, *Priest*, and *Kanzler* suggests a way to move beyond “classic” cases of male-female sexual harassment and toward a broader understanding of the ways in which all abusive treatment in the workplace inflicts dignitary harms on the workers who are victimized.

#### E. TORT REMEDIES FOR WORKPLACE HARASSMENT, BROADLY CONCEIVED: THE WORKPLACE AS AN INHERENTLY AGGRAVATING FACTOR IN DIGNITARY HARMS

The tort conception of dignitary harm does not privilege sexual harms over nonsexual harms. This suggests the possibility of using tort law as a means of addressing workplace abusiveness of the sort described in the hypothetical in

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196. *Id.* at 1342.

197. *Id.* at 1343.

198. *Id.* (citing *Bryant v. Better Bus. Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 747 (D. Md. 1996)).

199. *Id.* at 1343.

200. *Id.*

201. See cases listed *supra* note 168.

Part III.B.2—abusiveness that would not give rise to a cause of action under Title VII as it does not involve discrimination on the basis of race, sex, color, religion, or national origin. Such abusiveness may be every bit as common—and as painful to the victim—as discriminatory harassment, and tort law provides a promising way for plaintiffs to obtain relief. Indeed, tort concepts suggest that the workplace could and should be deemed an inherently aggravating factor when courts assess plaintiff claims of dignitary harm.

As the *Kanzler* court pointed out, in many of the sexual harassment cases involving claims of intentional infliction of emotional distress, courts have looked to the issue of abuse of power to determine whether a defendant's conduct is truly "outrageous," as required by the *Restatement*. Most courts adopting this approach have construed "abuse of power" quite broadly. The *Kanzler* court, for instance, regarded abuse of power as "an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests" and approvingly quoted the Utah Supreme Court, which stated in *Rutherford v. AT&T*<sup>202</sup> that, in general, workplace sexual harassment "has far more to do with the abusive exercise of one person's power over another than it does with sex."<sup>203</sup> Similarly, in *Godfrey*, the Court affirmed Prosser and Keeton's assertion that "[t]he extreme and outrageous nature of the conduct may arise not so much from what is done as from the abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests."<sup>204</sup>

This flexible notion of "abuse of power" suggests that dignitary harms inflicted in the workplace could be seen as inherently aggravated by the very fact that they occur in the workplace,<sup>205</sup> a setting in which employees are clearly in a dependent relationship both vis-à-vis their supervisors (most obviously) and vis-à-vis their coworkers (less obviously, but equally powerfully).

Take, first, the easier proposition that harassment by a supervisor will always constitute an abuse of power. This argument is straightforward: supervisors, by definition, have more power than those they supervise; they can often hire and fire; they may be in a position to make reports on an employee that will affect her advancement; they may be able to alter the terms or conditions of an employee's work (by assigning more, less, or different work, for instance); and

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202. 844 P.2d 949 (Utah 1992).

203. *Kanzler*, 937 P.2d at 1342 (quoting *Rutherford v. AT&T Comm. of Mountain States, Inc.*, 844 P.2d 949, 978 (Utah 1992)).

204. *Godfrey v. Perkin-Elmer*, 794 F. Supp. 1179, 1190 (D.N.H. 1992).

205. Cf. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 397 (1994) ("[C]omment e to the *Restatement* states that outrageous conduct 'may arise from an abuse by the actor of a position, or relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.' Some courts have seized upon this comment as a basis for applying the tort of intentional infliction of emotional distress in the employment context, reasoning that the imbalance in bargaining power between employer and employee requires application of the tort.").

they will generally have greater access to people still higher in the employment hierarchy. If a supervisor behaves inappropriately or abusively to a subordinate—even if the offending behavior is fairly minor—the subordinate is placed in a difficult or impossible position: failure to quietly tolerate the supervisor's abusive behavior may mean anything from having to endure a workplace that is increasingly unpleasant (harder tasks, longer hours, or reduced possibility of advancement) to the actual loss of the subordinate's job. The subordinate is in a lose-lose situation if harassed by a supervisor: she can either accept the harassing behavior, which renders the workplace unpleasant (at the least), or she can protest and risk making the workplace even more unpleasant, if she does not lose her job.

While it is true that coworkers, in general, do not have the power to promote or fire one another, coworker harassment may still be distressing and even discriminatory. A worker who relies on his job for economic survival is effectively a captive audience for a harassing coworker.<sup>206</sup> Coworkers have significant ability to alter the “terms or conditions” of employment by behaving in ways that render the workplace intolerable. Using the *Kanzler* or the Prosser and Keeton definition, abuse of power may also exist where one person's relation with another gives him the actual or apparent ability to affect or damage the other person's interests. By harassing a coworker in a way that renders the workplace intolerable for the victim, coworkers can clearly damage the victim's interests.

In *Priest*, the court also found that “defendant Rotary abused his position in relationship to Priest. . . .”<sup>207</sup> In assessing Priest's intentional infliction of emotional distress claim, the court also found that Priest was “peculiarly susceptible to emotional distress. . . .”<sup>208</sup> The court held this to be so both because of an “abdominal condition” that troubled Priest and, significantly, “by reason of her economic condition”:<sup>209</sup> her job was “the sole source of financial support for her minor son” and she had “bought a car and furniture and rented an apartment in reliance on the fact of being employed at Fireside.”<sup>210</sup>

This, the court noted, rendered Rotary's conduct toward Priest particularly outrageous because of his “knowledge that plaintiff Priest was peculiarly susceptible to emotional distress by reason of her abdominal condition *and by reason of her economic condition.*”<sup>211</sup> To the *Priest* court, the fact that the defendant's abusive behavior occurred in the workplace is seen as an aggravating condition; realistically, Priest couldn't simply quit her job when Rotary

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206. Cf. Jack Balkin, *Free Speech and Hostile Environments* (1999) <<http://www.yale.edu/lawweb/jbalkin/articles/frsphoen.htm>> (arguing that “workplace harassment is not protected by the First Amendment because it is directed at a captive audience”).

207. *Priest v. Rotary*, 634 F. Supp. 571, 578 (N.D. Cal. 1986).

208. *Id.*

209. *Id.*

210. *Id.* at 577.

211. *Id.* at 583 (emphasis added).

began to harass her because she *needed* that job. Rotary knew this and took advantage of her dependence.

Implicit in the *Priest* court's analysis is a deep critique of the employment-at-will paradigm.<sup>212</sup> the court suggests that an employment relationship creates a special duty of care for employers, given the financial dependence of their employees. Employer-defendants should be presumed to realize that employees are economically dependent on them and that if employees are faced with an abusive workplace, their emotional distress will inevitably be extreme.<sup>213</sup>

This reasoning bears a striking resemblance to the reasoning in earlier lines of tort cases, which held common carriers, innkeepers, and public utilities to a stricter standard in assessing intentional infliction of emotional distress. Further, this reasoning suggests that a fundamental shift in thinking about dignitary harms inflicted in the workplace is due.

The elements of power, choice, and dependence necessarily affect views of dignitary harms. As many courts have noted, not everything that is hurtful or annoying gives rise to a cause of action; absent a special duty of care, every person has to put up with a certain amount of indignity.<sup>214</sup> In particular, with regard to the tort of intentional infliction of emotional distress, "mere insult, indignity, or annoyance" is not enough to give rise to tort liability, absent "other circumstances of aggravation."<sup>215</sup> Nonetheless, since the Nineteenth Century, many courts have been willing to hold common carriers and their agents to a higher standard of behavior.<sup>216</sup> The reasoning behind these cases is clear: when using trains, planes, or buses, and the like, travelers are, in effect, captives: the conditions of modern life make it virtually impossible for us to "opt out" of using common carriers. In order to participate fully and equally in social, political, or economic life, people must use common carriers, creating deep dependence. This dependence renders people particularly vulnerable to any dignitary harms inflicted by common carriers. For public policy reasons, many courts have held that this dependence gives rise to the higher standard of care

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212. For a case typifying the employment at will approach, see, for example, *Pearson v. Youngstown Sheet and Tube Co.*, 332 F.2d 439 (7th Cir. 1964). For a discussion and defense of the concept of employment at will, see Duffy, *supra* note 205, at 396.

213. Several courts have accepted this analysis. See Austin, *supra* note 121, at 14. ("In granting relief to employees [on claims on intentional infliction of emotional distress], the courts sometimes make reference to the weaker bargaining power of employees as a group, the special nature of the employment relationship, and the limitations on the free mobility of labor."). Austin cites, for instance, *Blong v. Snyder*, 361 N.W.2d 312, 316 (Iowa Ct. App. 1984) ("Plaintiff's status as an employee entitled him to more protection from insulting or abusive treatment than would be expected in interactions between two strangers.").

214. See, e.g., PROSSER, *supra* note 79, at 59.

215. *Id.* This "severe harm requirement presents formidable obstacles to recovery." Austin, *supra* note 121, at 16.

216. See, e.g., *Chamberlain v. Chandler*, 3 Mason 242 (C.C.D. Mass 1823); *Bleeker v. Colorado & S. R.R. Co.*, 114 P. 481 (Colo. 1911); *Cole v. Atlanta & W. Point R.R. Co.*, 31 S.E. 107 (Ga. 1897); *Knoxville Traction Co. v. Lane*, 53 S.W. 557 (Tenn. 1899); *Texas & Pac. Ry. Co. v. Jones*, 39 S.W. 124 (Tex. Civ. App. 1897) (error refused).



expected of common carriers and their agents: the burden to common carriers of being held to a somewhat higher behavior standard is, on balance, less than the harm inflicted on ordinary citizens subjected to abusive behavior by common carriers.

Common carriers are held to a higher standard of care in most areas of tort law, most clearly in the jurisprudence of intentional infliction of emotional distress. In more recent years, some courts have extended this reasoning to cover inns and public utilities, as well as common carriers, for the same reasons.<sup>217</sup>

In the many cases assessing whether or not common carriers and the like should be held to a higher standard of care, courts have enunciated a three-part test: First, is the provided service something that is essential for ordinary people to realize their full potential as citizens and persons? Second, how burdensome would it be for an ordinary person to find an alternative source of the provided service? Third, which would be more burdensome: holding the provider to a higher standard of care or expecting ordinary people to bear the costs of the provider's tortious behavior?

Applying this three-part test to the context of the workplace, it makes sense to conclude that the employment context should be considered an inherently aggravating factor when courts assess whether the infliction of dignitary harm rises to the level of seriousness necessary for liability.<sup>218</sup>

*(1) Is the provided service something that is essential for ordinary people to reach their full potential as citizens and persons?*

This question is easily answered in the affirmative. The days when many Americans could grow and produce most of what they needed are long past. For most, employment is necessary for simple survival. Some people do inherit wealth, but such examples are relatively rare. Further, in a nation with an increasingly tattered social safety net, no one can assume that the state will care for them if they do not work.<sup>219</sup> As a result, over the course of the past century, employment has become increasingly essential. Today, a higher percentage of Americans than ever before must participate in the workforce to survive, and a smaller percentage of Americans than ever before is employed on farms or in small businesses.

Some statistics paint a striking picture: in 1900, only fifty percent of Americans of working age participated in the labor force, and thirty-eight percent of

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217. See, e.g., *Birmingham Ry. Light & Power Co. v. Glenn*, 60 So. 111 (Ala. 1912); *Haile v. New Orleans Ry. & Light Co.*, 65 So. 225 (La. 1914) (plaintiff recovered after agent of common carrier referred to her as "a big fat woman"); *Boyce v. Greeley Sq. Hotel Co.*, 126 N.E. 647 (N.Y. 1920); *Gillespie v. Brooklyn Heights R.R. Co.*, 70 N.E. 857 (N.Y. 1904) (plaintiff called a "deadbeat" and a "swindler"); *St. Louis-San Francisco R. R. Co. v. Clark*, 229 P. 779 (Okla. 1924); *Buchanan v. Western Union Tel. Co.*, 106 S.E. 159 (S.C. 1920) (indecent proposal made by telegraph messenger); *Lipman v. Atlantic Coast Line R.R. Co.*, 93 S.E. 714 (S.C. 1917) (plaintiff called a "lunatic"); *Milner Hotels v. Dougherty*, 15 So. 2d 358 (Miss. 1943).

218. Cf. Balkin, *supra* note 206.

219. What's more, being on welfare or other forms of public assistance is severely stigmatized.

those people were employed on farms. In 1940, the percentage of Americans working had increased only to fifty-two percent, but only seventeen percent of those people worked on farms. In 1990, sixty-five percent of working age Americans were employed—and fewer than two percent worked on farms. In 1997, the percentage of Americans participating in the labor force had risen to seventy-two percent.<sup>220</sup>

Furthermore, the people who comprise the workforce have changed. In 1900, fewer than twenty percent of working-age women were employed. In 1967, fifty-one percent of women were employed; in 1997, sixty percent of working-age women were employed and a whopping seventy-two percent of mothers of minor children worked.<sup>221</sup>

For most Americans, then, work is necessary for economic survival, and it is no accident that Americans are working longer hours and more weeks of the year than ever before; the real wage has fallen in the last decade and is lagging further and further behind the consumer price index.<sup>222</sup> The same things cost more, and with falling real wages, this means that work—and plenty of it—is increasingly necessary for most Americans.<sup>223</sup>

Moreover, work has become an increasingly central part of how social identities are constructed.<sup>224</sup> At one time, religion, class, and birthplace were the primary factors affecting identity. But increasingly, work is a primary identifier. As Vicki Schultz notes, “In advanced industrial societies, wage work is a primary source of . . . psychological well-being: [a] job provides both the means to meet life’s concrete needs and a position that confers a sense of place in the world. As scholars have begun to recognize, work not only bestows a livelihood and sense of community, but also provides the basis for full citizenship, and even for personal identity. Like it or not, we are what we do.”<sup>225</sup>

220. See Bureau of Labor Statistics, *Employment Characteristics of Families Summary* (visited Feb. 25, 1999) <<http://stats.bls.gov/news.release/work.nws.htm>>. According to the Bureau of Labor Statistics’ *Work Experience Summary* for 1997, “[t]he long-term rise in work activity of the population is entirely attributable to the increasing likelihood of women working outside the home.”

221. See *id.*

222. See Charles J. Whalen, *The Age of Anxiety: Erosion of the American Dream*, USA TODAY MAG., Sept. 1, 1996, at 14. (“After adjusting for inflation, today’s hourly wages give the average American less purchasing power than the average U.S. worker had in 1965. Although families have responded by sending more members to work and having them work longer hours, real median family income has fallen more than five percent since 1989.”); see also David R. Francis, *U.S. Workers on Job Longer for Less Pay*, CHRISTIAN SCI. MONITOR, May 15, 1992, at 8.

223. See, e.g., Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 626 (1943) (“We do not have slave labor, but there are nevertheless compulsions which force people to work. . . .”). Of course, it could be argued that the information age will alter all this: more and more of us will be able to control our work lives to a greater and greater extent; computers will replace people and usher in an age of leisure, and so on. If this happens, and employment become less relevant for most Americans, the workplace may no longer need to be viewed as an aggravating factor in assessing dignitary tort claims. Until then, however, I believe it should be deemed to be an aggravating factor for the reasons stated herein.

224. Cf. Abrams, *supra* note 4, at 1172 n.151 (commenting on the identity-affirming aspects of work).

225. Schultz, *supra* note 4, at 1756; cf. STUDDS TERKEL, *WORKING* xiii (Ballantine 1985) (1972)

The notion that work is critical in forming social identities and in constituting people as citizens can be seen with particular clarity in the context of the debate about America's welfare system.<sup>226</sup> To be without a job, in the current American social climate, is to be severely stigmatized, thought of as lazy, dependent, entitled, child-like.<sup>227</sup> Many commentators—especially conservative and neo-liberal commentators like Mickey Kaus,<sup>228</sup> David Ellwood,<sup>229</sup> and Lawrence Mead<sup>230</sup>—have insisted that “work for the employable is the clearest social obligation”<sup>231</sup> and that “employment is essential to being a functioning citizen.”<sup>232</sup> In this vision, the rights that inhere in all citizens are—quite literally—contingent upon a person's status as a member of the labor force.<sup>233</sup>

Work, then, is critical both for simple survival and for the formation of social and civic identity. Even more than in the case of common carriers and public accommodations, then, Americans rely on employment to secure the full benefits of citizenship and social and economic life.

(2) *How burdensome would it be for an ordinary person to find an alternative source of the provided service?*

In order to decide that employers should be held to a higher standard of care vis-à-vis their workers, it must be shown that for most workers, finding alternative sources of income is extremely burdensome.<sup>234</sup> In 1995, finding a job took

(“[Work] is about a search, too, for daily meaning as well as daily bread, for recognition as well as cash, for astonishment rather than torpor; in short, for a sort of life rather than a Monday through Friday sort of dying.”); HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 34 (1977) (describing work as “the most significant source of identity for western men and women”); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 252 (N.Y. TIMES ed., 1968) (“The principal measure of progress toward equality [is] that of employment. It is the primary source of individual or group identity. In America, what you do is what you are: to do nothing is to be nothing; to do little is to be little.” (quoting Daniel Patrick Moynihan)).

226. For an interesting discussion of this issue, see James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 WASH. U. L.Q. 103 (1996).

227. See, e.g., JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 22 (1991) (“To be on welfare is to lose one's independence and to be treated as less than a full member of society. In effect, the people who belong to the underclass are not quite citizens.”).

228. See generally MICKEY KAUS, *THE END OF EQUALITY* (1992).

229. See generally DAVID T. ELLWOOD, *POOR SUPPORT POVERTY IN THE AMERICAN FAMILY* (1998).

230. See generally LAWRENCE M. MEAD, *BEYOND ENTITLEMENT* (1986).

231. *Id.* at 243.

232. LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 13 (1992).

233. Two obvious ironies strike me: first, as usual in this sort of conservative discourse, only the poor who benefit from “unearned” wealth (in the form of welfare payments) are thought of as losing their right to be considered full citizens. Although it is work itself (rather than simply the possession of money) that is thought of as constituting persons as full citizens, there is no suggestion that the nonworking wealthy are not entitled to full citizenship. Second, it's worth noting that the same conservative commentators who insist that work is both a right and an obligation of citizenship, in the context of welfare reform, tend to insist upon the validity of “employment at will” conceptions of employer-employee relationships when it comes to labor relations and the like. In other words, work is a right if we're talking about welfare—but not if we're discussing employment practices in any other context.

234. It is worth noting also that workplace abusiveness does sometimes force employees out of their jobs: a recent study by a University of North Carolina psychologist found that 12% of

the average American job-searcher nearly three months, and, according to the Census Bureau, workers who lost their jobs generally were unable to find new jobs that paid as well as their old jobs: on average, workers who had previously lost their jobs found themselves with wages that were more than twenty percent lower in their new jobs.<sup>235</sup> Like passengers on a bus or people in their homes, workers are essentially a captive audience in their jobs: leaving is technically possible, but not without significant costs.<sup>236</sup> Moreover, to the extent that employers and their agents are not held to a higher standard of care, a worker may leave one abusive place of employment in which he has no legal recourse, only to find other equally abusive workplaces. Where this happens, the worker's "choice" of workplaces is illusive.<sup>237</sup>

(3) *Which would be more burdensome: holding the provider to a higher standard of care or expecting ordinary people to bear the costs of the provider's tortious behavior?*

Employers are already expected to take reasonable steps to ensure that workplaces will be physically safe for their employees, providing workers with adequate protection from toxic chemicals, dangerous machinery, smoking co-

the workplace harassment victims she surveyed quit their jobs in order to be free of harassment. See Martha Waggoner, *Workplace Incivility Rising*, ASSOCIATED PRESS, May 29, 1998. Job loss—for whatever reason—can have a devastating psychological effect on a worker as well as a devastating financial effect. A recent study found that the impact of job loss on most workers is clinically indistinguishable from the loss of a spouse. See James Krohe, Jr., *An Epidemic of Depression?*, 31 *ACROSS THE BOARD* 8 (1994). The notion that sexual harassment, in particular, can cause real and lasting psychological and physical harm can no longer be seriously disputed. See Bernstein, *supra* note 23, at 461 nn.96–97 (citing studies on the psychological and physical impact of workplace sexual harassment on women).

235. See Whalen, *supra* note 222, at 14. Whalen also cites a 1994 Department of Labor study, which found that "less than one of three displaced workers returns to full-time employment with equal or higher pay." *Id.* at 14; see also Esther Sales, *Surviving Unemployment: Economic Resources and Job Loss Duration in Blue Collar Households*, 40 *SOC. WORK* 4, 483 (1995).

236. See Balkin, *supra* note 206, at ¶ 34 ("Economic coercion leaves many workers to avoid exposure to harassing speech. Employees are a much better example of a captive audience than the so-called paradigm case of people sitting in their homes.").

237. *But see* Duffy, *supra* note 205, at 413 (claiming that "[w]ith the possible exception of cases in which managers are alleged to have taken action tantamount to false imprisonment, employees subject to outrageous actions are always free to avoid emotional distress caused by their supervisors by terminating employment"). As Balkin notes, however, captive audience doctrine provides a different way of analysing such assertions: "Captivity . . . is a matter of practicality rather than necessity. It is about the right not to have to flee rather than the inability to flee . . . minimum wage workers may have to move from job to job to avoid harassment. But the question is not whether there is another equally low-paying job available. The question is whether they should have to leave a job in order to avoid being sexually harassed." Balkin, *supra* note 206, at ¶ 34. For another thought-provoking discussion that implicitly challenges some of the core assumptions of the employment at will paradigm, see Ackerman, *supra* note 100. The employment at will paradigm assumes that workers enjoy complete freedom of contract; if they accept (or remain in) jobs in which they are harassed, they can be deemed to have consented to such an arrangement as Offy's remarks imply. But, as Ackerman notes, there is "a very powerful argument in favor of banning dignity-stripping arrangements, even those reached by knowledgeable adults in uncoerced settings." Ackerman, *supra* note 100. In other words, even if Duffy's assumptions are valid (which, I argue, they are not), one can take the position that certain things—including one's dignity—simply cannot be contracted away.

workers, and so on. Employers are also expected to take reasonable steps to protect their employees from being discriminated against on the job, inform them of antidiscrimination laws and policies, and act promptly to remedy any discrimination that occurs. Requiring employers to bear the burden of ensuring a nonabusive workplace, one in which all workers (regardless of sex) would be assured a workplace free of intentionally inflicted dignitary harms, is a logical extension of this premise.

In practice, there is no reason for such a requirement to be particularly onerous to employers.<sup>238</sup> Employers would be required to create “anti-abusiveness” policies: inform all employees that they are expected to treat others with courtesy and respect and refrain from threatening, intimidating, humiliating, and harassing subordinates or coworkers.<sup>239</sup> This concept is not particularly hard to articulate; a few well-chosen examples would generally suffice to establish the kinds of behavior that are unacceptable in the context of the workplace.<sup>240</sup> If an employee complained that a supervisor or coworker was behaving abusively, the employer would have a duty to investigate and remedy the abuse (if the abuse was found to be serious) by disciplining or transferring the abusive person. If an employee sued the tortfeasor and the employer, juries would be instructed to take into account the employer’s policy about abusive behavior, and the response of the employer to allegations of abuse, in assessing employer liability.<sup>241</sup> In this context, using tort law to address the problem of workplace harassment and abuse offers a promising practical solution.

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238. In fact, such a requirement would probably benefit employers’ bottom line, because employers have every reason to believe that workers who are harassed are demoralized and less productive: a recent University of North Carolina study on workplace incivility and bullying found that 12% of victims of workplace bullying said they intentionally decreased the quality of their work as a result of bullying; 22% said they decreased their work effort; 28% lost work time trying to avoid their persecutor, 52% said they lost time worrying about the persecutor and their interactions; 46% considered changing jobs, and 12% actually did change jobs. See Waggonner, *supra* note 234; see also Christine Pearson, *Workplace “Incivility” Study, Survey Research Summary* (visited June 1, 1999) <[www.bullybusters.org/home/fwd/bb/res/pearson.html](http://www.bullybusters.org/home/fwd/bb/res/pearson.html)> .

239. Cf. Bernstein, *supra* note 23, at 495 (discussing what a “respectful workplace” might look like). It should be noted that in addition to relying on existing tort categories to address workplace abusiveness, there are three other possibilities worth exploring: (1) judges could recognize an independent tort of workplace harassment, derived from the existing dignitary harm torts but with a more precise and focused definition; (2) states could adopt workplace harassment statutes, which could similarly contain carefully crafted definitions designed to permit changes in norms but to prevent frivolous claims; and (3) a federal workplace harassment statute could be developed. The statutory approach is worth serious consideration, as it would also eliminate many of the other practical difficulties and uncertainties associated with a tort-based approach to workplace abusiveness. See discussion of potential objection to the tort approach, *infra* Part IV. Exploring this further, however, is beyond the scope of this article.

240. In fact, consulting companies exist that promise to help employers design “antibullying” programs for their workplaces. See Guynn, *supra* note 122, at D1; see also The WorkDoctor, *Information Services for Workplace Health* <<http://www.workdoctor.com>> (the website of the major workplace bullying consulting group).

241. Part IV.C, *infra*, addresses and refutes some potential objections to this approach.

#### IV. POTENTIAL OBJECTIONS TO THE TORT APPROACH

So far, this article has outlined the many ways in which Title VII jurisprudence provides an inadequate account of the wrongs of workplace sexual harassment and argues for a more pluralistic conception of workplace harassment: one that acknowledges that all people can suffer from severe dignitary harms inflicted in the workplace, regardless of their gender and regardless of whether they were subjected to dignitary harms that were sexual in nature. Common-law torts, applied creatively, might offer such a way to address most kinds of workplace harassment, and, because of the changed social meaning of work, the employment context should be considered an aggravating factor when courts assess workplace dignitary harms.

The primary objections to this approach are all, in one way or another, pragmatic objections. They will be discussed here only briefly, because none of the objections reaches this article's fundamental point, which is that the common law offers us a way to distinguish between the dignitary nature of the harm of workplace harassment and the discriminatory context in which much harassment occurs. This distinction is important, because it permits the articulation of a philosophical point that is brought out too rarely, namely that the workplace harassment of women is wrong not for some essentialist reason having to do with "women" qua women, but because the workplace harassment of any human being, male or female, is wrong. Furthermore, tort jurisprudence provides a way to articulate the intuition that harms in the workplace should be taken more seriously than harms in many other places.

##### A. THE "GROUP HARM" OBJECTION

Catharine MacKinnon specifically rejected the notion of using the common law to remedy workplace sexual harassment of women. As discussed in Part III.C of this article, she felt that tort law, with its emphasis on individual rights and harms, was inherently ill-suited to addressing a problem that was faced by women *because* they were women and that affected the ability of all women to advance in the workplace. Following MacKinnon, many other feminist legal writers have likewise insisted that sexual harassment needs to be understood as a group harm, not an individual harm,<sup>242</sup> and that common-law remedies are therefore inappropriate. Thus, Kathryn Abrams argues:

Yes, harassment is a dignitary injury, but if we fail to appreciate that this dignitary injury is a function of, and connected to, other injuries within an unequal and hierarchical relationship, we miss much of what is morally and politically significant about the wrong. . . . [F]ailing to highlight the fact that this humiliation [sexual harassment] arises from a context of systematic

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242. See, e.g., Abrams, *supra* note 4, at 1176 (arguing that although sexual harassment may be "a dignitary harm," this is "a feature . . . that captures only part of the wrong . . . sexual harassment is also understood as a barrier to women's professional progress").

gender inequality individualizes the wrong and diminishes the imperative for responding to it. . . . This is not simply an abstract point but an issue with ramifications for public education, legal enforcement, and private efforts at prevention.<sup>243</sup>

The feminist insistence that sexual harassment must be understood as a systematic barrier to women's equal access to economic, social, and political power is an understandable stance. Indeed, in the early days of the women's movement, the feminist emphasis on sexual harassment as a "group harm" may well have played an important role in raising public awareness and sparking debate and reform. Today, however, an inability to transcend the distinction between "group" and "individual" harms does a disservice to understanding sexual harassment. The distinction has become increasingly facile: it fosters an essentialist understanding of workplace relations between the sexes and fails to convey many of the complex truths about the ways in which workplace harassment harms *all* workers.

Furthermore, on a purely pragmatic level, the "group harm" objection to pursuing tort-based remedies has little force for two reasons. First, Title VII claims can be raised in conjunction with tort causes of action; the victims can have it both ways. Part III argued for the need to disaggregate the nature of the harm of sexual harassment from the context in which the harm occurs. Tort causes of action, generally speaking, address the dignitary nature of the harm of sexual harassment of individual working women. Title VII actions, in contrast, address the discriminatory context in which harassment of working women occurs. If a plaintiff feels that the harassment she suffered was discriminatory, she can raise a Title VII claim and assert causes of action in tort as well—something that many plaintiffs do already.<sup>244</sup>

Second, even within the "individualistic" confines of tort law, women should be able to bring up arguments about the context of discrimination against women. Indeed, as the cases reviewed in Part III.D demonstrate, some courts have been quite willing to see the discriminatory context in which many women work as an exacerbating factor when assessing the severity of workplace harassment of women. The discriminatory context in which harassment of women occurs is clearly relevant to the "outrageousness" of the harm, to the

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243. *Id.* at 1186–87. *But cf.* Bernstein, *supra* note 166, at 1243–44 (arguing that the "group" nature of the harm of sexual harassment is an issue that is (to some degree, at least) beyond the scope of the courts: "The war against sexual harassment . . . has many fronts and needs an array of weapons. I would wage the war in segments, moving group-related concerns to the theaters of legislatures, workplaces, unions, and public opinion, while saving courts for the functions they best serve").

244. My colleague Judith Resnik points out that raising simultaneous tort and Title VII claims requires plaintiffs to pursue their claims in federal court, something that women harassment victims might at times prefer to avoid because a greater percentage of state court judges are women and arguably would be more sympathetic to novel interpretations of tort law regarding sexual harassment. This is an intriguing point requiring empirical research; it also raises the possibility that a state statutory approach to workplace harassment, discussed *infra* note 239, might be well worth exploring, although doing so is beyond the limited scope of this article.

culpability of the defendant, and to the employer's responsibility for seeking to prevent and remedy such abusive behavior.

#### B. THE "RIGID COURTS" OBJECTION

MacKinnon and other feminist writers make another objection to seeking tort remedies for workplace harassment. They note that many courts have been inflexible in applying tort doctrine to situations of workplace sexual harassment. For all the cases in which judges have been willing to view workplace harassment as "outrageous," there are many other cases in which courts have insisted that repeated sexual come-ons, insults, offensive touchings, and the like, however annoying or offensive, do not rise to the level of outrageousness required for recovery.<sup>245</sup> Although feminist thinkers have given less attention to this issue,<sup>246</sup> it might also be objected that if courts have been unwilling to be flexible when it comes to granting recovery for sexual harassment of women, a problem that has received enormous amounts of attention, they will be even more rigid when it comes to assessing whether nonsexual forms of dignitary harms in the workplace should be actionable.<sup>247</sup>

This objection also lacks force, because it ignores the doctrinal benefits of adopting tort doctrine in this context. The preferred approach is based on principle, rather than pragmatics. On the level of principle, the potential reluctance of courts to flexibly apply tort concepts when faced with allegations of workplace harassment does not alter the fundamental point about the ways in which common-law tort concepts permit us to reconceptualize workplace harassment.

Even on the level of pragmatics, however, the potential rigidity of the courts does not defeat the benefits of a tort-based approach. The genius of the common law is that it changes over time, adapting to reflect changing technologies, structures, and social mores. In the past two decades, more and more courts, faced with tort-based claims, have been willing to take a flexible and contextualized view of the sexual harassment of women in the workplace. Indeed, courts have become more and more willing, in general, to permit recovery for nonphysical, dignitary harms of all kinds.

The rigidity of some courts is no reason at all to abandon the effort to make workplace dignitary harms actionable. If some courts are rigid, the message to those who wish to see a workplace right to be free of intentionally inflicted

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245. See Chamallas, *supra* note 7, at 515-17.

246. *But see* Austin, *supra* note 121.

247. See Austin, *supra* note 121, at 6 ("Although employees win cases, the employers somehow come out ahead."); see also *id.* at 9 (noting that courts are reluctant to acknowledge causes of action for intentional infliction of emotional distress "if the emotional harm is an unintended or incidental result of an exercise of legitimate workplace authority, civilly undertaken. The courts are particularly wary of attempts to use [the tort of intentional infliction of emotional distress] to evade the rules sanctioning the summary discharge of at-will employees"). Despite these concerns, Austin concludes that tort law remains a promising avenue to explore in fostering broader conceptions of worker rights.



dignitary harms is simple: they need to try harder. Scholarly articles must lay out the reasons why courts should be sympathetic to such approaches and show that such an approach is consistent with the history and evolution of common law and is required by the changing nature and meaning of the workplace in ordinary life. Test cases must be litigated in a concerted fashion, rather than simply leaving to chance whether or not a particular plaintiff will choose to make these arguments. The common law is inherently conservative, but it does change over time; it has changed before, and it will change again.<sup>248</sup>

### C. THE "LIABILITY AND PREEMPTION" OBJECTION

Some may argue that there are additional practical barriers in the way of pursuing tort-based remedies for abusive workplace behavior, pointing specifically to two issues. First, in common law, employers are generally not responsible for the intentional torts of their agents on the grounds that employers can hardly predict or prevent intentional wrongdoing. Second, tort remedies for workplace harassment may face preemption problems under state workers' compensation statutes.

These objections can be answered in the same fashion as the last objection. On the level of principle, this objection is neither here nor there. On the level of pragmatics, there are compelling public policy arguments for holding employers liable for workplace harassment by subordinates. First, take the issue of employer liability.<sup>249</sup> As noted in Part III.E, employees are essentially captives in their places of employment, and employers are the lowest cost avoiders. In assessing employer liability for abusive workplace behavior, courts could apply the same standards laid out by the Supreme Court in *Burlington*<sup>250</sup> and *Faragher*,<sup>251</sup> standards designed for assessing employer liability for hostile environment harassment under Title VII. In the case of harassment by a coworker, the Court suggests its approval of a standard negligence-type test: if the employer knew or should have known of the harassment, and failed to take reasonable steps to prevent and/or remedy it, the employer will be liable. In cases of supervisors harassing subordinates, the standard outlined by the Court is higher: to defend against liability, employers must show that (a) they had a reasonable policy designed to prevent and remedy harassment, and (b) the plaintiff unreasonably failed to take advantage of such a policy.<sup>252</sup>

The issue of preemption by state worker's compensation statutes must also be fought on public policy grounds. To preempt tort claims for dignitary harms

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248. Cf. Post, *supra* note 76; see also Larson, *supra* note 104, at 58 (noting the "possibility of such transformative change using tort law as a tool").

249. Cf. Bernstein, *supra* note 23, at 492-97 (making a tort law analogy to argue that employer liability for sexual harassment under Title VII should be somewhere between fault-based liability and strict liability).

250. *Burlington v. Ellerth*, 524 U.S. 742 (1998).

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

252. See generally *Burlington*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775.

inflicted in the workplace is, implicitly, to claim that dignitary abuse is something that is a necessary risk of going to work. This notion needs to be resoundingly rejected: if all tort claims for intentional infliction of dignitary harms were to be preempted by workers' compensation statutes, employers would have little incentive to create nonabusive workplaces. Here, too, the solution is continual test cases and a barrage of policy argument in the pages of law journals and journals of opinion.

#### D. THE "CIVILITY CODE" OBJECTION

A final argument against a tort-based approach to workplace dignitary harassment might be that dignitary harm torts are simply too fuzzy and ill-defined and that encouraging the use of these causes of action to remedy workplace abusiveness risks creating a workplace "civility code" that will operate to the detriment of free expression and open and easy workplace interactions.<sup>253</sup> This objection is the converse of the "rigid courts" objection discussed in Part IV.B.

Here, the fear is not that courts will make recovery difficult by defining terms like "outrageous" or "offensive" in impossibly narrow ways. Instead, the fear is that courts will lower the bar too far, and plaintiffs will be able to recover too easily, diluting the requirements of the dignitary harm torts until any minor irritation or misunderstanding becomes actionable and all workplace comments and actions will have to be self-censored.

This objection is also overblown. In practice, such an effect is unlikely to be a problem: tort causes of action like invasion of privacy, defamation, intentional infliction of emotional distress, and assault and battery already exist, and in applying them in nonemployment contexts, courts have, if anything, tended to err on the side of caution in assessing plaintiff claims. The biggest danger with a tort approach to harassment, as MacKinnon noted twenty years ago, is not that courts will tend to let too much in: the danger is that they will not be flexible enough.

This objection reflects, in part, a fear that a more flexible approach would open the floodgates to a surge of frivolous litigation. But unless one is willing to argue that there should be no tort recovery at all for injuries that are not physical in nature, it is hard to claim that these causes of action should exist everywhere but in the workplace. Prosser and Keeton comment:

The most cogent objection to the protection of such [purely dignitary] interests lies in the "wide door" which might be opened, not only to fictitious claims, but to litigation in the field of trivialities and mere bad manners. It would be absurd for the law to seek to secure universal peace of mind, and many interferences with it must of necessity be left to other agencies of social control. . . . But [it] is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation," and it is a pitiful confession

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253. See generally Duffy, *supra* note 205.

of incompetence on the part of any court of justice to deny relief on such grounds. That a multiplicity of actions may follow is not a persuasive objection: if injuries are multiplied, actions should be multiplied, so injured persons may have recompense. So far as distinguishing true claims from false ones is concerned, what is required is rather a careful scrutiny of the evidence supporting the claim, and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law.<sup>254</sup>

There are, however, two somewhat stronger forms of the “civility code” objection. The first revolves around the proposal, made in Part III.E, that the workplace context *should* lower the bar that plaintiffs need to surmount—that due to the nature and meaning of work in modern American society, the employment context should be considered an inherently aggravating factor in assessing whether a defendant’s actions are sufficiently “outrageous” or “offensive” as to permit recovery. This concern is legitimate and can only be addressed by stressing once more that the common law tends to err on the side of conservatism. Robert Post’s argument is worth repeating: “the common law attempts not to search out and articulate first ethical principles, as would a certain kind of moral philosopher, but instead to discover and refresh the social norms by which we live.”<sup>255</sup> Lawyers and legal scholars are all norm clarifiers and norm entrepreneurs, in one way or another, and can play an important role in ensuring that tort-based causes of action are used and interpreted sensibly and that employers do not go overboard in policing workplace speech and behavior. Judges, too, should be urged to listen to claims of intentionally inflicted workplace dignitary harms with sympathetic and open minds, but without losing hold of basic common sense precepts.

Justice Scalia addressed a version of this concern in his opinion in *Oncale*.<sup>256</sup> Scalia questioned how courts should distinguish between same-sex workplace conduct that is abusive and conduct that, though perhaps annoying, should not be actionable:

In same-sex (as in all) harassment cases, [the] inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by the target . . . . The real social impact of workplace behavior often depends upon a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.<sup>257</sup>

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254. PROSSER, *supra* note 79, at 56 (citations omitted).

255. See generally Post, *supra* note 76, at 970.

256. *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998).

257. *Id.* at 1003.

Justice Scalia points the way to a solution here. In the tort context, judges could import the Supreme Court's test for determining the existence of "hostile environment" sexual harassment: conduct must be severe and pervasive in order to qualify as harassment. Judges could also look to some of the literature on harassment for guidance: Brodsky, for instance, defines harassment in a gender-neutral fashion, as "repeated and persistent attempts . . . to torment, wear down, frustrate, or get a reaction from another. It is treatment that persistently provokes, pressures, frightens, intimidates, or otherwise discomforts another person."<sup>258</sup> Using definitions like these, judges should be able to draw principled lines between the "mere insults" and "annoyances" that tort law cannot protect us against, and workplace conduct that is so abusive as to seriously interfere with a reasonable person's ability to function at work.

The genius of the common law is that it is able to be both conservative and progressive and at once. It tends to be slow to change, but when it changes, the changes generally and appropriately reflect deep shifts in social norms. To paraphrase the Rev. Dr. Martin Luther King, Jr., "The arc of the common law is long, but it arcs toward evolving social norms."<sup>259</sup>

The second more serious version of the "civility code" objection revolves around the issue of employer liability: if employers will be liable for abuse in the workplace, then employers and employees are potentially faced with a problem that goes beyond self-censorship in the workplace. Employers may have an incentive to police a civility code in ways that are chilling of harmless forms of free expression—and they may also have an incentive simply to fire workers who behave in ambiguous or borderline ways, on the grounds that it is easier to fire a worker who may cause a problem than to keep that worker on but control his behavior.<sup>260</sup> In a world where workers already have few job protections, employer liability for a broadened action of workplace harassment might just give employers one more incentive to fire people.

This "chilling effect" is a compelling point, and here too, the exercise of common sense is the most likely solution. If courts are sensible, employers will likely be sensible, too. Ultimately, the "civility code" objection can only be answered by reference to a familiar sort of balancing test: there is a risk, on the one hand, that some employers, some of the time, and some judges, some of the time, might seek to prevent or penalize trivial words or acts.<sup>261</sup> On the other

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258. BRODSKY, *supra* note 50, at 2.

259. Harold Myerson, *Left Behind: Why American Radicals Ain't*, LA WEEKLY, Apr. 24, 1998, at 54 (quoting Dr. Martin Luther King: "The moral arc of the universe is long, but it arcs toward justice."). Apologies to Dr. King.

260. I'm grateful to Vicki Schultz for pointing out this issue. *But cf.* Stephanie Armour & Barbara Hansen, *Flood of "Retaliation" Cases Surfacing in U.S. Workplace*, USA TODAY, Feb. 10, 1999, at 1A (discussing the increase in the number of employees fired for reporting problems like sexual harassment).

261. The concern about chilling workplace speech is somewhat ironic. On the whole, courts have tended to conclude that employees have very few speech rights in the workplace—employers can legally fire them for many acts of political speech. Yet although political conservatives have cheerfully

hand, there is the reality that thousands of workers, of all races, genders, nationalities, and religions, face severe abusiveness in the workplace, abuse that can cause significant emotional distress and interfere unreasonably with their ability to succeed as employees and citizens in the modern world.<sup>262</sup> Asserting that all persons have a right to be free of severe dignitary assault in the workplace is worth the risk.

#### V. CONCLUSION: WHY A PLURAL APPROACH TO WORKPLACE HARASSMENT IS BETTER THAN AN EXCLUSIVE FOCUS ON TITLE VII

Part I of this article notes some of the drawbacks of making Title VII the exclusive focus of sexual harassment litigation and discussion. Part II outlined a pluralistic approach to workplace harassment that distinguishes between the *nature of the harm* of workplace sexual harassment (a dignitary harm) and the *context in which the harms of harassment occur* (a context of discrimination against women) and urged the need for an understanding of workplace harassment that would lead us to protect workers of any sex or sexual orientation from all severe workplace harassment, whether sexual or nonsexual in nature. Part III demonstrated that common law tort causes of action provide a promising way to understand the dignitary harm element of classic cases of sexual harassment (male harasser/female victim) and showed that these common law causes of action contain the seed of a broad-based right to be free of severe dignitary harm in the workplace, because employers are similar enough to common carriers to hold them to a higher standard of care vis-à-vis their employees.

A pluralistic understanding of workplace harassment—one that embraces both common-law torts and Title VII within its ambit—has three important benefits. First, such a pluralistic approach allows for a legal remedy for the many workers who experience severe harassment on the job, but who would be hard pressed to assert that their harassment was “because of sex,” as required by even the most expansive reading of Title VII. Second, a pluralistic approach keeps the focus of Title VII where it should be: on addressing the problem of widespread workplace discrimination against members of discrete and vulnerable groups, such as racial, ethnic, and religious minorities, and, of course, women. Third, grounding understanding of the sexual harassment of women in a notion of dignitary harm as well as in a discrimination paradigm makes a critical political and philosophical point: Workplace harassment of women is wrong not because women are women, but because women are human beings and share with all other human beings the right to be treated with respect and concern.<sup>263</sup>

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applauded highly restrictive limits on political speech in the workplace, conservatives are among the first to cry foul over proposals that might limit nonpolitical, abusive workplace speech. As an example, see discussion in Balkin, *supra* note 206, at ¶ 30.

262. Note that workplace abusiveness tends to further disempower the already disempowered, be they women, blacks, or the poor. Cf. Austin, *supra* note 121.

263. Cf. Larson, *supra* note 104, at 74–75 (noting the “powerful implications of the idea that

A. PROVIDING A POTENTIAL LEGAL REMEDY FOR WORKPLACE HARASSMENT  
VICTIMS WHO CANNOT ASSERT SUCCESSFUL CLAIMS UNDER TITLE VII

Increased social awareness of the sexual harassment of women by men has drawn attention to other kinds of workplace harassment as well. Men can be harassed by women, women can be harassed by women, and men can be harassed by men. Moreover, people can be harassed in ways that are sexual, through propositions, salacious comments, and the like, but they can also be harassed in ways that are not sexual—they can be pressured, threatened, denigrated, tormented, discomfited, and humiliated over their physical appearance, accent, clothing, height, weight, and so on. Even in cases of utterly egregious harassment, however, not all such people have actionable Title VII claims because not all of these people can show that they were harassed because of their race, sex, religion, or national origin.<sup>264</sup>

Encouraging a flexible tort-based approach to workplace harassment would be a step toward providing a remedy for those who cannot prevail under Title VII. By focusing on the dignitary harms that are at the core of workplace harassment, tort law could provide remedies for those who suffer from severely abusive, but nondiscriminatory, behavior in the workplace.

Most importantly, this approach furthers an important normative vision: it promotes a vision of a workplace that is truly meritocratic, one where employees will be judged on their on-the-job competence, not on irrelevant characteristics such as physical appearance, accent, or whether they happen to resemble the kind of person coworkers just do not like. Work is not optional for most Americans: like it or not, most are dependent on work for their survival, and in an increasing number of ways, work defines one in the eyes of others. The cost of losing a job—or being forced to change jobs because harassment renders working conditions intolerable—is extraordinarily high. The price of a paycheck should not be humiliation and fear. When entering the workplace, employees should not have to check their dignity at the door.

B. KEEPING TITLE VII'S FOCUS WHERE IT BELONGS: ON REMEDYING WORKPLACE  
DISCRIMINATION

In the absence of a robust tort-based, dignitary harm understanding of workplace harassment, plaintiffs have sought to use Title VII to remedy many kinds of workplace harassment, including, most frequently, same-sex quid pro quo and hostile environment sexual harassment. Victims of same-sex sexual harassment often allege facts that are truly appalling—but that constitute “dis-

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women and people of color should be treated as beings of full humanity, with the same capacity to be harmed, the same expectations of safety and control of their body, possessions, labor and sexuality, and the same desire to make choices in pursuit of their life projects, as white, economically privileged men”); Austin, *supra* note 121, at 5 (“The tort of outrage would serve a useful pedagogical function if . . . [it] extolled the dignity of workers, and legitimated their claims to respectful treatment by supervisors.”).

264. See, e.g., Pollard v. Rea Magnet Wire Co., 824 F.2d. 557 (7th Cir. 1987).

crimination on the basis of sex” only under a definition that is either entirely formalistic or somewhat forced. In *Oncale*, the Supreme Court suggested that a male employee harassed in a sexual fashion by male coworkers could raise a claim under Title VII if he could show that he would not have been harassed “but for” being male.<sup>265</sup> The *Oncale* Court implicitly suggested two possible ways for *Oncale* to show this: first, using a desire-based model<sup>266</sup> he could argue that his harassers were homosexual, and harassed him out of homosexual desire—in that case, *Oncale* would have been harassed because of his sex, because a similarly situated woman would presumably not have been desired by her gay male coworkers and therefore would not have been sexually harassed. Second, the Court suggested that *Oncale* might show that his male coworkers, despite their own gender, were hostile to the presence of men (or additional men, perhaps) in the workplace.

Proving either of these things would be difficult in practice.<sup>267</sup> More to the point, both highly formalistic avenues represent a trivialization of the deepest purposes of Title VII. Title VII was enacted primarily to remedy discrimination against members of groups that had historically been excluded from equal access to social, political, and economic power. While a formalistic interpretation of what it means to be discriminated against on the basis of sex may satisfy linguists, it undermines the goals of Title VII. Title VII was designed to prevent women, along with members of certain other disadvantaged groups, from facing disproportionate barriers to workplace success—it was not designed to protect men in the workplace from the abusive behavior of other men.

Katherine Franke, Kathryn Abrams, and Vicki Schultz suggest another possible avenue for bringing same-sex, male-on-male harassment within the ambit of Title VII. They argue that to the extent that male harassment of other men may be motivated by a desire to maintain the workplace as a domain of stereotypical masculinity, such harassment may constitute discrimination on the basis of sex. In other words, if a man is harassed by other men at work for being “effeminate,” his harassers may be harassing for the very same reasons they would harass a woman: they want nothing “feminine” to seep into their domain, but instead want to preserve the workplace as a site of masculine power and privilege.

This argument is stronger than more formalistic arguments for including same-sex harassment within the ambit of Title VII. Nonetheless, even this approach pushes the antidiscrimination paradigm a bit too far. Without drawing a sharp line, Title VII should be reserved for fairly clear-cut cases in which members of more powerful groups seek to prevent the workplace success or advancement of members of discrete and vulnerable groups. Carving out a robust tort-based remedy for people whose harassment does not fit this model provides a means to have it both ways.

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265. *Oncale v. Sundowner*, 118 S. Ct. 998 (1998); see also discussion of *Oncale*, *supra* note 26.

266. The desire model has been elegantly critiqued by Vicki Schultz. See Schultz, *supra* note 4.

267. Cf. Yoshino, *supra* note 24.

The most fundamental point is one of principle. Title VII may be understood in some circumstances to render same-sex harassment actionable, but doing so may be a mistake. Feminists have already begun to pay for such mistakes, in many of the ways suggested by Vicki Schultz.<sup>268</sup> Put another way, imagine two circles, one wholly contained by the other. Label the outside circle “actions that cause dignitary harm” and label the inside circle “discriminatory actions.” In some sense, all discriminatory actions involve the infliction of dignitary harms, making discrimination a subset of dignitary harm. However, not all actions that cause dignitary harm are discriminatory. All severe workplace abuses should be remediable under law, but not all should be remedied under Title VII. A pluralistic understanding of workplace harassment permits us to keep the focus of Title VII where it should be: on remedying discrimination against women.

### C. EMPHASIZING THAT WOMEN ARE FULL AND EQUAL HUMAN BEINGS

Another important reason for a pluralistic understanding of workplace harassment exists. To the extent that women who are harassed by men in the workplace focus exclusively on Title VII as a remedy, the risk of a backlash is exacerbated. Not, indeed, a justified backlash, but a backlash that feminists must nonetheless take into account when choosing legal strategies. Thus, Ellen Paul decries Title VII approaches as promoting “victimology,”<sup>269</sup> and Mark Hager asserts that “Title VII harassment liability encourages a dependent . . . and passive form of feminism.”<sup>270</sup>

By adopting a pluralist approach to workplace harassment, women who are harassed at work could assert both Title VII and tort causes of action. The Title VII cause of action is important: if women are someday to have equal access to social, political, and economic power, society must constantly be reminded of the ways in which women are disproportionately disadvantaged in the workplace. Intentional discrimination against women continues to occur, and even acts that are not motivated by a discriminatory impetus may nonetheless have an adverse impact on women.

The tort-based prong is equally important. By emphasizing the related notions of personhood and dignitary harms, a tort approach makes a critical point about what is, and what is not, wrong with the workplace harassment of women. A tort approach to the workplace harassment of women emphasizes that such harassment is not wrong because women somehow have “special” rights, because women are inherently weaker or more sensitive than men, because men are always predatory and domineering, or because women are doomed forever to be victims. Workplace harassment, sexual or nonsexual, wrongs women because they are human beings—and all human beings, regardless of sex, have a right to be treated with respect and concern.

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268. See generally Schultz, *supra* note 4.

269. Paul, *supra* note 23, at 347–49; see also examples of backlash, *supra* note 5.

270. Hager, *supra* note 23, at 424.



The argument that all human beings are deserving of respect is important philosophically: although workplace harassment of women occurs in a context of discrimination, such harassment is not wrong because it wrongs women. Female or male, we all are human beings, and workplace harassment wrongs us all.