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Chamallas, Martha

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ESSAYS

WRITING ABOUT SEXUAL HARASSMENT: A GUIDE TO THE LITERATURE

Martha Chamallas*

INTRODUCTION

Sexual harassment law is of particular interest to feminist theorists confronting the capacity of law to promote cultural change. Because sexual harassment was not regarded as a discrete injury prior to the campaign for its inclusion as a form of sex discrimination under Title VII of the Civil Rights Act,¹ the change in the law has done more than simply create new legal rights. This feminist intervention into the law has affected the cultural meaning of interactions between men and women in the workplace, even when the new meanings have not translated into legal victories.

The legal claim for sexual harassment is notable for its distinctively feminist origins. Born in the mid-1970s, the term was invented by feminist activists, given legal content by feminist liti-

* Professor of Law, University of Iowa. I wish to thank Liza Diaz for her research assistance.

1. Title VII of the Civil Rights Act of 1964 makes it unlawful for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988). The original Act did not mention sexual harassment, nor did it provide for damages for civil rights plaintiffs. The Civil Rights Act of 1991 clearly contemplates actions for sexual harassment and permits plaintiffs to recover compensatory and punitive damages up to a maximum of between \$50,000 and \$300,000, depending on the size of the employer. 42 U.S.C. § 1981a(a)(1), (b) (Supp. III 1991). Jury trials are now available under Title VII for plaintiffs seeking damages for intentional discrimination. 42 U.S.C. 1981a(c)(1) (Supp. III 1991). The most comprehensive treatment of sexual harassment doctrine can be found in BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* (1992).

gators and scholars, and sustained by a wide-ranging body of scholarship generated largely by feminist academics. Sexual harassment is the quintessential feminist harm — in Catharine MacKinnon's words, "the first time in history . . . that women have defined women's injuries in a law."² The goal of legal feminism has been to fit the cause of action to women's experience in the workplace. As a phenomenon, sexual harassment is virtually gender-specific: unlike other types of sex discrimination suits where male plaintiffs frequently complain of gender-based injury, the great majority of sexual harassment plaintiffs are women, and their complaints rarely have a precise analogue in the experience of men.³

In its twenty year life span, the legal literature on sexual harassment has peaked at three points. The first wave occurred just prior to and following the adoption of the Guidelines on Sexual Harassment by the Equal Employment Opportunity Commission in 1980.⁴ These early books and articles described the phenomenon of sexual harassment from women's point of view and countered the stock objections to treating harassment as something other than harmless flirtation. The second wave of scholarship came in response to *Meritor Savings Bank v. Vinson*,⁵ the 1986 Supreme Court decision that formally established sexual harassment as a violation of Title VII. Writers analyzed and crit-

2. CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court (1986)*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 103, 105 (1987).

3. The Equal Employment Opportunity Commission reported that in 1992, 968 of the 10,577 sexual harassment claims were filed by men. In 1991, 514 out of a total of 6886 claims were filed by men. The Commission figures do not indicate what percentage of the male respondents claim that they were harassed by women. *Man Wins \$1 Million Sex Harassment Suit*, N.Y. TIMES, May 21, 1993, at A15. Male plaintiffs have frequently complained of sexually abusive treatment by male co-workers who taunt them because of their homosexuality or perceived homosexuality. The courts have so far refused to treat harassment based on sexual orientation as actionable under Title VII. See, e.g., *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *Polly v. Houston Lighting & Power Co.*, 62 Fair Empl. Prac. Cas. (BNA) 627, 629-30 (S.D. Tex. 1992). A few heterosexual males have fared better in the courts. A married couple recently won a sexual harassment suit against their boss who treated them both abusively. The boss boasted to the husband that he would make a better lover for the wife than her husband. *Chiapuzio v. BLT Operating Corp.*, 62 Fair Empl. Prac. Cas. (BNA) 707 (D. Wyo. 1993). A California jury has recently awarded a one million dollar verdict against a female supervisor charged with harassing a male employee. The award is the largest against a female harasser. *Man Wins \$1 Million Sex Harassment Suit*, *supra*, at A15.

4. EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1993).

5. 477 U.S. 57 (1986).

icized the various elements of proof that courts had engrafted onto the sexual harassment claim and expressed concerns that sexual harassment victims were facing a series of legal obstacles reminiscent of those encountered by rape victims. The Hill/Thomas hearings in the fall of 1991 were a major force behind the third wave of scholarship. The recent reflection pieces in the law reviews discuss the intersection of race and gender in women's experience of harassment, and how race, sexual orientation, and other dimensions of personal identity affect our understanding of the meaning of sexual harassment.

This Essay provides an overview of the legal literature on sexual harassment,⁶ with attention to major trends in the emerging legal doctrine. The works I discuss also have significance for the development of feminist legal theory; in several respects the sexual harassment literature is a microcosm of broader theoretical shifts that have occurred in feminist theory in the last two decades.⁷

I. THE FIRST WAVE: FOUNDATIONS AND HISTORY

In legal circles, Catharine MacKinnon's book, *Sexual Harassment of Working Women*, published in 1979, has undoubtedly been the most influential text on sexual harassment.⁸ The book is a classic in feminist scholarship, blending particularized accounts of women's experience of sexual harassment with a coherent, persuasive legal argument for prohibiting harassment as a violation of women's civil rights. Its practical contribution was to create two legal categories for describing and proving sexual harassment. MacKinnon's *quid pro quo* and *offensive working environment* (or *condition of work*) types of sexual harassment⁹

6. The articles discussed and cited in this essay represent only a very small percentage of the articles written on sexual harassment. Several high quality articles are not treated in this essay because of the limitations of space and my emphasis on articles focusing on feminist theory. I also limited my discussion to articles that were published prior to August 1993.

7. For those unfamiliar with feminist legal theory, the following provide thoughtful analyses of the major shifts in scholarship: Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 5 BERKELEY WOMEN'S L.J. 191 (1989-90); Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1987-88).

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

9. *Quid pro quo* sexual harassment takes place when a supervisor threatens harm or promises a benefit in exchange for sexual compliance. In *quid pro quo* cases, the harassment is directly linked to the grant or denial of an economic benefit.

were later taken up by the EEOC and the courts and provided the basic doctrine for organizing litigation.

For MacKinnon, sexual harassment was best viewed as a structural feature¹⁰ of women's inferior position in the workplace. Influenced by the work of sociologist Rosabeth Moss Kanter,¹¹ MacKinnon constructed a structuralist account of sexual harassment that deprivatized and depersonalized the injury. MacKinnon argued that women in feminized jobs — the vast force of pink collar workers — were "set up" for sexual harassment.

In such jobs a woman is employed as a woman. She is also, apparently, treated like a woman, with one aspect of this being the explicitly sexual. Specifically, if part of the reason the woman is hired is to be pleasing to a male boss, whose notion of a qualified worker merges with a sexist notion of the proper role of women, it is hardly surprising that sexual intimacy, forced when necessary, would be considered part of her duties and his privileges.¹²

For women in male-dominated jobs, MacKinnon theorized that the "token" woman was often singled out for harassment because she was highly visible, marked by her sex, and an easy target for male co-workers who resented the invasion of their territory.¹³ Describing a feedback loop, MacKinnon showed how sexual harassment simultaneously kept women out of nontraditional

EEOC Guidelines provide for liability when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] . . . is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a)(1)(2) (1993); see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 62 (1986). Offensive working environment occurs when the harassing conduct of a supervisor, co-employee, or third party (e.g., client or customer) "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1993).

10. Structuralist accounts of workplace behavior and workers' attitudes place primary importance on organizational structures and cultures and downplay the significance of individual beliefs and choices. Thus, MacKinnon stresses that women are susceptible to harassment because of occupational segregation, a situation in which most women occupy low status, low paying jobs and tend to be supervised by men. MACKINNON, *supra* note 8 at 10-18. More recently, Vicki Schultz has employed a structuralist approach to criticize the court's ruling in the controversial case of *EEOC v. Sears, Roebuck & Co.*, 628 F.2d 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

11. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

12. MACKINNON, *supra* note 8, at 18.

13. *Id.* at 9, 40.

jobs and reinforced the image of workers in women's jobs as sexually accessible.

MacKinnon's legal argument against sexual harassment drew much of its power from the analogy she made to race discrimination. In at least some race discrimination cases, MacKinnon believed that the courts had recognized "the socially created, systemic, historical, and group-defined character of racial status."¹⁴ She maintained that this "substantive" description of the nature and effects of racism could and should be applied to sex. In *Sexual Harassment of Working Women*, MacKinnon first proposed her now-famous "inequality" or "dominance" approach¹⁵ and argued that because sexual harassment had the effect of subordinating women to men in the workforce, it should be declared unlawful.

Outside of legal circles, the appearance in 1978 of Lin Farley's book, *Sexual Shakedown*, also helped to establish sexual harassment as an important topic on the feminist agenda.¹⁶ Farley's tracing of the history of sexual harassment is astute: she notes that although the term "sexual harassment" was not coined until the mid-1970s, the abusive practice has a much longer history. Farley describes the sexual exploitation of slave women by their masters and mill workers by their foremen as early examples of sexual harassment.

The historical aspects of sexual harassment have not yet received much attention in the legal literature. Jill Laurie Goodman's article,¹⁷ published as part of the 1981 symposium on sexual harassment in the *Capital University Law Review*, contains a good synopsis of historical sources. The most sophisticated historical treatment of sexual harassment is Elvia Arriola's 1990 article¹⁸ which takes a "social approach to legal history" and

14. *Id.* at 132.

15. In *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION*, MacKinnon called this approach, the "inequality approach." *Id.* at 102. In her later book, *FEMINISM UNMODIFIED, DISCOURSES ON LIFE AND LAW*, MacKinnon renamed the approach the "dominance approach." CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination* (1984), republished in *FEMINISM UNMODIFIED, DISCOURSES ON LIFE AND LAW* 40 (1987).

16. LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978).

17. Jill L. Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 *CAP. U. L. REV.* 445 (1981).

18. Elvia R. Arriola, "What's the Big Deal?" *Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 *COLUM. HUM. RTS. L. REV.* 21 (1990).

carefully excavates the key developments since 1970, with a special emphasis on popular culture and on how the law had a different impact on women in blue-collar jobs, particularly women of color and lesbians. For most readers who were not personally engaged in feminist activism in the early 1970s, Arriola's article has the great virtue of providing a context in which to place the legal doctrine, and conveying a feel for the people, the organizations, and the symbols that gave meaning to the contemporary campaign against sexual harassment.

The foundation established by MacKinnon's and Farley's books and the publication of the *EEOC Guidelines* also led social scientists to take up the study of sexual harassment as a serious topic for research. These studies proved important for the law because the findings of the social scientists were later cited in cases to substantiate the claims of sexual harassment victims and to shape the elements of the cause of action. In a recent article, Barbara Gutek provides a useful synthesis of the social science research.¹⁹ She explains how much of this research focuses on men's and women's everyday definitions of sexual harassment and the prevalence of sexual harassment in different contexts. The most prominent finding of the studies discussed by Gutek is that women typically define sexual harassment more broadly than men and that these differing perceptions of sexual harassment are consistent with the self-interest of each group. The research is premised on a simple but important observation: "It is in men's self-interest to see relatively little sexual harassment because men are most often the offenders whereas it is in women's self-interest to see relatively more sexual harassment because women tend to be the victims in sexual harassment encounters."²⁰ This "two worlds" phenomenon documented by social scientists provides the empirical support for challenging purportedly objective standards in sexual harassment litigation and shores up feminist contentions that "objective" standards must be unmasked as knowledge claims based only on the partial experience of men.²¹

19. Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335 (1992).

20. *Id.* at 343.

21. A central feature of feminist and other critical scholarship is its investigation of the relationship between knowledge and power. The take-home message of much of this work is that what frequently passes for the whole or universal truth is instead a representation of events from the perspective of those who possess the power to have their version of reality accepted. Critical feminist scholars look for multiple

These early feminist legal critiques, combined with the social science research, legitimated sexual harassment as a distinct legal injury with a real connection to the experiences of women workers. When it came to establishing the specific elements of the legal claim, however, it was harder to match the emerging legal categories to feminist conceptions of the harms women actually suffer when they are harassed at work.

II. THE SECOND WAVE: DOCTRINAL CRITIQUE AND IMPLEMENTATION

The Supreme Court did not decide its first sexual harassment case until 1986, a decade after the first case in which the lower courts recognized the cause of action.²² In one respect, *Meritor Savings Bank v. Vinson*²³ represented a remarkable victory for feminist legal activists: a unanimous Court held that both types of harassment — quid pro quo and hostile or offensive working environment — were actionable under Title VII. A very conservative Court allowed a claim even in those instances in which the harassment produced no direct economic injury.²⁴ In refining the details of proof required in sexual harassment suits, however, the Court was less protective of the interests of harassment victims. Departing from the EEOC Guidelines, the Court ruled that employers were not automatically liable for the harassing acts of supervisory employees in offensive working environment cases.²⁵ Even after plaintiffs established that harassment at their workplace was “severe or pervasive,”²⁶ the employer might still avoid liability by showing that it was unaware of and did not implicitly ratify the supervisor’s actions. The Court also noted that a plaintiff’s provocative dress or public expression of sexual fantasies could be admitted into evidence to discredit her allegations and defeat her claim.²⁷

meanings and multiple perspectives in analyzing legal texts and human events. See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 184–214 (1990); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1013–16 (1991); Dennis M. Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992).

22. The first case to recognize the claim of sexual harassment was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

23. 477 U.S. 57 (1986).

24. *Id.* at 64.

25. *Id.* at 72.

26. *Id.* at 67.

27. *Id.* at 69.

A. *Elements of Proof*

The most thorough critique of *Meritor Savings Bank* and the lower courts' handling of sexual harassment cases is *Sex at Work*,²⁸ Susan Estrich's 1991 article in which she applies many of the same arguments she first employed in her work on the law of rape.²⁹ Estrich contends that "[t]hese very same doctrines, unique in criminal law, are becoming familiar tools in sexual harassment."³⁰ Estrich aims to convince the courts to abandon several limitations they have engrafted onto the newly elaborated cause of action.

At the heart of Estrich's critique is her assessment that often the conduct of the sexual harassment victim, rather than the conduct of the harasser, is scrutinized during the course of the litigation. The victim who does not behave in the way the court believes a reasonable woman should behave is penalized. Estrich claims that because so few real women measure up to these expectations, it is exceedingly difficult to secure legal protection.

One judges the woman's injury from a perspective which ignores the woman's views; or one compares her view to that of some ideal reasonable woman, or that of women afraid to speak out against harassment for fear of losing their jobs; and thus one applies a standard that the victim cannot and does not meet.³¹

One problematic element of proof is the requirement that the plaintiff prove that the harasser's conduct was "unwelcome," regardless of how objectionable the conduct might appear. Estrich observes that "unwelcomeness has emerged as the doctrinal stepchild of the rape standards of consent and resistance, and shares virtually all of their problems."³² Estrich makes a persuasive case for doing away with the unwelcomeness requirement in both quid pro quo and offensive working environment cases, a recommendation echoed by other commentators.³³ As she reads the cases, Estrich sees the harassment victim caught in the famil-

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

29. See SUSAN ESTRICH, *REAL RAPE* (1987). Estrich was not the first legal commentator to compare the judicial treatment of sexual harassment cases to rape prosecutions. For an earlier critique, see Joan Vermeulen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 CAP. U. L. REV. 499, 523-24 (1981).

30. Estrich, *supra* note 28, at 815.

31. *Id.* at 815-16.

32. *Id.* at 827.

33. See, e.g., Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459, 1463 (1992).

iar double-bind when the courts evaluate whether she welcomed the behavior about which she now complains.

In practice, both traditional and nontraditional women may find that their own actions are used against them in the unwelcomeness analysis. A woman who behaves in the most stereotypical ways — complimenting men, straightening their ties, “mov[ing] her body in a provocative manner,” let alone eating dinner with the boss on a business trip, or remaining friendly even after rejecting his advances — may find that the sexual advances she rejects are, as a matter of law, not unwelcome. Similarly, women who act too much like men — who use “crude and vulgar language,” or choose to eat with the men in the employee lunchroom — cannot be heard to complain of a worksite which is “permeated by an extensive amount of lewd and vulgar conversation and conduct.”³⁴

Estrich also takes issue with the requirement that plaintiffs in offensive working environment cases prove that the harassment was severe or pervasive. This qualification tends to limit relief to only the most egregious cases. Estrich maintains that even sporadic harassment can be harmful and argues that the quantum and severity of the harassment should affect only the amount of recovery, not determine the basic question of liability.³⁵ Most recently, B. Glenn George has proposed that the courts refine the elements of proof in offensive working environment litigation to encompass all discriminatory behavior that is ongoing and regular, even if the conduct might be regarded as trivial.

Imagine an employer who provides a coffee pot in each male employee’s office, but requires female employees to use a common coffee pot at the end of the hall. The “trivial” inconvenience of walking a few extra steps to get coffee is hardly “abusive” and is unlikely to interfere substantially, or even minimally, with a woman’s ability to perform her job. But the symbolic implications are clearly intolerable.³⁶

So far, the courts have shown little inclination to ease the sexual harassment plaintiff’s burden in the direction Estrich and George propose. As the authors acknowledge, dispensing with such elements as proof of unwelcomeness and pervasiveness

34. Estrich, *supra* note 28, at 830.

35. *Id.* at 843–47.

36. B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 21 (1993).

would open up the courts to typical cases and expose the widespread dimensions of the problem.³⁷

B. *Credibility of Harassment Victims*

A recurring theme of writers who have studied sexual harassment cases is that the courts treat sexual harassment plaintiffs with undue skepticism. Like rape victims, sexual harassment victims are said to lack credibility. In *Sexual Harassment: Women's Experience vs. Legal Definitions*, Wendy Pollack concludes that "[t]he overwhelming impression created by hostile work environment sexual harassment cases is that, regardless of the standard applied, women simply are not trusted. This is true for decisions that find for plaintiffs as well as those which find against them."³⁸

The literature contains a rich discussion of the reasons why women are not accorded credibility in this context. Susan Deller Ross³⁹ explores the case of Richard Berendzen, the former President of American University who was forced to resign after pleading guilty to making obscene phone calls. She makes the point that absent hard evidence (like the tape recordings in the Berendzen case), most people will tend to believe the more highly-ranked and credentialed person, particularly if there are some readily available myths about women that can be used to discredit the lower-ranking woman. Reflecting upon the thousands of letters she received after the confirmation hearings, Anita Hill describes the "most disheartening stories" as those involving mothers who did not believe their daughters' accounts of sexual harassment. Hill speculates that these instances of distrust may "represent attempts to distance ourselves from the pain of the harassment experience," attempts to convince ourselves that "it couldn't happen to me because it really didn't happen to

37. As this Essay went to press, a unanimous Supreme Court decided *Harris v. Forklift Sys.*, No. 92-1168, 1993 U.S. LEXIS 7155 (U.S. Nov. 9, 1993). The Court refused to require plaintiffs to prove that they suffered severe psychological harm in offensive working environment cases. Proof of "unwelcomeness" and "severity or pervasiveness" are still required elements of the prima facie case.

38. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 69 (1990).

39. Susan D. Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451, 1452-63 (1992).

her.⁴⁰ Penelope Bryan⁴¹ explores the nature of the trauma which women experience when they suddenly realize that their words will not be believed. The lack of credibility exposes women's vulnerability and takes away their ability to challenge discrimination. Ironically, this may result in women identifying with those in power, rather than identifying with other women.

At trial, defendants often try to destroy the credibility of sexual harassment plaintiffs by introducing evidence bearing on plaintiff's dress, sexual history, or other sexual conduct outside of work. Such evidence of "provocative" dress or other sexualized conduct purports to bear on whether plaintiff "welcomed" the advances. However, several commentators have observed that the portrayal of the harassment victim as a "bad girl" tends to justify a denial of protection, even when it is clear that the plaintiff subjectively did not desire the sexual conduct directed at her.⁴² Wendy Pollack effectively uses narrative to unpack the male-dominated notion of "provocative" dress and calls into question the Supreme Court's ruling that what a plaintiff wears to work is relevant to whether she was sexually harassed:

What is provocative? As an apprentice carpenter I attended a school two days a month that housed a variety of apprenticeship programs. Every day the cafeteria served lunch to 300 to 400 apprentices, all men except for three or four women. Whenever a woman walked through the cafeteria, especially a young woman, the place would go wild. The men would shout, whistle, and howl until the woman left the room. One woman in particular was a favorite target for this behavior. She was an apprentice painter. She wore the same white painters' pants that all the other painters wore. There was nothing in her dress or manner that welcomed the men's behavior. The only possible cause of this attention that I could identify was that she had blond hair.⁴³

Feminist theorists have recognized that the lack of credibility afforded to sexual harassment victims is closely linked to the minimization of the injury of sexual harassment. Martha Maho-

40. Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445, 1446 (1992).

41. Penelope E. Bryan, *Holding Women's Psyches Hostage: An Interpretive Analogy on the Thomas/Hill Hearings*, 69 DENV. U. L. REV. 171 (1992).

42. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 807 (1988); Linda J. Krieger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J. 115 (1985); Catharine A. MacKinnon, *Introduction, Symposium: Sexual Harassment*, 10 CAP. U. L. REV. i, iii (1981).

43. Pollack, *supra* note 38, at 57 n.73.

ney's scholarship⁴⁴ brilliantly disentangles the dilemma of the sexual harassment victim who "chooses" to stay on the job, despite the hostile environment, and by staying runs the risk of being told that the abuse is not serious enough to warrant legal intervention. Mahoney challenges the popular notion that "exit" is the normal and appropriate response to abuse, drawing an analogy to domestic violence. Mahoney first makes a strong case for the proposition that few workers actually have the luxury (or make the choice) "to take this job and shove it."

Exit is not the norm for many workers who encounter painful choices about work. Workers threatened by plant closings or job cuts make givebacks on wages and working conditions. When women face particularly agonizing choices in relation to work, they often internalize the pain and keep the job. This is why there were sterilized plaintiffs in fetal protection cases and why latchkey children care for themselves after school.⁴⁵

In the most powerful part of the piece, Mahoney explains why this emphasis on exit is so harmful to victims. When the issue becomes "why didn't she leave?" the only legally permissible response may be that the victim was too weak or confused to resist, an account that frequently does not correspond to women's self-understanding of their own behavior and situation. This narrative forces harassment plaintiffs into a "discourse of victimization" in which they automatically lose credibility by having to explain their "inconsistent" behavior of staying on the job and not complaining immediately. In this respect, the law is conspicuously resistant to feminist transformations:

[W]hile a generation of social historians have painted a complex world of oppression and resistance — slaves both suffer and resist, battered women gradually shape the consciousness of social workers — law has not managed to incorporate this duality and struggle, pain and strength, but filters it to a sense of victimization.⁴⁶

Mahoney's critique presents a compelling argument for a more complicated legal framework that acknowledges both oppression and resistance as the normal situation for women in the real world where most harassment victims neither leave nor sue.

44. Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992).

45. *Id.* at 1289.

46. *Id.* at 1307 (footnote omitted).

C. *Perspective and Objectivity*

From the standpoint of feminist theory, the most important issue to arise in sexual harassment litigation concerns perspective: the viewpoint through which the law makes judgments about the legality and harmful quality of the events affecting the plaintiff. A particular target of attack among feminist scholars has been the legal construct of the "reasonable person." In the hands of some courts,⁴⁷ deployment of the reasonable person standard makes it appear as if there can be only one "objective" assessment of human behavior, masking the reality that men and women often experience sexual conduct differently.

In *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*,⁴⁸ I trace the development of feminist writings on perspective, writings that have already had a significant impact on legal doctrine in sexual harassment cases. Kathryn Abrams's 1989 article⁴⁹ has received considerable judicial attention. It was cited extensively in *Ellison v. Brady*,⁵⁰ the most important case to adopt the "reasonable woman" standard. Abrams criticizes the "reasonable person" standard for its underlying assumption "that there is some view of sexual harassment that we are all likely to share, once we set aside the overreaction of the victim. It is a stark denial of the range of social facts that makes sexual harassment a distinctly different experience for men and women."⁵¹

Abrams offers two significant explanations as to why women hold distinctive views about sexual conduct in the workplace. The first reason stresses women's position as outsiders in the workplace:

Women are comparative newcomers to many kinds of work. . . . Some women may feel distant from coworkers who have different personal and professional backgrounds; others may have difficulty finding mentors among senior workers, many of whom may feel uncomfortable forming professional relationships with women. Because of these factors, many women view their position in the workplace as marginal or preca-

47. The case that generated the most outrage among feminist scholars was *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

48. Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 *TEX. J. WOMEN & L.* 95 (1992).

49. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 *VAND. L. REV.* 1183 (1989).

50. 924 F.2d 872 (9th Cir. 1991).

51. Abrams, *supra* note 49, at 1202.

rious. They are likely to construe disturbing personal interactions, stereotypical views of women, or other affronts to their competence as workers as serious judgments about their ability to succeed in the work environment.⁵²

Abrams calls this response to sexual joking, taunts, and other offensive behaviors the sense of "devaluative sexualization." Her article offers a vocabulary for feminists who search for a way to describe why jokes and other commonplace behavior are taken so seriously by women.

The second reason Abrams identifies as conditioning women's response to sexual conduct in the workplace emphasizes the greater risks of sexual violence women face.

While many women hold positive views about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. . . . Because of the inequality and coercion with which [sex] is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience.⁵³

This fear of sexual coercion means that sexual propositioning and sexual pursuit may be seen as a prelude to force in the eyes of women.

Incorporating women's viewpoints into legal rules is complicated because any new legal construct (whether it is the "reasonable woman," "reasonable victim," or some other modification of the "reasonable person" standard) poses the risk of essentialism, i.e., treating all women as if they possessed some natural trait that predetermines their response to sexual behavior. Among feminist critics, Lucinda Finley⁵⁴ and Nancy Ehrenreich⁵⁵ have expressed reservations about the transformative potential of the "reasonable woman" standard. Ehrenreich finds fault with the courts' desire to cling to objectivity by refusing to discard the notion of "reasonableness." She believes that the search for the viewpoint of the reasonable woman could readily translate into a futile search for a consensus viewpoint among women, with the danger that the values of the more dominant in the group — namely, white, affluent, heterosexual women — will be construed

52. *Id.* at 1204-05.

53. *Id.* at 1205.

54. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 64-65 (1989).

55. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

as representative of the whole.⁵⁶ Carol Sanger,⁵⁷ on the other hand, thinks that the “reasonable woman” standard is an improvement, even if it is unrealistic to suppose that judges or juries in sexual harassment suits will fully comprehend the subjective experience of harassment victims. She argues that “[t]he [reasonable woman] standard does not replace the jury with the victim; the jury decides if the woman is reasonable or not. But it is *her* experience, not *his* intent, that focuses the inquiry.”⁵⁸

In my scholarship, I have argued for a feminist construction of the “reasonable woman” standard. Rather than searching for the typical or normal woman, I would have the courts assess the rationality of plaintiff’s claim that sexual conduct in the workplace limits her chances for advancement and success.

Putting this feminist gloss on reasonableness may well mean that the hypothetical reasonable woman will not be the average woman who has found a way to cope with, but not to challenge, sexually harassing conduct. In such a construction, the hypothetical reasonable woman is the woman who is able to offer a reasoned account of how the sexual conduct challenged in the lawsuit functions to deprive women of employment opportunities.⁵⁹

Reasonableness in my proposal is linked to an assessment of the dynamics of the workplace culture, rather than to a judgment of the appropriateness of the individual plaintiff’s response. I argue that when reasonableness is reconstructed from the perspective of women, it is not sufficient to prohibit only the most virulent forms of sexual harassment. Instead, “women are entitled to experience what men already have — a working environment that is receptive to their sex.”⁶⁰

For the most part, the debate in the courts has centered on whether to adopt the “reasonable woman” or some other victim-oriented standard without paying much attention to the meaning of such standards in concrete cases.⁶¹ The concerns that some

56. *Id.* at 1218.

57. Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411 (1992).

58. *Id.* at 1415.

59. Chamallas, *supra* note 48, at 135.

60. *Id.* at 137.

61. The most recent trend seems to be in favor of adopting a modified standard. See, e.g., *Burns v. McGregor*, 989 F.2d 959, 965 (8th Cir. 1993); *Lehmann v. Toys ‘R’ Us, Inc.*, 626 A.2d 445, 453 (N.J. 1993); *Stingley v. Arizona*, 796 F. Supp. 424, 428 (D. Ariz. 1992); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1524 (M.D. Fla.

feminists have expressed about the use of explicitly modified standards will be justified if courts and juries are so influenced by stereotypes of the way women should behave that they are unable to empathize with the plight of the plaintiff.

III. THE THIRD WAVE: THE AFTERMATH OF HILL/THOMAS

The 1991 confirmation hearings of Judge Clarence Thomas marked the most intense moment of public awareness and public debate about sexual harassment — declared by Carol Sanger to be a “seismic year for sexual harassment.”⁶² The feminist legal scholarship generated in the aftermath of the hearings reflects a maturity going well beyond advocacy for more vigorous enforcement of Title VII law. The most recent commentators have paid closer attention to the intersections of race, sexual orientation, and class. Sexual harassment outside the workplace has also become a hot topic, with more articles focusing on harassment in educational institutions, in courtrooms, and on public streets.

A. *Race and Intersectionality*

Prior to the Hill/Thomas hearings, there was not much discussion in the feminist legal literature on the intersection of race and gender in the sexual harassment context. In her first book, Catharine MacKinnon commented upon the fact that black women had brought a disproportionate number of sexual harassment lawsuits.⁶³ Since 1991, however, several feminist scholars have examined the ways in which the harassment of women of color is distinctive and cannot be understood simply as a more virulent form of harassment of white women.

Kimberle Crenshaw's intersectionality theory⁶⁴ has been particularly useful in explaining why many people found Anita Hill's claim of sexual harassment hard to accept. Writing for the

1991) (all adopting the reasonable woman standard). *But see* Radtke v. Everett, 501 N.W.2d 155, 164 (Mich. 1993) (endorsing reasonable person standard).

62. Sanger, *supra* note 57, at 1411. Sanger regards the Ninth Circuit's opinion in Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), and the Hill/Thomas hearings as critical events.

63. MACKINNON, *supra* note 8, at 53–54.

64. Crenshaw first articulated her intersectionality theory in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139.

Southern California Law Review's symposium on Hill/Thomas,⁶⁵ Crenshaw restated her theory:

African-American women by virtue of our race and gender are situated within at least two systems of subordination: racism and sexism. This dual vulnerability does not simply mean that our burdens are doubled but instead, that the dynamics of racism and sexism intersect in our lives to create experiences that are sometimes unique to us. In other words, our experiences of racism are shaped by our gender, and our experiences of sexism are often shaped by our race. The rocks and hard places that make it so difficult for Black women to articulate these experiences, however, are not simply racism and sexism, but instead, the oppositional politics of mainstream feminism and antiracism. Because each movement focuses on gender or race exclusive of the other, issues reflecting the intersections of race and gender are alien to both movements. Consequently, although Black women are formally constituents of both, their intersectional interests are addressed by neither.⁶⁶

In an incisive essay, Emma Jordan shows how Thomas and his supporters were successful in casting Anita Hill as the "white feminist who happened to be black," thereby stripping her of her racial identity and working class background.⁶⁷ Throughout the hearings, Thomas was able to retain his racial identity as a black man in the public's eye. It was Thomas who convinced the public that he was the victim of a "high tech lynching," while Hill was initially unable to make the public understand that her race also made her vulnerable to abusive treatment in the workplace. Adrienne Davis and Stephanie Wildman⁶⁸ take this to mean that race as a symbol was gendered, and that the symbol "black" equalled "male." They observe that "in a stunning sleight of hand, [Thomas] managed to convince all involved, including the Senate, that white racism, rather than a Black woman, had accused him of harassment. Thus, race became something Professor Hill did not have."⁶⁹

65. Symposium, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992).

66. Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1467-68 (1992).

67. Emma C. Jordan, *Race, Gender and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse*, 15 HARV. WOMEN'S L.J. 1, 12-13 (1992).

68. Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992).

69. *Id.* at 1381-82 (footnote omitted).

The deracialization of Anita Hill was placed within its historical context by Estelle Freedman, a social historian noted for her work on sexuality.⁷⁰ Her essay⁷¹ complicates our understanding of the practice of lynching, commonly thought to imperil the lives only of black men. Instead, Freedman explains that some black women were also lynched, particularly if they charged rape and named a white man as their assailant. Lynching was thus a practice that punished both sexes for their resistance to white supremacy. The erasure of black women's resistance in the historical record makes it harder for women like Anita Hill to prove that they are vulnerable to abuse because of their race as well as their sex. According to Freedman, "[p]rotecting a black man came more naturally to [the Senate Judiciary Committee] than protecting a black woman. However appalled they might have been by the history of lynching, when the Senators heard 'black,' they saw only 'male' in the historical metaphor."⁷²

B. *Other Dimensions of Personal Identity: Sexual Orientation and Class*

Legal writers are just beginning to explore how sexual harassment injures gay men and lesbians. Elvia Arriola tells how pioneer lesbian women in the construction industry were forced to hide their sexual identity for fear of escalating harassment by their male co-workers.⁷³ Samuel Marcossou's tightly reasoned article⁷⁴ on the intersection of sexual harassment and antigay discrimination focuses on conditions faced by gay men. He constructs a persuasive case that any harassing conduct which is sexual in nature should qualify as sexual harassment under Title VII, regardless of the gender of the target. A major premise of his argument is that antigay harassment indirectly targets women because it reinforces stereotypes about appropriate gender roles and perpetuates male-created and male-dominated norms regarding sexual conduct and language at work. His position is a

70. See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (1988).

71. Estelle B. Freedman, *The Manipulation of History at the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1361 (1992).

72. *Id.* at 1364.

73. Arriola, *supra* note 18, at 62.

74. Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992).

variant of a proposal first made by Sylvia Law in 1988,⁷⁵ which has so far been rejected in the courts.⁷⁶

The intersection of sexual harassment and class has been explored by only a few scholars. Early on, Catharine MacKinnon noted that class was a problematic term for any analysis that centers on women's experience:

[W]omen's class status in the strict sense is often ambiguous. Is a secretary for a fancy law firm in a different class from a secretary for a struggling, small business? Is a nurse married to a doctor "working class" or "middle class" on her job? Is a lesbian factory worker from an advantaged background with a rich ex-husband who refuses to help support the children because of her sexual preference "upper class"?⁷⁷

MacKinnon's desire to focus on the situation of all women workers in the struggle against sexual harassment has not been achieved. Elvia Arriola charges that, in popular culture, sexual harassment has been portrayed as a problem affecting women who work in the white-collar sector. She documents how the lack of post-hiring support given to women in blue-collar jobs, many of whom were women of color, meant that efforts to integrate were stalled by the intolerable conditions women faced once they succeeded in breaking the gender barrier.⁷⁸ The particular hardships encountered by women in the trades is also analyzed in an important article by Vicki Schultz,⁷⁹ where she examines the connection between sex segregation and sexual harassment.

Martha Mahoney's scholarship is unusual because she works outside the familiar dichotomies of blue-collar versus white-collar or traditional versus non-traditional work. She contends that sexual harassment has not been adequately addressed because abuse at the workplace, experienced by a wide range of employees, has also been ignored or suppressed. Because the public discourse on work lacks a radical dimension, it is not surprising that a full appreciation of women's oppression at work is also lacking:

When at-will employment renders all workers vulnerable, its interaction with other forms of social dominance such as ra-

75. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; see also Chamallas, *supra* note 48, at 124-30; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 633-50 (1992).

76. See cases cited *supra* note 3.

77. MACKINNON, *supra* note 8, at 29.

78. Arriola, *supra* note 18, at 57-58.

79. Schultz, *supra* note 10, at 1834-35.

cism and sexism increases vulnerability to exploitation and abuse. Other structural features of law also facilitate harassment but conceal the way it is part of abuse of power regarding work. The legal determination that poverty is not a suspect classification tends to focus legal reform on issues that involve suspect classes and leave class itself out of the picture. This diminishes our consciousness of work generally, including among professionals.⁸⁰

C. *Beyond the Workplace: Harassment in Schools, Courtrooms, and on the Street*

Particularly in the post-Hill/Thomas era, the sexual harassment literature has expanded beyond discussions of harassment in terms of employment. There are some good articles treating sexual harassment in universities and colleges,⁸¹ including the issue of professor/student sexual relationships that appear to be consensual.⁸² Martha McCluskey's account⁸³ of sexual harassment by fraternities at Colby College is particularly compelling in describing how everyday harassment diminishes the educational experience for women at co-educational institutions. In line with the findings of task forces on gender bias in the courts, Marina Angel's *Sexual Harassment by Judges*⁸⁴ comments on the inadequacy of the legal response to harassment practiced by judges against employees and other participants in the judicial process.

To date the most influential article on harassment outside the employment context is Cynthia Grant Bowman's *Street Harassment and the Informal Ghettoization of Women*.⁸⁵ Her call to make street harassment a misdemeanor has generated national attention and legislative proposals.⁸⁶ The article is com-

80. Mahoney, *supra* note 44, at 1298.

81. See, e.g., Phyllis L. Crocker & Anne E. Simon, *Sexual Harassment in Education*, 10 CAP. U. L. REV. 541 (1981); Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987).

82. For discussion of such "asymmetric" relationships, see Chamallas, *supra* note 42, at 843-62; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 108-11 (1987).

83. Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 ME. L. REV. 261 (1992).

84. Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817 (1991).

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

86. *Move to Protect Women from Street Harassment*, N.Y. TIMES, July 2, 1993, at D19.

prehensive and original. If the discussion about street harassment is sustained by others, its practical effect could be enormous.

CONCLUSION

The feminist strategy to use the law to validate women's experience of workplace discrimination is a dynamic and precarious process. There is a persistent tension between the courts' inclination to domesticate the cause of action and the radical origins of the claim. Catharine MacKinnon observed in the early stages of the campaign against sexual harassment that "[t]he law against sexual harassment often seems to turn women's demand to control our own sexuality into a request for paternal protection, leaving the impression that it is more traditional morality and less women's power that is vindicated."⁸⁷ The observation holds true today. The feminist literature on sexual harassment functions as a counterpoint to the caselaw: when the courts highlight gender difference and women's vulnerability, feminist scholars try to redirect the law to emphasize the legitimacy of women's perspectives and the systemic nature of women's oppression. The process of critique and reconstruction has been unusually active in this area of inquiry and we can expect disagreements among feminists to intensify.

Perhaps because of its feminist origins, the legitimacy of the sexual harassment claim also remains contested. Now that it is settled that sexual harassment is a form of sex discrimination, the most basic challenges to the legitimacy of the claim are likely to be cast in constitutional terms. Some commentators have argued for First Amendment protection for many forms of verbal harassment in the workplace.⁸⁸ If their arguments are accepted by the courts, the offensive working environment claim could be greatly curtailed, if not eliminated as a practical matter. Given the distinctly non-feminist foundations of First Amendment doctrine, this prospect is not unthinkable, although no court has yet relied on the First Amendment to insulate an employer from liability for sexual harassment.⁸⁹

87. MacKinnon, *supra* note 42, at viii.

88. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

89. Two Title VII cases have rejected a First Amendment defense. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991); *Jew v. University of Iowa*, 749 F. Supp. 946, 961 (S.D. Iowa 1990).

The fragility of the claim of sexual harassment is not surprising. A feminist cause of action is a rarity in American law and fits uncomfortably in a system designed principally to reflect the experiences and needs of dominant groups. The feminist legal scholarship on sexual harassment has been especially rich and innovative because it directly confronts this dilemma.