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ARTICLES

Pink, White, and Blue

CLASS ASSUMPTIONS IN THE JUDICIAL INTERPRETATIONS OF TITLE VII HOSTILE ENVIRONMENT SEX HARASSMENT*

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I. INTRODUCTION

It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.¹

Hostile environment sex harassment² jurisprudence has gone astray. Rather than make good on Title VII's³ promise to dismantle the legacy of sex discrimination in the workplace, some courts, such as the Tenth Circuit quoted above, have decided that sex harassment law simply cannot be expected to affect the way in which men and women interact at work. This passive view of Title VII has manifested itself in court rulings that suggest that harassment law cannot pierce the cultural exterior of the blue-collar workplace, where crude and offensive behavior is allowed to reign.⁴ Factoring in the class culture of the workplace—that is, the blue- or white-collar culture of the workplace—when assessing hostile work environment claims has essentially established a different standard for what constitutes harassment of blue-collar women, forcing them to prove harassing behavior above and beyond what is “normal” for the blue-collar work setting. Courts that reject this trend recognize that considering workplace culture in this way creates unequal tiers of protection from sex harassment under Title VII,⁵ making it more difficult for women in blue-collar fields to seek legal redress for a hostile work environment. Accordingly, these courts have declined to take into account class culture in order to provide uniform protection for all working women. The result has been a bifurcation of court

¹ *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) (citing *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986)).

² I use the term “sex harassment” instead of “sexual harassment” throughout this article to emphasize that harassment is a form of sex discrimination under the law, whether or not it is rooted in sexual want. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78-80 (1998) (referring to Title VII's proscription of discrimination “because of . . . sex” and holding that harassment “need not be motivated by sexual desire”). See also discussion *infra* Part VI.

³ Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating 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) (2000). This federal statute proscribes workplace sex harassment as a form of sex discrimination in employment.

⁴ See discussion *infra* Part IV.A.

⁵ See discussion *infra* Part IV.B.

rulings that leaves women working in the blue-collar trades vulnerable to a particular court's take on the role of workplace culture.

The recent judicial trend recognizing a blue-collar setting as different from a white-collar setting is disturbing because focusing on class differences within the work environment misunderstands and obscures the true purpose of sex harassment law under Title VII: to make the work environment more accommodating for women by removing the discrimination and harassment that have long disadvantaged them as workers. The vestiges of sex discrimination and gender animus in the workplace⁶ are culturally-based,⁷ not class-based, and thus must be countered with a cultural re-understanding of appropriate workplace behavior. Contrary to the Tenth Circuit's inert view of Title VII, sex harassment law has had an impact in the workplace. It is not magic. But it is law, the effect of which has led to increased awareness on the part of employees, clearer company policies, and the development of on-site training.⁸

The current debate over blue-collar versus white-collar culture diverts attention away from the central goal of sex harassment law and proceeds along a deleterious detour. One only need observe the crude and "rough hewn" behavior that permeates both types of workplaces to see that no real difference exists between blue-collar and white-collar environments with respect to sex harassment.⁹ Vulgar actions¹⁰ pervade both the shop-room and the boardroom because the public world of work, whether blue- or white-collar, has long been a male-dominated realm shaped by masculine norms.¹¹ Although the migration of women into the workforce has changed the sex balance to varying degrees in different fields, women still confront hostile attitudes at work. The problem of sex harassment speaks to unwelcome male reactions to women

⁶ See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

⁷ See discussion *infra* Part VI.

⁸ See discussion *infra* Part III.

⁹ See discussion *infra* Part V.B.

¹⁰ I use the terms "vulgar" and "crude" behavior to refer to hostile conduct in the workplace that is discriminatory on the basis of gender—behavior that falls under actionable sex harassment under Title VII. These terms are not intended to encompass nondiscriminatory language.

¹¹ See discussion *infra* Part VI.

entering *the* work environment, and not just *a type of* work environment.¹²

This article suggests that cultural patterns of gender rather than class have defined the work environment, overriding any supposed class distinctions with respect to sex harassment. Title VII, to be effective, must oppose and help reshape the gendered culture of the workplace rather than excuse it under a false cloak of class normative justification. This article traces the Supreme Court's Title VII jurisprudence on hostile environment sex harassment in Part II, and follows with a discussion of the impact of harassment law on the workplace in Part III. Part IV delves into the current controversy between blue-collar and white-collar culture, while Part V discredits the behavioral assumptions associated with class. Finally, Part VI reframes the dialogue by reconnecting the phenomenon of sex harassment to masculine behavioral norms in the work setting. When examining sex harassment hostile environment claims, courts need to remain faithful to what sex harassment law aims to address and ameliorate: the problem of sex discrimination in the form of gendered and sexualized workplace culture. Eliminating the false divide between blue-collar and white-collar environments will advance a more productive understanding of sex harassment law and better address the traditional barriers to working women.

II. THE SUPREME COURT'S TITLE VII JURISPRUDENCE ON HOSTILE ENVIRONMENT SEX HARASSMENT

Sex harassment was first judicially recognized as impermissible sex discrimination within the meaning of Title VII in 1986, when the Supreme Court decided *Meritor Savings*

¹² While this article focuses on sex harassment in the workplace, I want to note that sex harassment is a common problem that occurs in other environments as well, including on the street, at school, and through the Internet. See generally Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175 (2000) (stating that sex harassment and other behavior that reduce women's privacy also permeate cyberspace); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993) (arguing that street harassment significantly restricts women's freedom and confines them to the home); Rebecca K. Lee, *Romantic and Electronic Stalking in a College Context*, 4 WM. & MARY J. WOMEN & L. 373 (1998) (describing how women are stalked and harassed via e-mail and other on-line forums); Pamela Y. Price, *Eradicating Sexual Harassment in Education*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 60 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing the ineffectiveness of Title IX in addressing the continuing problem of sex harassment in educational settings).

Bank v. Vinson.¹³ In *Meritor*, the plaintiff Mechelle Vinson alleged that her male superior, a vice president at the bank where she worked, propositioned her for a sexual relationship.¹⁴ Although Vinson first objected, she eventually relented because she thought that she would be fired if she did not.¹⁵ From this point on, and continuing over the course of several years, Vinson testified that her supervisor repeatedly subjected her to sexual advances at the bank, describing how he "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."¹⁶ After four years at the bank, Vinson left on an indefinite sick leave and was then fired for her extended absence.¹⁷ Vinson sued the supervisor and the bank for sex harassment under Title VII, but the federal district court rejected her claim, failing even to settle the contradictory testimony regarding whether Vinson and the supervisor had engaged in sexual relations.¹⁸ Instead, the district court found that even if a sexual relationship did exist, it was voluntary and did not implicate Vinson's employment.¹⁹ The appellate court reversed, finding that the district court had not considered whether Vinson's allegation constituted a hostile work environment, which would be actionable under Title VII.²⁰

The Supreme Court held in *Meritor* that sex harassment is a form of sex discrimination in violation of Title VII, actionable in either its quid pro quo or hostile environment form.²¹ An employer is liable for quid pro quo harassment when sexual relations are implicitly or explicitly tied to economic or employment consequences.²² Hostile environment harassment involves workplace conduct that unreasonably interferes with an individual's work performance or renders the work

¹³ 477 U.S. 57 (1986).

¹⁴ *Id.* at 59-60.

¹⁵ *Id.*

¹⁶ *Id.* at 60.

¹⁷ *Id.*

¹⁸ *Meritor Sav. Bank*, 477 U.S. at 60-61. Vinson's supervisor denied all allegations of sexual relations, arguing that she had brought her claim as a result of a business dispute. *Id.* at 61.

¹⁹ *Id.* at 61.

²⁰ *Id.* at 62.

²¹ *Id.* at 65 (citing 29 C.F.R. § 1604.11(a)(3) (1985)). While the Court remanded the case on the issue of hostile environment sex harassment, the Court declined to announce a rule with respect to employer liability. *Id.* at 72-73.

²² *Id.* at 64-65.

environment intimidating, hostile, or offensive.²³ In discussing the applicability of the hostile environment theory to sex harassment, the Court looked to lower court case law involving racial and ethnic discrimination. The Court highlighted *Rogers v. EEOC*,²⁴ a Fifth Circuit case holding an employer liable under Title VII for creating a hostile environment for a minority employee by discriminating against its also minority clientele, even though the complainant did not sustain economic injury.²⁵ Following *Rogers*, the Supreme Court observed that other courts applied the hostile environment theory to cases involving harassment based on race,²⁶ religion,²⁷ and national origin.²⁸ The Supreme Court agreed that Title VII also could be used to proscribe hostile environment harassment based on sex,²⁹ in accordance with the Equal Employment Opportunity Commission's [EEOC] promulgated Guidelines on sex harassment.³⁰ The comparison to race harassment is a logical one, and the Court highlighted this analogy, quoting the Eleventh Circuit's opinion in *Henson v. City of Dundee*: "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."³¹ The parallel between sex and race harassment under the law does not mean, however, that they do not intersect in real life; sex harassment of minority women

²³ *Meritor Sav. Bank*, 477 U.S. at 64-65.

²⁴ 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)

²⁵ *Id.* at 65-66.

²⁶ *See, e.g.*, *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977) (cited in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986)); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (cited in *Meritor*, 477 U.S. at 66).

²⁷ *See, e.g.*, *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (cited in *Meritor*, 477 U.S. at 66).

²⁸ *See, e.g.*, *Cariddi v. Kan. City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (cited in *Meritor*, 477 U.S. at 66).

²⁹ *Meritor*, 477 U.S. at 66.

³⁰ The Guidelines provide in pertinent part:

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

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2003).

³¹ *Meritor*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

is often tinted with race harassment, implicating and harming their multi-faceted identities as women and as women of color.³²

The Supreme Court in *Meritor* found that hostile environment harassment based on sex does indeed fall within Title VII's purview, and added that to be actionable, the harassment must be "sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment.'"³³ Class was not germane to evaluating this hostile environment claim. The Court neither remarked upon the class norms of Vinson's workplace nor referred to the white-collar setting of the bank in determining that the harassment was severe and pervasive. Even assuming, *arguendo*, that the Court had noticed the white-collar nature of Vinson's work environment, such an observation would have only helped to demonstrate that crudity does not stop short of the professional office: certainly no one would claim that the conduct in this case (i.e., fondling, exposing, forcibly raping) was anything less than an example of extreme and violent vulgarity, and the harasser nobody less than a white-collar executive.

In *Harris v. Forklift Systems, Inc.*,³⁴ the Supreme Court further articulated the standards by which to assess the admittedly difficult hostile environment harassment suit. The facts in *Harris* show that Charles Hardy, the president of an equipment rental company, subjected a female manager to a slew of sexist and sexually-oriented comments.³⁵ According to Harris' testimony, Hardy repeatedly hurled insults at her, for example saying "[y]ou're a woman, what do you know,"³⁶ calling her "a dumb ass woman,"³⁷ and publicly suggesting that he and Harris "go to the Holiday Inn to negotiate [her] raise."³⁸ When Hardy failed to change his behavior after Harris complained, she quit the company and filed a hostile environment sex harassment charge.³⁹

The Supreme Court upheld Harris' claim, ruling that harassment creates a cause of action if it satisfies both an objective and subjective standard: (1) the conduct must be

³² See discussion *infra* Part V.C.

³³ 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904).

³⁴ 510 U.S. 17 (1993).

³⁵ *Id.* at 19.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Harris*, 510 U.S. at 19.

“severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive;”⁴⁰ and (2) the complainant must “subjectively perceive the environment to be abusive.”⁴¹ The Court additionally held that psychological injury to the employee is relevant but not necessary to show that the environment was abusive to the complainant.⁴² Instead of stating dispositive factors, the Court recommended applying a totality of the circumstances analysis that “may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁴³

Again, as in *Meritor*, the Court did not comment upon the class context of Harris’ work setting, nor did the Court include it as a factor in the totality analysis it set forth. While it is true that the list of factors was not meant to be exhaustive, one would expect the Court to have included the class context of the work environment if it were an especially relevant factor. It is not even clear how the “class factor” would be construed in *Harris*, because while the industry setting was blue-collar, the accused harasser was the white-collar president of the company. Does the industry setting where the harassment takes place determine the class characterization of the workplace, or is this established by the specific status of the harasser? What if the president or upper-level manager rose to his position from the shop-floor?⁴⁴ Does it matter? The answer is no. Sex harassment, by definition, is discrimination based on sex, not class. Thus, class context is not relevant to a finding of sex harassment. “As the [EEOC] emphasized,” Justice Ginsburg observed in her concurring opinion in *Harris*, “the adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance.”⁴⁵ Accordingly, the analysis of

⁴⁰ *Id.* at 21.

⁴¹ *Id.* at 21-22.

⁴² *Id.* at 23.

⁴³ *Id.*

⁴⁴ See SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 66 (1999) (stating that in at least one naval shipyard that the author had visited, “[t]he white-collar administrators had largely risen from the blue-collar shops”).

⁴⁵ *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring, and adding that harassment which alters the working conditions “as to ‘ma[k]e it more difficult to do the job’” would sufficiently establish that the harassment has “unreasonably interfered with the plaintiff’s work performance,” citing *Davis v. Monsanto Chem. Co.*, 858 F.2d

a hostile environment claim should focus on whether the plaintiff found it harder to perform the job in the face of hostile interference, regardless of the class association of the plaintiff's work environment.

In *Oncale v. Sundowner Offshore Services, Inc.*,⁴⁶ the most recent sex harassment case to clarify the type of behavior that constitutes a hostile environment, the Supreme Court held that hostile environment harassment not motivated by sexual desire can still violate Title VII if the harassment is because of sex. Plaintiff Joseph Oncale worked as a roustabout on an oil rig where other male crew members publicly forced him to endure sexually humiliating activity, including physical and sexual assaults.⁴⁷ He received no help and little sympathy after complaining to supervisory personnel, and simply was told that his situation was not unique since the same crew members had also harassed other employees in the company.⁴⁸ Oncale soon resigned because he feared that he would be raped by his harassers if he remained.⁴⁹ The Supreme Court found that same-sex harassment is harassment based on sex,⁵⁰ as required under Title VII, and that sex harassment need not be erotically-motivated but can be the product of gender animus.⁵¹ Taking the Court's position a step further, it follows that gender hostility in turn is largely culturally-derived from masculine norms dictating who (in terms of gender identity) and what (in terms of conduct) are acceptable in a particular

345, 349 (6th Cir. 1988)).

⁴⁶ 523 U.S. 75 (1998).

⁴⁷ *Id.* at 77.

⁴⁸ *Id.*

⁴⁹ *Id.* According to Oncale's allegations,

[T]he harassment included [Danny] Pippen and [Brandon] Johnson restraining him while [John] Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises.

Oncale v. Sundowner Offshore Serv., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

⁵⁰ *Oncale*, 523 U.S. at 80-81.

⁵¹ *Id.* at 80. As the Court put it:

But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.

work environment.⁵² In this vein, the threatening and abusive actions committed against Oncale were disturbing attempts to emasculate him within the highly-masculinized environment of the oil rig. By standing for the proposition that a man could be subjected to sex harassment by fellow male co-workers absent any sexual motivation, *Oncale* serves to undercut the primacy of (heterosexual) masculine norms in the workplace and arguably establishes gay rights in the area of sex harassment law.⁵³

In trying to elucidate the objective and subjective standard when determining the severity of the harassment,⁵⁴ the Court stated in dicta that workplace behavior should be viewed in light of the “surrounding circumstances, expectations, and relationships”⁵⁵ and that courts should be sensitive to the “social context” in which the alleged behavior takes place.⁵⁶ Justice Scalia, who wrote the majority opinion for the Court in *Oncale*, offered a comparison between the environment of a professional football player and that of the coach’s secretary:

A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.⁵⁷

Rather than move sex harassment law forward, however, *Oncale*’s language likely has confused it. After *Oncale*, courts will apply their own sense of how “social context” should be understood, and many may continue to follow in the backward footsteps of the Tenth Circuit quoted

⁵² See discussion *infra* Part VI.A.

⁵³ See Marc Spindelman, *Discriminating Pleasures*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 201 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (stating that “*Oncale* is an important step forward for sex equality rights, including the rights of lesbians and gay men,” in opposition to Janet Halley’s queer theory critique that *Oncale* allows Title VII to become a dangerous tool for sexuality regulation, including homophobic regulation (citing Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 183 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004))).

⁵⁴ *Oncale*, 523 U.S. at 81.

⁵⁵ *Id.* at 82.

⁵⁶ *Id.* at 81.

⁵⁷ *Id.* at 81-82.

earlier.⁵⁸ Some courts have already seized upon *Oncale's* vague "common sense" directive to argue that workplace culture is part of the social context and should be taken into account when evaluating harassment claims.⁵⁹ Although the Supreme Court has never specifically mentioned class, lower courts both before and after *Oncale* have defined workplace culture in terms of class—that is, according to its blue- or white-collar context.⁶⁰ But it does not appear that *Oncale's* text supports this understanding, especially given Justice Scalia's own preference for close textual readings. The comparison that the Court made between the professional football player on the field and the secretary back at the office is not a comparison between a blue-collar and white-collar workplace. Moreover, it focuses on a male-centered professional sport that is hardly representative of most work environments. To be fair, perhaps the Court presented the football example because both the professional football player and the roustabout on the oil rig work in predominately, if not exclusively, male environments. Even so, the Court did not link the analogy to a discussion of *Oncale's* particular situation, and in any event the illustration still fails to make a class distinction. Arguably, if the Supreme Court had wanted class context to be specifically considered in the totality of the circumstances test, the Court could have either included class or used the phrase "economic context" instead of "social context" in its decision.

Oncale would have provided a good opportunity for the Supreme Court to set forth differing standards of vulgarity depending on the blue- or white-collar work context, since *Oncale* itself is set within the blue-collar setting of the oil platform. Yet the Court opinion did not at all discuss the "natural" crudeness of *Oncale's* work environment or hold his harassers' actions to a different standard of coarseness. That the Court did not use the facts and setting of *Oncale* to illustrate any supposed class difference in harassing behavior is telling. Rather, *Oncale* is important because the Court recognized that same-sex harassment could be sex harassment, irrespective of the class context. In sum, the Supreme Court in its jurisprudence on sex harassment has focused only on the discriminatory dynamics of the workplace based on sex and

⁵⁸ *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995).

⁵⁹ *See, e.g., Pirolli v. World Flavors, Inc.*, No. 98-3596, 1999 WL 1065214, at *5 (E.D. Pa. Nov. 23, 1999); *Smith v. Sheahan*, 189 F.3d 529, 534-35 (7th Cir. 1999).

⁶⁰ *See case discussion infra* Part IV.

gender, and not on class.⁶¹ The Circuit courts that have diverged from this gender-based analysis have neglected to consider the entire context of these Supreme Court cases, and have interjected their own class assumptions in the adjudication of hostile environment harassment claims, in this way failing to uphold the fundamental goal of Title VII.

III. IMPACT OF SEX HARASSMENT LAW ON THE WORKPLACE

When the Tenth Circuit echoed the district court sentiment that one could hardly “claim that Title VII was designed to bring about a magical transformation in the social mores of American workers,”⁶² it was correct only in the sense that the change was not meant to be “magical” but part of the normal course of business for employers. For women to have access to equal opportunity in employment, employers necessarily need to play an active role in addressing the obstacles that have kept women out of certain job sectors for too long. Promoting awareness of sex harassment through harassment law has helped create a different understanding of expectations in the workplace, affecting both employers and employees alike.

A. Faragher and Ellerth: Impact on Employers

After *Oncale*, the Supreme Court revisited the issue of sex harassment, this time concerning the issue of employer liability. In *Faragher v. City of Boca Raton*,⁶³ the Court held

⁶¹ While the United States was one of the first nations to render sex harassment illegal as a form of sex discrimination and has made the most progress in this area of the law, other countries around the world have also begun to take steps to address sex harassment. For instance, the European Community in 1991 passed a Code of Conduct (although not binding) with the goal of preventing sex harassment. Notably, this Code also does not include the class culture of the workplace in defining what constitutes a hostile work environment based on sex. Rather, the Code states in relevant part that “[t]he essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behavior is acceptable to them and what they regard as offensive.” Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work 92/131/EEC, 1992 O.J. (L 49) 1, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992h0131&model=guichett (last visited Jan. 19, 2005). See also, e.g., Beverley H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. 43, 69-88 (1993).

⁶² *Gross*, 53 F.3d at 1538 (citing *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986)).

⁶³ 524 U.S. 775 (1998).

that an employer is vicariously liable for a supervisor's harassment of a lower-level employee unless the employer can demonstrate that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁶⁴ The Court expanded on this holding in *Burlington Industries, Inc. v. Ellerth*,⁶⁵ ruling that the difference between quid pro quo and hostile environment harassment does not control the issue of employer liability and that employers can be liable for either type of conduct, regardless of whether they were aware of the harassment.⁶⁶

The clarified standards for employer liability plainly indicate that employers have an affirmative duty to institute policies and procedures addressing and preventing sex harassment at the workplace, control mechanisms that in turn are precisely intended to shape employee behavior. Companies, as a result, are directly tackling the problem, many of them establishing more specific policies and educating employees about sex harassment, with some even implementing a code of ethics in the workplace.⁶⁷ Employers should be taking notice; the number of sex harassment charges filed with the EEOC leapt from 10,532 in 1992 to 15,549 in 1995, and remained relatively constant through 2001, dipping somewhat in 2002

⁶⁴ *Id.* at 807.

⁶⁵ 524 U.S. 742 (1998).

⁶⁶ *Id.* at 754. The Court subsequently has ruled on a few additional sex harassment cases not dealing directly with work culture issues: *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998) (holding that in order for a school to be liable for teacher-student harassment, a school official with the authority to take corrective measures must have actual knowledge of, or act deliberately indifferent to, the offensive conduct); *Davis ex. rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (applying the same strict standard specified in *Gebser* to student-on-student sex harassment by holding that a school board is potentially liable only where it had actual notice and showed deliberate indifference); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271-72 (2001) (holding that an isolated incident, unless extremely serious, does not amount to sex harassment and that a right-to-sue letter issued by the EEOC to employee three months before supervisor announced possibly transferring employee was insufficient to show causality between employee's protected activity and the adverse employment action); *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2346-47 (2004) (establishing that to make a constructive discharge claim due to hostile work environment sex harassment, the plaintiff must show that resignation was an appropriate response to unbearable conditions, to which the employer may then raise the *Ellerth/Faragher* affirmative defense, provided that the employer did not engage in adverse employment actions).

⁶⁷ Heather Pauly, *Sex and the Workplace*, CHICAGO SUN-TIMES, Aug. 26, 1998, at 6.

and 2003.⁶⁸ Awards paid in settlements with the EEOC likewise jumped from \$12.7 million in 1992 to \$50.3 million in 1999 and remained in the \$50 million range through 2003, demonstrating the costly consequences of these suits.⁶⁹

As the Court explained in *Faragher*, “[Title VII’s] ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.”⁷⁰ Avoiding a harm that is as common as workplace sex harassment can only be achieved by revising our notions of what is appropriate behavior in the workplace and no longer tolerating previously condoned harassing conduct. Under the recently articulated legal standards for employer liability, employers are directed to proactively influence and monitor the way the sexes interact in the workplace. And after Congress amended Title VII in 1991 to allow sex harassment victims to sue for damages, including punitive damages,⁷¹ employers have a strong incentive to do so. No magic required.

Moreover, the Supreme Court appears to agree that Title VII was intended, at least in some measure, to modify our notion of what is acceptable in the workplace when it comes to harassment. The respondents in *Oncale* argued that “recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace,”⁷² but the Supreme Court rejected this argument, remarking that “[this] risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute.”⁷³ If we assume that discrimination is a form of social behavior, then anti-discrimination law must address social practices in the workplace that have discriminating effects. To this end, the Tenth Circuit’s concern about preventing a “cultural

⁶⁸ U.S. EEOC, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 – FY 2003*, at <http://www.eeoc.gov/stats/harass.html> (last visited Jan. 19, 2005). 14,396 charges and 13,566 charges were filed in 2002 and 2003, respectively. *Id.*

⁶⁹ *Id.* This amount does not include monetary damages paid through litigation. *Id.*

⁷⁰ 524 U.S. at 806 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

⁷¹ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (2000)). This amendment allows harassment plaintiffs to obtain from \$50,000 up to \$300,000 in total damages. 42 U.S.C. § 1981(b)(3) (2000).

⁷² *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 80 (1998).

⁷³ *Id.* (referring to Title VII’s requirement that the discrimination be on the basis of sex; that is, “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed”).

transformation” under Title VII misses the point of harassment law, and indeed, undermines it.

B. Federal Government Survey: Impact on Employees

Since enacting Title VII in 1964, Congress has shown concern about the problem of sex harassment within the federal government and in the late 1970s requested that the U.S. Merit System Protection Board⁷⁴ conduct a study on the incidence and impact of sex harassment in federal worksites.⁷⁵ The Merit System Protection Board (“Board”) conducted its first study in 1980 and two follow-up studies in 1987 and 1994.⁷⁶ In the Introduction to the 1994 report, the Board stated:

In confronting the issue of sexual harassment, the Federal Government is interested not only in avoiding situations in which a court would find a violation of law, but also in *preventing the creation of an unpleasant, unproductive work atmosphere*. The sexually harassing behaviors reported by survey respondents and discussed in this report—whether or not they are cause for legal action—can most definitely create an unproductive working environment and thus are an appropriate focus of our attention.⁷⁷

According to the report, the government is interested in going beyond curbing illegal conduct to also address any offensive conduct that can reduce the productivity and happiness of employees. Such an expansive perspective is directly contrary to the Tenth Circuit’s pronouncement; rather, such an approach is exactly concerned with affecting the general tenor of the workplace by increasing awareness and shaping attitudes regarding sex harassment.

Attitudes certainly have been changing over time, as both men and women in the federal government are converging in their views of what falls under harassing behavior.⁷⁸ Through a survey of federal employees conducted in 1980, 1987, and 1994, the Board found that both men and women considered a broader spectrum of behavior to constitute sex harassment, whether initiated by a coworker or supervisor and

⁷⁴ The U.S. Merit System Protection Board is an independent agency responsible for examining the U.S. civil service system.

⁷⁵ See U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES*, 1 (Oct. 1995), available at www.mspb.gov/studies/sexhar.pdf (last visited Jan. 19, 2005) [hereinafter *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE*].

⁷⁶ *Id.*

⁷⁷ *Id.* at 3 (emphasis added).

⁷⁸ *Id.* at 5.

ranging from “pressure for sexual favors” to “sexual teasing, jokes, [and] remarks.”⁷⁹ The survey also showed that federal employees were reflecting critically on how their behavior may be perceived by others at the workplace and were altering their conduct as a result, an outcome that the Board views as a positive step in sex harassment awareness.⁸⁰ Importantly, despite critics’ concerns that the increased attention to sex harassment will stifle human relationships in the workplace,⁸¹ the survey found that only a small minority of men and women believed that a “fear of being accused of [sex] harassment” had rendered their work environments less than comfortable.⁸²

This adjustment in public attitudes, at least among federal employees, is not surprising if we consider that sex harassment law has helped influence the way that certain workplace behavior is perceived.⁸³ Just as progressive civil rights legislation in the 1960s helped change the nature of racial interaction despite considerable resistance,⁸⁴ sex harassment law has helped facilitate a change in the nature of gender interaction. It is precisely when the law challenges deep-rooted discriminatory notions that the law does and must call for revised social norms. Social norms, though malleable, are slow to change but the law can precipitate new understandings of social behavior. To believe that sex harassment law can be efficacious without affecting underlying attitudes about women in the workplace is to misunderstand the core of the problem. Some legal observers may believe that the law should not act as the key apparatus for social reform,⁸⁵

⁷⁹ *Id.* at 7.

⁸⁰ SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 75, at 9.

⁸¹ See, e.g., Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 503 (2002) (stating that Title VII “inhibits social interactions and office relationships”).

⁸² SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 75, at 9 (“Only 18 percent of men and 6 percent of women respondents agreed that fear of being accused of sexual harassment had made their organizations uncomfortable places to work. Apparently the increasingly acknowledged need for self-restraint doesn’t necessarily equate to discomfort on the job.”).

⁸³ See Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN’S L.J. 143, 190 (2002) (arguing that the legitimacy of sex harassment law depends upon harassment being viewed as “immoral behavior” that warrants government intervention because harassment “inflicts physical, emotional, psychological, and economic harm on its victims and society”).

⁸⁴ *Id.* at 180.

⁸⁵ See Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171, 171 (1993) (stating that “there tend to be two kinds of people when it comes to the topic of ‘law and social change’—those who believe that law is an important instrument of

but the law does function as a type of social code. The law, as a set of social rules, helps to organize society and holds people accountable for their actions. The cultural legitimacy of sex harassment law further can be strengthened through popular culture and the media in terms of how the issue of sex harassment is conveyed to the public, including the public response to employers accused of sex harassment.⁸⁶

IV. THE CLASS DEBATE: BLUE-COLLAR V. WHITE-COLLAR?

According to a study that examined every federal judicial opinion on workplace sex harassment for a period of ten years after *Meritor*, harassment plaintiffs in these cases were predominately women and predominately blue-collar or clerical.⁸⁷ In the federal district court opinions that mentioned the occupational status of the plaintiff, 38% of the plaintiffs were blue-collar, 29% were clerical employees, 21% were management and white-collar, and 12% were professional.⁸⁸ Furthermore, hostile environment claims made up the vast majority of sex harassment claims, with 70% of the cases involving only a hostile environment claim and 22.5% of the cases involving both hostile environment and quid pro quo claims.⁸⁹ The large number of hostile environment harassment cases that get filed in court demonstrate that sex harassment is a broad societal problem, and not simply the result of a few "bad apples" in the workplace.

Additionally, hostile environment claims more frequently arose out of majority-male work settings, whereas mixed-sex workplaces produced a greater percentage of quid pro quo charges.⁹⁰ The connection between instances of hostile environment harassment and male-dominated workplaces is important and strongly suggests that the mostly-male composition of the workplace plays a role in fostering a type of

social change and those who think not").

⁸⁶ See Zalesne, *supra* note 83, at 216-17.

⁸⁷ Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 560-61 (2001) ("Only 5.4% of the plaintiffs (a total of twenty-seven) are men . . .").

⁸⁸ *Id.* at 561 (stating that the plaintiff's occupation was provided in 90% of the cases).

⁸⁹ *Id.* at 565. This study examined 502 district court opinions and 164 appellate court opinions. *Id.* at 556.

⁹⁰ *Id.* at 565-66 ("In the eighty-eight mostly-male workplace cases, only 17% include a quid pro quo claim and 83% rely solely on hostile environment claims. In the 145 mixed-workplace cases, by contrast, 34% include quid pro quo claims and only 66% rely solely on hostile environment claims.").

environment that women find harassing and discriminatory. The pervasiveness of sex harassment in both blue-collar and white-collar jobs further indicates that class norms are not driving this phenomenon.

Some courts, however, both pre- and post-*Oncale*, have mistakenly concentrated on the class culture of the workplace as part of their totality and social context analysis, causing a Circuit divide.⁹¹ Among the Circuit courts, the Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits have largely taken into account workplace culture in terms of class when assessing a harassment claim.⁹² On the other end of the spectrum, the First, Fourth, and Sixth Circuits have declined to factor in workplace class culture.⁹³ The Circuits that give special treatment to class culture are primarily motivated by formalist and administrative concerns, whereas the Circuits that refuse to take this approach are motivated by equality concerns.⁹⁴

A. *Special Treatment of Class Context*

One of the first court decisions that considered workplace culture was *Gross v. Burggraf Construction Co.*⁹⁵ The plaintiff, Patricia Gross, was hired as a water truck driver with a construction company and was supervised by George Randall Anderson.⁹⁶ In asserting her Title VII claim, Gross alleged that Anderson harassed her by calling her parts of the female anatomy and remarking to another employee, "Mark, sometimes don't you just want to smash a woman in the face?"⁹⁷ The district court granted the defendant construction company's motion for summary judgment, and Gross

⁹¹ See Frank, *supra* note 81, at 438-41.

⁹² See, e.g., *Barbour v. Browner*, 181 F.3d 1342, 1349 (D.C. Cir. 1999); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1010-11 (7th Cir. 1999); *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997); *Montandon v. Farmland Indus.*, 116 F.3d 355, 358 (8th Cir. 1997); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537-38 (10th Cir. 1995); *Reed v. Shepard*, 939 F.2d 484, 491-92 (7th Cir. 1991); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924-25 (5th Cir. 1982).

⁹³ See, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713, 735 (1st Cir. 2001); *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 194 (4th Cir. 2000); *Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999).

⁹⁴ Frank, *supra* note 81, at 440-41.

⁹⁵ 53 F.3d 1531 (1995).

⁹⁶ *Id.* at 1535.

⁹⁷ *Id.* at 1536.

appealed.⁹⁸ The Tenth Circuit fully embraced the idea that Gross' work environment should be evaluated according to its blue-collar nature "where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments."⁹⁹ Citing *Rabidue v. Osceola Refining Co.*,¹⁰⁰ the Tenth Circuit affirmed that different workplace norms may exist in certain work environments:

[Otherwise,] [t]he standard for determining sex[ual] harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this.¹⁰¹

The Tenth Circuit compared the construction setting of Gross' job with that of a prep school faculty meeting or the Congress floor to conclude that different speech is acceptable in different types of workplaces. In dismissing Gross' claim, the Court concluded that crude language in a blue-collar environment is part of the workplace culture and does not rise to the level of actionable gender-based harassment and discrimination under Title VII.¹⁰² The court preferred to defer to the already-existing "rough-hewn" culture of the blue-collar environment rather than use Title VII to help bring about a cultural change in the workplace with respect to gender relations.

These courts gave special consideration to the class context of the workplace because they believe it is highly pertinent to assessing the objective and subjective severity of the alleged conduct.¹⁰³ In defending this approach, at least one law review article posits that factoring in "workplace culture" (defined in terms of class) can serve to better differentiate between unrefined teasing and a serious case of harassment.¹⁰⁴ The benefits would include reducing some of the ambiguity present in hostile environment law to promote consistency and

⁹⁸ *Id.*

⁹⁹ *Id.* at 1538.

¹⁰⁰ 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

¹⁰¹ *Gross*, 53 F.3d at 1538 (quoting *Rabidue*, 584 F. Supp. at 430).

¹⁰² *Id.* at 1538, 1547.

¹⁰³ See Frank, *supra* note 81, at 466.

¹⁰⁴ *Id.* at 490.

certainty in the legal outcomes of these cases.¹⁰⁵ Under this view, narrowing the current standards would also cut down on the number of harassment cases that increasingly occupy federal and state court dockets.¹⁰⁶

B. *Non-Special Treatment of Class Context*

Despite its previous ruling in *Rabidue*, the Sixth Circuit ruled the other way in *Williams v. General Motors Corp.*¹⁰⁷ In this case, plaintiff Marilyn Williams worked the midnight shift in a plant warehouse, distributing materials used at the plant to assemblers.¹⁰⁸ She alleged that during her employment in this shift, she was harassed by her coworkers and male supervisor in a series of both sexual and nonsexual ways, creating a hostile work environment based on her gender in violation of Title VII.¹⁰⁹ The district court denied relief by granting summary judgment in favor of the employer, and Williams appealed.¹¹⁰

The Sixth Circuit in *Williams* explicitly declined to adopt a different severity standard for a hostile environment according to the work culture and openly stated its disagreement with the Circuit decision in *Gross*:

We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment. Surely women working in the trades do not deserve less protection from the law than women working in a courthouse.¹¹¹

As the *Williams* Court observed, factoring in the blue- or white-collar nature of the workplace creates two tiers of protection under Title VII, and makes it more problematic for women in blue-collar fields to obtain legal redress for hostile environment harassment by requiring them to show a level of vulgarity above and beyond the normative culture of the trade.

¹⁰⁵ *Id.* at 492.

¹⁰⁶ *See id.*

¹⁰⁷ 187 F.3d 553 (6th Cir. 1999).

¹⁰⁸ *Id.* at 559.

¹⁰⁹ *Id.* at 559-60.

¹¹⁰ *Id.* at 560.

¹¹¹ *Id.* at 564.

The First Circuit in *O'Rourke v. City of Providence*¹¹² followed the approach of the Sixth Circuit. In *O'Rourke*, the plaintiff was hired as a firefighter with the City of Providence Fire Department.¹¹³ Starting from her training period and continuing throughout her employment as a line firefighter, the plaintiff was the target of a constant discriminatory campaign that included her being subjected to sexually disparaging comments, sexual taunts, pornographic material, and differential treatment by her supervisors.¹¹⁴ Although the City, relying on *Gross*, posited that the conduct of the plaintiff's coworkers needed to be considered within the blue-collar context of the firefighting industry, the First Circuit declined to embrace this different standard for the same reasons articulated by the *Williams* court.¹¹⁵

The *Williams* and *O'Rourke* Courts in essence provided an equality rationale for rejecting workplace culture as a relevant factor in assessing harassment claims: women in blue-collar fields should not have to endure considerably more "coarseness" in order for their claims to come within the protective ambit of Title VII.¹¹⁶ While the equality argument is a compelling one, it poses the problem of relativism in that such an argument seeks to focus only on equality of status rather than on elevation of status.¹¹⁷ In other words, courts could simply require all workers to demonstrate the level of vulgarity currently demanded of blue-collar plaintiffs and still ensure equal, albeit inadequate, protection. Courts instead should aim not only to equalize but also to *enhance* the protection afforded to all working women by advocating for an equal and better standard.

As previously discussed, courts that give special emphasis to workplace culture offer legalist reasons for adopting such an approach, including: certainty, predictability, and uniformity of decisions.¹¹⁸ But these goals would also be achieved if all courts were to refrain from giving special treatment to workplace culture. Further, while these objectives may be desirable, they should not be prioritized at the expense of failing to address the common and pervasive nature of sex

¹¹² 235 F.3d 713 (1st Cir. 2001).

¹¹³ *Id.* at 717.

¹¹⁴ *Id.* at 718-25.

¹¹⁵ *Id.* at 735.

¹¹⁶ *See id.*; *Williams*, 187 F.3d at 564.

¹¹⁷ I owe thanks to Robin West for her insight on this point.

¹¹⁸ Frank, *supra* note 81, at 492.

harassment, an area of the law difficult to demarcate with bright lines. Sex harassment, especially in the form of hostile environment, should be addressed in its widespread form under anti-discrimination law according to Title VII's "broad rule of workplace equality."¹¹⁹ The ubiquitous nature of sex harassment at work may make it more difficult to regulate efficiently, but it is no less a serious harm simply because it is so widespread.

Those who see Title VII as overbroad and vague may be concerned about the law's possible chilling effect on speech, particularly speech that is regulated based on its content and viewpoint, such as crude or sexist language.¹²⁰ The First Amendment right is not absolute, however, and the Supreme Court has held that the government may prohibit or limit certain categories of speech, including fighting words,¹²¹ offensive speech,¹²² and obscenity,¹²³ all of which may apply to the kinds of vulgar and derogatory comments and materials that make up the facts in hostile environment claims.¹²⁴ The Supreme Court has been more wary of restricting speech on the basis of point of view, holding in *R.A.V. v. City of St. Paul*¹²⁵ that discriminatory fighting words that express a specific viewpoint are protected under the First Amendment. But the Court in *R.A.V.* differentiated Title VII's regulation of sexually harassing conduct from the statute at issue:

[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example,

¹¹⁹ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993); MACKINNON, *supra* note 6, at 96-97.

¹²⁰ See, e.g., Frank, *supra* note 81, at 499.

¹²¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (holding that "fighting words" or "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not constitutionally protected speech).

¹²² *FCC v. Pacifica Found.*, 438 U.S. 726, 746-50 (1978) (holding that it is constitutional to restrict "indecent" speech, especially when it is directed toward a captive audience).

¹²³ *Miller v. California*, 413 U.S. 15, 24-25 (1973) (holding that "patently offensive" sexually-oriented speech has minimal First Amendment protection).

¹²⁴ See MICHAEL J. ZIMMER, CHARLES A. SULLIVAN, RICHARD F. RICHARDS, & DEBORAH A. CALLOWAY, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 603-11 (2000).

¹²⁵ 505 U.S. 377 (1992) (involving a cross-burning statute that prohibited symbols that would create "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender").

sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.¹²⁶

According to the Court’s dicta, harassing speech is proscribable under Title VII because the speech is construed as discriminatory conduct. Free speech advocates may believe that the freedom of private individuals to speak outweighs the competing interest in nondiscrimination, but the high Court appears to be willing to tolerate the incidental effect on speech involved in prohibiting discriminatory behavior in the workplace.

V. DEBUNKING THE ASSUMPTIONS

A. *Judicial Depictions of Blue-Collar Norms*

As one peruses the court decisions in hostile environment harassment cases, one can identify a pattern among the judicial depictions of blue-collar behavioral norms. The judiciary in large part has not attempted to deliver informed and empathetic decisions about the plight of blue-collar targets of harassment, but instead has offered detached and thin observations about the blue-collar workplace.¹²⁷ The distance that some judges place between themselves and blue-collar workers is made evident in their court opinions. The Tenth Circuit’s proclamation in *Gross* that crude speech is “tolerated” in the blue-collar environment but would be “offensive or unacceptable” in a white-collar setting such as a “prep school faculty meeting” or “on the floor of Congress” exemplifies the exaggerated notions of what goes on in the “rough and tumble” blue-collar work world.¹²⁸

In addition to implying that blue-collar environments have lower standards of decorum than white-collar environments, such judicial opinions beg the question of why

¹²⁶ *Id.* at 389-90 (citations omitted).

¹²⁷ Martha Nussbaum maintains that in addition to “technical legal knowledge, a knowledge of history and precedent, [and] careful attention to proper legal impartiality[,] . . . judges must also be capable of fancy and sympathy” if they are to issue “fully rational” decisions. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 121 (1995).

¹²⁸ *Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1538 (1995).

harassing speech that would be found unacceptable by white-collar employees should be good and fine for their blue-collar counterparts. It is difficult to ignore the classism that taints these observations. In *Rabidue*, the appellate court provided a similar line of stereotypical reasoning, agreeing with the district court that “[s]exual jokes, sexual conversations and girlie magazines may abound” in “some work environments”¹²⁹—referring to blue-collar environments. Other courts have contrasted the blue-collar environment to that of a Victorian parlor,¹³⁰ using sarcasm to portray what they view as the prudish claims of blue-collar female plaintiffs in harassment suits and to downplay the offensive working conditions alleged.¹³¹ In *Williams*, Judge Ryan of the Sixth Circuit stated in his dissent that “[t]he shop floor is a rough and indelicate environment in which finishing school manners are not the behavioral norm,”¹³² suggesting that blue-collar settings are devoid of much civility.

The federal judiciary, however, consists of an elite group of professionals who, secluded in their chambers, are far removed from the blue-collar workplace and the daily habits of the working-class.¹³³ As such, they seem to accept at face value that blue-collar employees have a cultural proclivity toward the profane and vulgar, and rely on this assumption to make sweeping generalizations about “blue-collar culture.” Given that sex harassment injures women in the workplace and interferes with their employment to keep them economically vulnerable, it is troubling that judges have begun explicitly using class differentiation to condone harassment against women already socio-economically disadvantaged by their

¹²⁹ *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620-21 (6th Cir. 1986) (citing *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

¹³⁰ See, e.g., *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995) (maintaining that “a less onerous standard of [Title VII sex harassment] liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence.”); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988) (stating that “Title VII does not mandate an employment environment worthy of a Victorian salon.”).

¹³¹ See Rebecca Brannan, *When the Pig is in the Barnyard, Not the Parlor: Should Courts Apply a “Coarseness Factor” in Analyzing Blue-Collar Hostile Work Environment Claims?*, 17 GA. ST. U. L. REV. 789, 811 (2001).

¹³² *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 571 (6th Cir. 1999).

¹³³ See, e.g., Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 LAW & SOC. INQUIRY 497, 516 (1996) (noting that “judges tend to come from an upper-class background, or at least have reached the upper classes, and may favor upper-class or corporate litigants”).

occupations. Further, such a differentiation serves to promote the harmful public policy of maintaining permanent class distinctions in our society.¹³⁴

B. *Vulgarity Along the Workplace Spectrum*

Notwithstanding the exaggerated depictions, pitting the behavioral norms of the trades against the professions is both unsettling and inaccurate. Vulgar language and crude behavior routinely takes place not only on the shop-floor but *also* in the office space. One only need recall that the outrageous harassing incidents in *Meritor* took place in the “professional” white-collar setting of a bank, where the branch’s vice-president showed himself to be no model of refinement.¹³⁵

Sex harassment cases set in white-collar environments are replete with instances of vulgar language. For instance, in *Smith v. Northwest Financial Acceptance, Inc.*,¹³⁶ the plaintiff worked in a financial services office as an accounts service representative.¹³⁷ In this small office setting where everyone shared an open working space without any walls or partitions, the plaintiff’s supervisor publicly commented that she should “get a little this weekend” so that she could return “in a better mood,” that she would be “the worst piece of ass that I ever had,” and that she “must be a sad piece of ass” who “can’t keep a man.”¹³⁸ The supervisor also made at least one racially offensive remark to the plaintiff when he said that she “would find a decent man if [she] just quit dating Mexicans.”¹³⁹

The court in *Smith* distinguished the employment setting in this case from that in *Gross*,¹⁴⁰ stating: “This is not a factual scenario like that in *Gross v. Burggraf Construction Co.*, where the rough and tumble surroundings of the construction industry can make vulgarity and sexual epithets common and

¹³⁴ While this article argues that class does not and should not matter in the adjudication of hostile environment harassment claims, this is not to suggest that class or socio-economic status is not an important consideration in other social contexts or with respect to other legal claims. The argument presented here only aims to show that sex harassment is linked to traditional masculine norms in the workplace, and as such should not be trivialized because of the class context of the plaintiff’s work environment.

¹³⁵ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). See *supra* notes 14-20 and accompanying text.

¹³⁶ 129 F.3d 1408 (10th Cir. 1997).

¹³⁷ *Id.* at 1412.

¹³⁸ *Id.* at 1414.

¹³⁹ *Id.*

¹⁴⁰ 53 F.3d 1531 (10th Cir. 1995).

reasonable conduct.”¹⁴¹ The Tenth Circuit in *Smith* accepted *Gross*' holding that more extreme and coarse conduct can be “reasonable” in certain class-affiliated industries, but implied that this standard does not apply to the “genteel” setting of the financial industry. Thus the plaintiff was allowed to recover on her hostile work environment sex harassment claim,¹⁴² although she likely would not have prevailed if she had been a blue-collar employee.

Alternatively, the court in a white-collar harassment case may invoke the personality norms of an individual to pin the offending behavior on the person rather than on the work environment. Such an approach allows the court to maintain its class-based expectation regarding the white-collar work setting. In *Gleason v. Mesirov Financial, Inc.*,¹⁴³ another case set against the polished backdrop of a financial firm, the Seventh Circuit observed that “vulgar banter, tinged with sexual innuendo” cannot be completely avoided in the “modern workplace.”¹⁴⁴ Acknowledging the liberal use of coarse language described in the facts of this case, the court implied that vulgarity is certainly not limited to the working-class context.¹⁴⁵ But the court also depicted the firm's supervisor as particularly “coarse and boorish,” specific personality traits that spilled into his workplace behavior.¹⁴⁶ In attributing the conduct to the particular individual, it appears that the court attempted to preserve the pristine appearance of the white-collar workplace by suggesting that it was an aberrational individual and not the culture of the work environment that caused the harassment.

In yet another white-collar harassment case,¹⁴⁷ the court noted that the plaintiff and her supervisor merely had different working styles (the plaintiff was “straight-laced” whereas her supervisor was “more informal” and “relaxed”),¹⁴⁸ implying that the plaintiff might have over-reacted to her boss' “friendly and perhaps romantic” but not harassing actions.¹⁴⁹ One of his “relaxed” remarks included the following: “You cold northern

¹⁴¹ *Smith*, 129 F.3d at 1414 (citation omitted).

¹⁴² *Id.* at 1419.

¹⁴³ 118 F.3d 1134 (7th Cir. 1997).

¹⁴⁴ *Id.* at 1144.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Fox v. Ravinia Club, Inc.*, 761 F. Supp. 797 (N.D. Ga. 1991).

¹⁴⁸ *Id.* at 799.

¹⁴⁹ *See id.* at 800.

bitch. Why don't you give us southern boys a break and say yes once in a while?"¹⁵⁰ He further commented to the plaintiff that she, in her position as the secretary for membership services at the private club where she worked, could offer sex to encourage prospective members to join.¹⁵¹ The court conceded that sexual innuendos were commonplace in the plaintiff's work environment, but nonetheless held that the crude and suggestive conversation at issue did not amount to actionable harassment.¹⁵²

The facts in these cases vividly show that coarse language and behavior infiltrate all kinds of workplaces, regardless of the class association of the specific work setting or type of industry. Coarseness may be more visible in blue-collar environments (in the form of pin-ups and other visual markers of crude sexuality) perhaps because blue-collar employees generally do not need to maintain presentable workspaces for clients, whereas white-collar employees have a public image to consider.

However, crudeness may also openly thrive in visual form even in white-collar office environments. In *Brennan v. Metropolitan Opera Ass'n*,¹⁵³ the female plaintiff, who worked as an Assistant Stage Director at the Metropolitan Opera Association ("Met"), complained that the coworker with whom she shared an office had pinned up postcard-sized pictures of nude and semi-nude men on one of the office's bulletin boards.¹⁵⁴ A couple of the pictures were cut so that only the bodies were displayed.¹⁵⁵ When the plaintiff took down the pictures and told her coworker that she found them offensive, her coworker did not respond but re-posted the pictures.¹⁵⁶ Although the plaintiff informed her supervisor about the pictures, they remained on the bulletin board for the rest of the plaintiff's tenure at the Met.¹⁵⁷

The court ruled that these pictures did not create a hostile work environment because the plaintiff lacked evidence to show that they were a hindrance to her work performance.¹⁵⁸

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 799.

¹⁵² *Fox*, 761 F. Supp. at 801.

¹⁵³ 192 F.3d 310 (2d Cir. 1999).

¹⁵⁴ *Id.* at 315.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Brennan*, 192 F.3d at 319.

The court did not mention the workplace culture of the Met; it only stated that the pictures were "arguably inappropriate in a work setting."¹⁵⁹ This case illustrates that white-collar workplaces are not necessarily clean of visual coarseness, as employees may bring lewd materials to the office for either private or office consumption.

Thus, despite some courts' tendency to want to distinguish between the blue-collar shop and the white-collar suite when it comes to sex harassment, their class expectations do not hold true. Courts invoke either the nature of the workplace or the nature of the individual to explain the offending vulgarities at issue and to maintain their class-defined conceptions of the specific work environment. Adjusting the explanation for the harassing conduct, however, does not change the facts behind the harassment: crude behavior exists along the workplace spectrum, demonstrating that even while the industry setting changes, the behavior does not.

C. *Sex Harassment and the Cultural Defense Argument*

The Anita Hill-Clarence Thomas hearings propelled the issue of sex harassment into the public limelight in 1991.¹⁶⁰ During the Senate confirmation hearings for Thomas' nomination to the Supreme Court, Hill testified that Thomas had harassed her while she worked for him, first at the Department of Education and then again, ironically, at the EEOC.¹⁶¹ The conversations that Hill recounted having had with Thomas at work are not at all tame, and could match the vulgarity of anything said on the factory floor:

[Judge Thomas] would call me into his office for reports on education issues and projects or he might suggest that . . . we go to lunch to a government cafeteria. After a brief discussion of work, he would turn the conversation to a discussion of sexual matters. His conversations were very vivid. He spoke about acts that he had seen in pornographic films involving such matters as women having sex with animals, and films showing group sex or rape scenes. He talked about pornographic materials depicting individuals with large penises, or large breasts involved in various sex acts.¹⁶²

¹⁵⁹ *Id.*

¹⁶⁰ *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., pt. 4 (1991) [hereinafter *Hill-Thomas Hearings*].

¹⁶¹ *Id.* at 36-38.

¹⁶² *Id.* at 37.

Hill's testimony included another crude incident that she stated occurred at Thomas' office at the EEOC, where he made the now infamous comment, "Who has put pubic hair on my Coke?"¹⁶³ According to Hill, Thomas also told her about an individual he had seen in some pornographic material with the name "Long John Silver."¹⁶⁴ If these allegations about Thomas are true, then vulgarity knows no boundaries and pervades even the high-level government office.

Despite the white-collar context of Hill's workplace, some Senators clearly wanted evidence of extreme vulgarity in Thomas' actions before conceding that Thomas may have harassed Hill.¹⁶⁵ Senator Arlen Specter began his interrogation of Hill with "You testified this morning . . . that the most embarrassing question involved—this is not too bad—women's large breasts. That is a word we use all the time. That was the most embarrassing aspect of what Judge Thomas had said to you."¹⁶⁶ Aside from the fact that Senator Specter was

¹⁶³ *Id.* at 38.

¹⁶⁴ *Id.* at 56.

¹⁶⁵ In response to the Senate's unrelenting quest to discover the most lurid of details regarding the harassment allegations, Hill shared her thoughts on the ordeal in her autobiographical account of the hearings: "How many times . . . how much detail . . . how vulgar did the language have to be and . . . how uncomfortable do I have to feel in order for [them] to comprehend what happened to me?" ANITA HILL, *SPEAKING TRUTH TO POWER 178* (1997) (ellipses and brackets in original).

¹⁶⁶ *Hill-Thomas Hearings*, *supra* note 160, at 61. Another significant aspect of Hill's allegations is that she, a black woman, was charging a black man of sexual impropriety. As a result, racial as well as gender politics came into play, as shown by the fact that Thomas characterized the hearing as a "high-tech lynching." *Id.* at 157. As Kimberlé Crenshaw points out, it should have been clear that the lynching metaphor did not apply to Thomas' situation, primarily because this was an intra-racial case and lynching was historically used by the white mob to victimize black men who had been suspected of raping white women. See Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES* 832-33 (D. Kelly Weisberg ed., 1996). But Thomas strategically deployed this powerful symbol of racial oppression to bring his racial identity as a black male to the fore and make this case one of race discrimination rather than sex harassment. See generally Emma Coleman Jordan, *The Power of False Racial Memory and the Metaphor of Lynching*, in *RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS* 37 (Anita Faye Hill & Emma Coleman Jordan eds., 1995). Simultaneously, Hill's identity as a black woman receded into the background and Thomas' misplaced metaphor went unchallenged. See A. Leon Higginbotham, Jr., *The Hill-Thomas Hearings—What Took Place and What Happened: White Male Domination, Black Male Domination and the Denigration of Black Women*, in *RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS* 32-33 (Anita Faye Hill & Emma Coleman Jordan eds., 1995). The changed focus of the hearings too clearly illustrates how accusations of racism can take precedence over accusations of sexism, as our national leaders tend to tread more carefully around the issue of possible race bias. Crenshaw, *supra*, at 832 ("Thomas's move to drape himself in a history of black male repression was particularly effective in the all-white male Senate, whose members could not muster the moral authority to

attempting to mischaracterize Hill's statement, his remark also demonstrates that crude speech (at least involving "women's large breasts") is apparently tolerated on the floor of Congress.

In the wake of the Hill-Thomas hearings, Harvard sociologist Orlando Patterson put forth a cultural critique of Hill's harassment claim.¹⁶⁷ In a *New York Times* op-ed piece, Patterson argued that even if Thomas did engage in the sexual talk that Hill alleged, Thomas' behavior could not be construed as sex harassment because he was only using the "down-home style of courting" supposedly characteristic of interaction between black women and black men.¹⁶⁸ According to Patterson, even if the allegations were accurate, Thomas would be justified in lying during the hearings because most of the nation would not comprehend that such sexual teasing is a part of black courtship practice.¹⁶⁹ Despite the fact that there was no "back-and-forth sexual banter" in Hill's case in that she did not play the part of the "repart-ee" to Thomas' "repart-or,"¹⁷⁰ Patterson questioned whether Hill was truly harmed by the alleged comments, responding incredulously to her disregard for black mating practices and her uninformed reaction.¹⁷¹

Even assuming that the sexual banter described by Patterson is a part of the black cultural dating script, there is no reason to further assume that black women *actually* desire this style of courting, notwithstanding their familiarity with it.¹⁷² In fact, such a reading of women's wants ignores the larger socio-historical context of gender relations and how men have been allowed to define what women apparently desire.¹⁷³ Women are familiar with sex harassment and a host of other offensive and abusive behavior that have long been socially condoned in our history of unequal power between the

challenge Thomas's sensationalist characterization.").

¹⁶⁷ Orlando Patterson, Editorial, *Race, Gender, and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, § 4, at 15.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See *Hill-Thomas Hearings*, *supra* note 160, at 37 (demonstrating that Anita Hill maintained throughout her testimony that she on several occasions told Thomas that she found his comments inappropriate, and never said anything to suggest that she welcomed or appreciated his sexual remarks).

¹⁷¹ Patterson, *supra* note 167.

¹⁷² See Crenshaw, *supra* note 166, at 838.

¹⁷³ See Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81 (1987) (arguing that "women suffer more than men" and that "women often find painful the same objective event or condition that men find pleasurable").

genders.¹⁷⁴ Therefore whether Hill was aware of any such “down-home style of courting” is irrelevant, especially given that the alleged conduct took place within the hierarchical setting of the workplace where Thomas was her superior.¹⁷⁵ Unlike how Patterson portrays it, sex harassment is not a dating problem;¹⁷⁶ women employees find sex harassment abusive and debilitating because it denies them equal dignity and opportunity in the public realm of work.¹⁷⁷

Patterson’s argument is basically a cultural defense argument in that he attempts to explain and excuse Thomas’ behavior by introducing a black cultural custom to show that Thomas did not act with the intent to harass.¹⁷⁸ Primarily employed in criminal law, immigrant defendants have asserted a cultural defense in cases of spousal murder, positing that they acted in accordance with their particular cultural (i.e., not American) mandates, and thus should be judged against a different and culturally-sensitive standard.¹⁷⁹ The cultural defense can also be likened to the “provocation defense” or “heat of passion” defense, raised in intimate homicide cases.¹⁸⁰ Under the provocation defense, men who kill in passion are partially justified because they could not maintain self-restraint in cases of adultery.¹⁸¹ Just as these defenses serve to

¹⁷⁴ Other culturally-sanctioned behavior that women have had to endure include rape (both stranger- and acquaintance-rape), domestic violence, and stalking. See, e.g., Lee, *supra* note 12, at 389-405 (tracing the history of stalking behavior from ancient to modern times and illustrating that stalking activity has been culturally encouraged and facilitated by Western notions of romance).

¹⁷⁵ Crenshaw, *supra* note 166, at 837 (noting that Patterson’s argument fails to differentiate between the private personal world and the public work world in the way that men and women interact).

¹⁷⁶ *Id.* at 838.

¹⁷⁷ See generally MACKINNON, *supra* note 6.

¹⁷⁸ See Crenshaw, *supra* note 166, at 835; Leti Volpp, (Mis)Identifying Culture: Asian Women and the “Cultural Defense,” 17 HARV. WOMEN’S L. J. 57, 57 (1994) (“The ‘cultural defense’ is a legal strategy that defendants use in attempts to excuse criminal behavior or to mitigate culpability based on a lack of requisite mens rea.”).

¹⁷⁹ See Volpp, *supra* note 178, at 57. One such case is *People v. Dong Lu Chen*, in which a Chinese immigrant accused his wife of infidelity and murdered her in accordance with “Chinese culture” for bringing shame onto the family. Persuading the trial judge of his cultural defense, the defendant was granted probation instead of a prison sentence. *Id.* at 64-77.

¹⁸⁰ See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1339-44 (1997).

¹⁸¹ *Id.* at 1339. The long-held image of intimate murder involved provocation due to sexual infidelity, but Nourse points out that many of the actual cases in which the provocation defense is used do not concern adultery but a failed relationship in which the woman left or tried to leave. In case after case, the male defendant who killed his partner or ex-partner in the “heat of passion” could realistically hope to receive a lighter sentence based on his “extreme emotional disturbance.” *Id.* at 1342-

shield the lover-killer from liability, the blue-collar workplace defense serves to shield the worker-harasser from liability. These subculture-specific arguments fail to grasp that sexual violence and gender subordination cross cultural and class lines. Patterson's claim that Hill was not a harassment victim because she is black is analogous to the class culture claim that the blue-collar woman is not a harassment victim because she is blue-collar.

The problem of sexism in conjunction with racial and cultural stereotyping presents an especially grievous problem for black and other minority women workers. Stereotypical images of colored women and their sexuality have dominated America's view of the "other" and whet some men's fetishizing appetites.¹⁸² African-American women, for example, are seen as sexually available and aggressive women who do not need protection from unwanted sex because they crave sexual liaisons.¹⁸³ Asian-American women are viewed as sexually submissive and exotic, while Latina women are perceived as sexually fiery with hot tempers and a sexual attitude to match.¹⁸⁴ The stereotyped sexual personality of a minority woman operates to objectify her as a woman and as a woman of her specific color, thus making her the target of an ugly blend of both sex and race harassment.

In addition to being discriminated against on the basis of their gender and particular race, immigrant women are further vulnerable to sex harassment because their precarious status in society makes it even more difficult for them to challenge their abusive working conditions. These workers may have limited language skills as well as limited knowledge about their legal rights, and may fear being deported for complaining,

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¹⁸² See, e.g., Adele Logan Alexander, *"She's No Lady, She's a Nigger": Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill*, in RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 14-16 (Anita Faye Hill & Emma Coleman Jordan eds., 1995); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 570-72 (1989) (describing the popular image of the black woman as a "Jezebel," a loose woman who flaunts her sexuality); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 191 (1997) (noting that Asian Pacific women are stereotypically viewed as "exotic, hyper-eroticized, masochistic, desirous of sexual domination"); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993) (identifying the stereotype of Latina women as "hot-blooded" and very sexual).

¹⁸³ See generally Alexander, *supra* note 182; Austin, *supra* note 182.

¹⁸⁴ See generally Cho, *supra* note 182; Ontiveros, *supra* note 182.

depending on their immigration status.¹⁸⁵ Immigrant women are commonly harassed,¹⁸⁶ prompting EEOC suits such as the class action against Grace Culinary Systems, Inc. and Townsend Culinary, Inc. for allegedly maintaining harassing and hostile work conditions for twenty-two of their immigrant female workers, a case that ultimately settled for \$1 million.¹⁸⁷ These immigrant women were low-wage workers at a food-processing plant and were forced to deal with their managers' groping and requests for sexual favors over a period of several years.¹⁸⁸ The problem of sex harassment thus reaches and harms immigrant female laborers, who are many times disadvantaged because of gender, class, race, ethnicity, and alienage.¹⁸⁹

On a fundamental level, the problem of sex harassment affects and harms women of all backgrounds and in all occupations. The larger conversation needs to be steered away from the false distinction between blue- and white-collar environments. Rather, the discussion should be recast in terms of masculine workplace norms discriminating against and encumbering female workers,¹⁹⁰ preventing their significant, if not equal, foothold in the labor market.

VI. REFRAMING THE DISCUSSION: MASCULINE, NOT CLASS, WORKPLACE NORMS

Characterizing vulgar behavior that women find harassing as either class-based or individually-determined neglects to protect women workers and fails to provide equal opportunity in the workplace as required under Title VII. Harassment should not be understood as lying on a spectrum of

¹⁸⁵ See Maria L. Ontiveros, *To Help Those Most In Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 620-21 (1993-1994).

¹⁸⁶ *Id.* at 620.

¹⁸⁷ Press Release, U.S. Equal Employment Opportunity Commission, EEOC Obtains \$1 Million for Low-Wage Workers Who Were Sexually Harassed at Food Processing Plant (June 1, 2000), at <http://www.eeoc.gov/press/6-1-00.html> (last visited April 22, 2005).

¹⁸⁸ *Id.*

¹⁸⁹ While I do not presume to offer here a thorough discussion of how a woman may experience sex harassment with respect to her race, ethnicity, and alienage, I nevertheless seek to at least incorporate some of these concerns into this article, because the experiences of all women should be considered to fully address the problem of sex harassment.

¹⁹⁰ Masculine norms, heterosexual in tradition, similarly discriminate against non-conforming male workers. See discussion *supra* on *Oncale* in Part II.

class-influenced normative behavior, but viewed as the product of the socio-cultural normative behavior of men in the workplace. Blue-collar men harass blue-collar women in their shared workplaces while white-collar men harass white-collar women in their same places of work. Consequently, gender hostility—at times along with racial and ethnic hostility—is predominately steering the harassment, and not class norms.¹⁹¹

A. *Sex Harassment As Male Normative Behavior*

Sex harassment acts to keep the workplace a site of male power and traditional cultural masculinity.¹⁹² As Kathryn Abrams has cogently asserted in her scholarship on sex harassment, work settings reproduce male-associated practices and preferences that communicate men's dominant social influence.¹⁹³ Masculine preferences mold the work atmosphere—demonstrated for instance through sexually-oriented chatter and horseplay—and this conduct becomes viewed as “normal” for the workplace rather than a product of masculine partiality and privilege.¹⁹⁴ Threatened by the increasing entry of women into the labor market, especially into traditionally male jobs, employers and employees have responded by forcefully maintaining and insisting upon their normative masculine behavior, resulting in instances of sex harassment.¹⁹⁵

At its core, sex harassment is about conventional masculine behavioral norms that operate to harm women

¹⁹¹ I do believe, however, that class prejudice can lead to abuse at work apart from sex harassment. Regina Austin has argued that class or occupational prejudice and elitism, in conjunction with racist and sexist attitudes, can operate to oppress working-class employees. See generally Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

¹⁹² See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205-12 (1998).

¹⁹³ *Id.* at 1210.

¹⁹⁴ *Id.* Locating the problem of sex harassment within the larger context of gender hierarchy, as described here, focuses on socially-constructed masculine versus feminine norms rather than on biological sex. This argument converges with Katherine Franke's “hetero-patriarchal” analytical framework regarding sex harassment which focuses on the devaluation of femininity vis-à-vis masculinity and the maintenance and regulation of gender norms. See generally Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997). Abrams both builds upon and departs from Franke's framework by examining sex harassment within the particular history and context of the work environment and the struggle for workplace equality. Abrams, *supra* note 187, at 1193-1204.

¹⁹⁵ Abrams, *supra* note 192, at 1206-10.

economically, physically, emotionally, and sexually. Traditionally male-dominated fields of work are just that—male dominated—and hence it is unsurprising that workplace norms reflect masculine behavioral norms rather than class behavioral norms. As sociologist Georg Simmel explained: “Man’s position of power does not only assure his relative superiority over the woman, but it assures that his standards become generalized as generically human standards that are to govern the behavior of men and women alike. . . .”¹⁹⁶ Men have had a monopoly on the public world of work for much of our history (except for certain traditional “pink-collar” fields such as nursing, primary school teaching, and domestic help, all of which parallel traditional female duties in the home), and thus norms in the workplace have been derived from masculine expectations and male entitlement.¹⁹⁷ When women entered the working world, they entered a pre-determined culture governed by male standards that had evolved into commonplace standards, which nevertheless remained gender-biased.

Sex harassment came to be considered a form of sex discrimination because courts eventually recognized that women workers were being treated differently on the basis of sex and were disadvantaged on the job as a result.¹⁹⁸ The problem of sex harassment was first recognized three decades ago as male superiors were using their job positions and economic power to intimidate women.¹⁹⁹ Male employers sought to remind female employees that they could not stay in the workplace unless they fulfilled their gender-expected role of being compliant and sexually accessible.²⁰⁰ If the female employee did not submit to her supervisor’s sexual demands, then her employment status would suffer.²⁰¹

Sex harassment emerged under the umbrella of Title VII violations because such gender stereotyping and abuse were finally understood to undermine women’s equal treatment in the workplace.²⁰² Legal feminist pioneer Catharine

¹⁹⁶ GEORG SIMMEL, *PHILOSOPHISCHE KULTUR* (1911), *quoted in* MACKINNON, *supra* note 5, at 3.

¹⁹⁷ *See* Abrams, *supra* note 192, at 1205-06.

¹⁹⁸ *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986) (recognizing sex harassment as sex discrimination under Title VII); MACKINNON, *supra* note 6, at 143-213 (arguing for an interpretation of sex harassment as a legal injury based on sex).

¹⁹⁹ MACKINNON, *supra* note 6, at 2.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 57-82 (describing the history of early sex harassment cases).

MacKinnon argued in the 1970s that women's economic subordination is linked to their sexual subordination, and that the prevailing structure of gender relations made the sexual domination of women a normative and pervasive occurrence.²⁰³ She asserted that sex harassment is a distinct injury that afflicts many female employees because the sexual subjugation of women in society recreates itself in the work setting. In other words, women are vulnerable to sexual abuse because of their inferior economic status in the workplace and in society.²⁰⁴ MacKinnon also identified two forms of sex harassment, quid pro quo and condition-of-work (now known as hostile work environment),²⁰⁵ both of which were recognized by the Supreme Court in *Meritor*.²⁰⁶

Uncovering the way in which sex harassment is perpetrated, MacKinnon denounced the once-believed view that sexual misbehavior is a private, individually-focused, and natural matter, arguing instead that sex harassment is a socially constructed public problem.²⁰⁷ By showing that sex harassment is a pervasive injury inflicted predominately upon women, who traditionally have less economic power, MacKinnon maintained that it should have a public remedy and be proscribed under federal anti-discrimination law.²⁰⁸ Workplace sex harassment is sex discrimination because it prevents women from claiming equal power in the labor market on the basis of their sex.²⁰⁹ According to MacKinnon, men's work-related control over women necessarily involves men's sexual control over women, since women's unequal capital status is interconnected with the social reality of unequal sexual relations between men and women and the harmful sexualization of women.²¹⁰

MacKinnon's socio-cultural explanation helped facilitate a broad-based perspective on the problem of sex harassment by addressing how the problem can be manifested in the form of a discrete quid pro quo or diffuse hostile environment. Her work aided in rendering workplace sex harassment a cause of action

²⁰³ *Id.* at 220.

²⁰⁴ See MACKINNON, *supra* note 6, at 216-18.

²⁰⁵ *Id.* at 32-47.

²⁰⁶ 477 U.S. 57, 65 (1986).

²⁰⁷ MACKINNON, *supra* note 6, at 220.

²⁰⁸ *Id.* at 208.

²⁰⁹ *Id.* at 174-78.

²¹⁰ *Id.* at 174.

under Title VII, and helped spark a nationwide consciousness that had remained dormant for too long.²¹¹

Another legal feminist scholar, Vicki Schultz, asserts that sex harassment is mostly perpetrated to undermine or insult women's control over their work.²¹² She challenges what she calls the sexual desire-dominance paradigm, the prevailing belief that sex harassment must be of a sexual nature to be actionable under Title VII.²¹³ Instead, she contends that sex harassment follows a competence-centered model in that it primarily serves to discredit women's competence and place in the male-dominated sphere of work.²¹⁴ In contrast to MacKinnon, Schultz argues that sex harassment is not a mere reflection of gender inequality produced elsewhere in society, but actually serves to depict women specifically as incapable workers. Sex harassment thus guarantees men's superior foothold in the workplace by granting them access to better jobs, positions, and sources of power.²¹⁵ Hence, Schultz posits that sex harassment laws should be enforced according to whether the harassment is gender-based, and not whether the harassment is simply sexually driven or perpetrated.²¹⁶ Harassment stemming from sexual desire or consisting of sexual advances presumably would still be illegal under Schultz's definition, but would not constitute the only valid kind of sex harassment. According to Schultz's competence-based paradigm, male employers and coworkers in traditionally male jobs want to preserve these occupations as male realms, and thus harass female entrants in order to undermine their efforts to succeed on the job.²¹⁷

In a follow-up piece, Schultz argues that sex harassment is primarily linked to sex segregation in employment, where men exclusively or predominately occupy positions of authority and engage in sex harassment to maintain female employees' subordinate and outsider status.²¹⁸ Under this argument, the fact that men dominate the

²¹¹ See Cass Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 829 (1988) (reviewing CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987)).

²¹² Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

²¹³ *Id.* at 1689.

²¹⁴ *Id.* at 1755.

²¹⁵ *Id.* at 1690-91.

²¹⁶ *Id.* at 1795-96.

²¹⁷ Schultz, *supra* note 212, at 1690-91.

²¹⁸ Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2171-72 (2003).

organizational hierarchy is what renders sexual behavior within the organization dangerous.²¹⁹ Accordingly, Schultz urgently calls for full gender integration in the workplace, where women are equals and are represented at all levels of the organization to ensure that they actually have a role in shaping workplace dynamics.²²⁰

Despite their differences, both MacKinnon and Schultz assert that sex harassment is based on sex and that masculine coercion and entitlement dominate the workplace and the gender relations within it. In this way, both scholars critique the structural inequality of power between the sexes. Yet a more complete picture finds that *structural and socio-cultural* forces have operated in tandem to keep women marginalized at work. The problem of sex harassment stems from hostile male reactions to women as they enter and remain in the work environment, regardless of whether the environment is blue- or white-collar. Hence, cultural patterns of gender rather than class govern the workplace.

Separating sex harassment claims into blue- and white-collar contexts only advances irrelevant and detrimental class distinctions that neglect the gender-based underpinnings of sex harassment. The debate over the norms of blue- and white-collar culture distracts attention from the main issue underlying sex harassment. In recognizing that vulgar actions permeate both the shop-floor and the office, one must keep in mind the actual role of workplace culture in facilitating sex harassment. The imagined distinction between white- and blue-collar environments needs to be discarded so that the discussion can be correctly refocused on traditional masculine workplace norms and its injurious effect on female workers.

Courts have learned not to disaggregate incidents of harassment but to look at the totality of the circumstances because they understand that harassment rarely consists of one discrete incident; rather, harassment is temporal and has a cumulative effect. Courts also should not disaggregate workplaces by class, because sex harassment in the workplace reflects the sexism that is rooted in our larger cultural traditions of gender interaction. Women have broken the silence surrounding sex harassment by bringing cases and sharing the devastating effect that harassment has had on

²¹⁹ *Id.* at 2171-72.

²²⁰ *Id.* at 2174.

their aspirations and sense of self. Like men, women seek meaningful work to engage in productive activity and to gain a sense of order over their lives, economic and otherwise, but sex harassment in the workplace destroys their rightful and *legal* expectations to equal opportunity.

B. *Question of Essentialism*

Some critics may argue that focusing on the gendered foundation of sex harassment promotes a uniform or "essential" description of women's experience in the workplace that ignores other interacting facets of a woman's identity, such as race, ethnicity, class, and sexual orientation.²²¹ However, the aim here is certainly not to neglect or discount the relevance of these various influential factors in women's daily lives.²²² This work attempts to show only that class differentiation should not be invoked to give less protection to blue-collar women against sex harassment because both blue-collar and white-collar women are harmed by it. Admittedly, blue-collar women may at times experience more explicit sex harassment than white-collar women, as depicted by scholars who have conducted in-depth field research into the working lives of blue-collar women.²²³ But class at most only exacerbates sex harassment—class neither mitigates nor explains sex harassment. The source of sex harassment, whether in blue- or white-collar settings, is found not in class culture but in customary male behavioral norms operating in conjunction with male hostility against women in their places of work.

²²¹ See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166-67 (1989) (asserting that feminist theory needs to incorporate a racial analysis to attract non-white women to the movement); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586-90 (1990) (arguing that leading feminist legal theorists, while sympathetic to the plight of all women, tend to speak in one voice that represents women's experience from a white, heterosexual, and privileged standpoint, and obscures the experience of diverse women who do not fit into this prevailing norm).

²²² See discussion *supra* Part V.C.

²²³ See, e.g., CAROL CHETKOVICH, *REAL HEAT: GENDER AND RACE IN THE URBAN FIRE SERVICE* (1997) (interviewing female firefighters in the Oakland Fire Department); 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, 51-63, app. at 70 (1990) (incorporating personal and telephone interviews of women construction workers into her research).

C. *Progress (to be made) in the Workplace*

The presence of a critical mass of women in white-collar fields has altered to some extent, although by no means eliminated, the normative practices (if not attitudes) of white-collar men more so than in the blue-collar trades, where women still only constitute a bare minority.²²⁴ The unfortunate reality is that the specific interests of blue-collar women have been marginalized by the mostly middle- and upper-class feminist movement.²²⁵ The primary beneficiaries of the feminist movement have been middle-class women who made progress by entering the ranks of male-dominated white-collar jobs.²²⁶ As the women's movement sought to elevate women's status in society by bringing them into the most prestigious occupations, the movement neglected to make a similar push to bring working-class women into traditionally male blue-collar jobs.²²⁷ Consequently, women's representation in highly-paid blue-collar jobs has lagged and continues to lag far behind women's representation in highly-paid white-collar jobs.²²⁸ For instance, the percentage of women in full-time executive, administrative, and managerial occupations was 34.2% in 1983 and increased to 47.5% in 2002.²²⁹ On the other hand, women are far less represented in higher paying blue-collar jobs, such as protective service (17.7% women in 2002, up from 9.5% in 1983) and precision production, craft, and repair (8.0% women in 2002, up from 7.9% in 1983).²³⁰ Within the protective service occupations, women represented only 3.6% of firefighters and 12.4% of police and sheriff's patrol officers in 2003.²³¹ Likewise, women represented only 2.8% of the construction trades in 2003.²³² Further, women made up 7.9% of the labor force in the

²²⁴ Arriola, *supra* note 222, at 46-48.

²²⁵ *See id.* at 46.

²²⁶ *Id.*

²²⁷ *See id.* at 46-47.

²²⁸ *See id.* at 47.

²²⁹ Bureau of Labor Statistics, U.S. Dep't of Labor, Rep. 972, Highlights of Women's Earnings in 2002, at 10 (2003) [hereinafter Highlights of Women's Earnings in 2002]. The first year for which comparable data is available is 1983.

²³⁰ *Id.*

²³¹ Bureau of Labor Statistics, U.S. Dep't of Labor, Household Data Annual Averages: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity 211 (2003) [hereinafter Household Data Annual Averages 2003], available at <http://www.bls.gov/cps/cpsaatl.pdf> (last visited March 03, 2005).

²³² *Id.*

transportation and material moving occupations in 2002, slightly up from 4.7% in 1983.²³³

As the numbers show, progress has been slow. Rather than gain significant entry into the better paying blue-collar workforce, unskilled women have remained mostly represented in the service occupation of private household work (92.5% women in 2002 and 96.0% in 1983).²³⁴ The traditionally pink-collar fields have remained female-dominated: in 2003 women made up 96.6% of secretaries, 97.8% of preschool and kindergarten teachers, and 92.1% of registered nurses.²³⁵ The pay differentials among the various blue-collar occupations in 2002 were substantial: women who worked in private household service occupations had median weekly earnings of \$276 while women in transportation and material moving jobs made \$449 per week; women in precision production made \$479 per week and women in protective service made \$501 per week.²³⁶ Within the blue-collar sector in 2000, the highest paying occupations included protective service, precision production, and transportation work, all of which have very few women in their ranks.²³⁷

Despite the strides that women have made in white-collar fields, the best paying and highly coveted blue-collar sectors have yet to embrace women into its labor force. The blue-collar division is still highly sex-segregated, indicating that something about these workplaces is keeping women out. This is even more problematic if one considers that women make up a greater proportion of the working poor,²³⁸ including poor one-parent families,²³⁹ and may be faced with the unsavory "choice" of entering a predominately male and most likely hostile blue-collar occupation for higher pay, or entering a predominately female but lower-paying blue-collar job.

Given that women have not yet entered many of the most arduous blue-collar trades in sufficient numbers to make them their own, men in these trades may exhibit extreme

²³³ Highlights of Women's Earnings in 2002, *supra* note 229, at 10.

²³⁴ *See id.*

²³⁵ *See* Household Data Annual Averages 2003, *supra* note 231, at 210, 212.

²³⁶ Highlights of Women's Earnings in 2002, *supra* note 229, at 10.

²³⁷ *See* John E. Buckley, *Rankings of full-time occupations, by earnings, 2000*, 125 MONTHLY LAB. REV. 46 (2002).

²³⁸ *See* Abraham Mosisa, Bureau of Labor Statistics, U.S. Dep't of Labor, Rep. 968, A Profile of the Working Poor, 2001, at 1-2 (2003) ("In 2001, the proportion of those who were in the labor force for 27 weeks or more who were classified as working poor continued to be higher for women than for men—5.5 versus 4.4 percent . . .").

²³⁹ *See id.* at 10-11.

hostility in an attempt to stave off full sex integration and preserve what they perceive to be the remaining "untainted" preserves of male work culture.²⁴⁰ Part of what makes the most segregated of the blue-collar fields so traditionally masculine appears to be the significant physical strength and stamina required, and the tool- or equipment-based nature of the work.²⁴¹ Hence, if men in these jobs derive their sense of manhood from the manual and physically demanding aspects of the job, then their masculine identity might be threatened by seeing a woman doing the same work. Modern working-class men may also feel a lack of job security in this increasingly technological and globalized age, and thus perhaps more urgently seek to maintain their tenuous grasp on labor-intensive occupations.

Blue-collar women may have a harder time confronting problems of sex harassment due to the greater physical risks present in their work settings and the importance of coworker assistance in dangerous jobs. Their class occupation should not further be used against them in their demand for working conditions free of abuse. Hostile environment harassment is just as, if not more, serious and prevalent a problem for blue-collar women as it is for white-collar women. Consequently, blue-collar women should not be forced to endure a more severe degree of harassment before they can successfully hold their harassers legally accountable. Moreover, subscribing to such strict class differences suggests a kind of "class essentialism" that ignores the significant relevance of gender in sex harassment.

D. *Assumption of Risk Defense*

Some observers maintain that women who apply for blue-collar positions are aware of the coarse environments of these jobs and hence assume the risk of being surrounded by this kind of conduct when they enter the job.²⁴² But contrary to

²⁴⁰ In addition to workplaces, hostile male opposition to women's entry exists in other all-male or nearly all-male environments. See, e.g., FALUDI, *supra* note 43, at 117-21 (1999) (describing the severe animosity unleashed toward the Citadel's new female faculty and first female cadets).

²⁴¹ *Id.* at 85-86 (describing how traditional manhood involved man's utility with his hands).

²⁴² See, e.g., Kelly Ann Cahill, *Hooters: Should There Be An Assumption of Risk Defense to Some Hostile Work Environment Claims?*, 48 VAND. L. REV. 1107 (1995) (exploring potential assumption of risk arguments in hostile environment suits).

this claim, the problem in fact is that a woman's "consent" has been repeatedly invoked to justify her oppression, as Robin West has observed: "[T]he conditions which create [women's] misery—unwanted pregnancies, violent and abusive marriages, sexual harassment on the job—are often traceable to acts of consent. Women—somewhat uniquely—consent to their misery."²⁴³

This assumption of risk argument is linked to the notion of consent, which the Supreme Court termed as "voluntariness" in *Meritor*: "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' The correct inquiry is whether respondent by her *conduct* indicated that the alleged sexual advances were unwelcome."²⁴⁴ Susan Estrich makes an analogy between the voluntariness standard for sex harassment victims and the consent standard for rape victims in that both require that the victim demonstrate unwelcomeness.²⁴⁵ To determine if the woman has expressed that the offensive action was indeed unwelcome, Estrich notes that courts are instructed by *Meritor's* holding to look to the woman's conduct, implying that simple words of opposition may not be sufficient.²⁴⁶ Certainly, a woman's verbal resistance to a man's sexual pursuits has not been taken seriously in our culture because the woman is expected to say no rather than easily give in to his attention, an unfortunate legacy of our Western courtship tradition.²⁴⁷ Yet on the other hand, as Estrich cautions, a woman cannot act too stereotypically "feminine" because she may then be seen to have welcomed the sexual overtures.²⁴⁸ Applying this argument to a date-rape situation might complicate matters even further since the victim agreed to go on the date. But a date is not synonymous with sex, and her presence on the date should not be construed as her consent to anything that might happen on the date.

Likewise in the case of sex harassment, the assumption of risk argument presumes that a woman's presence in the

²⁴³ West, *supra* note 173, at 161.

²⁴⁴ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (emphasis added).

²⁴⁵ Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 813-816 (1991).

²⁴⁶ *Id.* at 825-26 (asserting that looking at the harassment victim's conduct can include focusing on how she dresses and talks to see if she acts in a provocative manner).

²⁴⁷ See Lee, *supra* note 11, at 394-95 (arguing that stalking activity predominately stems from our Western mores of romance and courtship, in which the woman has the cultural role of playing "hard to get" and the suitor is expected to engage in romantic persistence to "prove" his love).

²⁴⁸ Estrich, *supra* note 245, at 830.

blue-collar work environment signals her "consent" to the coarse practices of that environment. The female employee was fully aware of the behavioral norms of the particular work setting, the argument goes, and thus she must have been willing to tolerate the conduct. Once a woman enters the blue-collar working world, she is on her own and can only blame herself for choosing the wrong job if she ends up feeling harassed.

How exactly should a woman act once she joins her male counterparts in her blue-collar occupation? She might not want to engage in vulgar banter with her coworkers but may feel compelled to do so in an attempt to be seen as part of the group and fit in. In *Carr v. Gas Turbine Div.*,²⁴⁹ for instance, the plaintiff was the first female to work in the tinsmith shop and in her testimony admitted that she joined her all-male coworkers in crude dialogue because she wanted to be accepted as "one of the boys."²⁵⁰ The district court rejected Carr's hostile environment harassment claim, holding that since Carr herself had used vulgarities, she "invited" the harassing conduct.²⁵¹ Realizing the incongruity of this ruling, Chief Judge Richard Posner, writing for the Seventh Circuit in Carr's appeal, quickly dismissed the trial court's conclusion, stating that "[w]elcome sexual harassment" is an oxymoron.²⁵² Unlike the district court judge, Judge Posner exhibited more empathy in his opinion as he attempted to understand the events that took place in the tinsmith shop from Carr's lone standpoint, stating that "her [vulgar] words and conduct cannot be compared to those of the men and used to justify their conduct The asymmetry of positions must be considered. She was one woman; they were many men."²⁵³ In highlighting the unequal power dynamic between Carr and her coworkers, Judge Posner implicitly recognized the gendered norms of the male-dominated workplace where the harassment had nothing to do with Carr's behavior and everything to do with her being a woman who dared enter their shop.

Fitting in and being accepted by the group may be even more important in particularly dangerous fields such as

²⁴⁹ *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007 (7th Cir. 1994).

²⁵⁰ *Id.* at 1009-11.

²⁵¹ *Id.* at 1010.

²⁵² *Id.* at 1008.

²⁵³ *Id.* at 1011. See NUSSBAUM, *supra* note 127, at 104-11 (pointing out Judge Posner's "use of empathy in connection with judicious assessment").

firefighting, where mutual cooperation is key and where one must be able to rely on one's coworkers.²⁵⁴ But trying to fit in should not require a woman to endure abusive working conditions that are passed off as blue-collar norms. Furthermore, a woman who attempts to work in an intimidating environment should not be viewed as welcoming the hostile behavior, thus preventing her from later asserting a legitimate hostile environment harassment claim. On the other hand, even a tradeswoman who tries to avoid or repel the group's practices may continue to be harassed. As Judge Posner noted, a female welder at Carr's workplace who declined to take part in the crude behavior admitted that she still had to fend off her domineering male coworkers with her welding arc.²⁵⁵ She likely would still be targeted for harassment because she would be viewed as "oversensitive" or not a group player—someone not cut out for the trades.

In either scenario, a blue-collar woman can find herself being subjected to a hostile environment because she reacts to her environment in either a stereotypically masculine or feminine manner. She finds herself in a catch-22 situation regarding how to behave on the job. Courts would look more favorably upon a plaintiff who avoided the vulgar behavior altogether because her non-involvement avoids complicating the unwelcomeness question, although courts have nevertheless found that a plaintiff can be straight-laced or oversensitive to her supervisor's sexual comments.²⁵⁶ The defense that the blue-collar plaintiff herself took part in the uncouth behavior ignores the unequal relations between men and women.²⁵⁷ Given our historical and social understanding of gender relations and sexual violence, a man would feel less threatened by a woman's suggestive or harassing actions than vice versa. As one scholar put it, "[a] woman firefighter might be able to put up a photograph of a naked man, but she cannot reproduce the social context that conveys to pornography the power to intimidate."²⁵⁸

Even for women who enter the trades because they are attracted to this type of work, it is the work and not the disrespectful environment accompanying it that draws them to

²⁵⁴ See CHETKOVICH, *supra* note 223.

²⁵⁵ Carr, 32 F.3d at 1011.

²⁵⁶ See, e.g., Fox v. Ravinia Club, Inc., 761 F. Supp. 797, 799 (N.D. Ga. 1991).

²⁵⁷ CHETKOVICH, *supra* note 223, at 80.

²⁵⁸ *Id.*

the jobs.²⁵⁹ Women who want to work in construction or firefighting should not have to contend with offensive and harmful comments on the job. If commonly-shared class norms were truly driving the work culture, then women in blue-collar jobs who belong to the same class (at least in terms of industry position) as their male counterparts presumably would find the work environment comfortable and appropriate, rather than abusive and hostile. However, blue-collar women make more than the occasional claim of hostile environment harassment with respect to their blue-collar jobs,²⁶⁰ implying that male domination, and not class difference, has significantly shaped the work environment.

Blue-collar employees may engage in crude banter as a form of workplace humor to break the monotony of work on the shopfloor or to downplay the dangers or stresses involved in risky blue-collar work.²⁶¹ Cultural studies indicate that teasing and practical joking can promote group cohesion in a job where teamwork is crucial to successful job performance.²⁶² In addition, these studies suggest that humor can help diffuse simmering hostility by allowing it to be channeled through a sort of "safety-valve," in this way helping to maintain social order at work.²⁶³

Nonetheless, men should not be allowed to "let off steam" at work by engaging in coarse dialogue and actions that women find abusive. Such a perspective would condone behavior that sounds disturbingly similar to the verbal and emotional abuse that occur in cases of domestic violence.²⁶⁴ Women, whether at work or at home, must not be expected to tolerate the aggressive and abusive behavioral tendencies of

²⁵⁹ See generally Sylvia A. Law, "Girls Can't Be Plumbers"—Affirmative Action for Women in Construction: Beyond Goals and Quotas, 24 HARV. C.R.-C.L. L. REV. 45 (1989).

²⁶⁰ Juliano & Schwab, *supra* note 87, at 560-61, 565 (observing that the majority of harassment plaintiffs were female and blue-collar or clerical, and the majority of sex harassment cases involved hostile environment claims).

²⁶¹ See CHETKOVICH, *supra* note 223, at 33-35; DAVID COLLINSON, MANAGING THE SHOPFLOOR: SUBJECTIVITY, MASCULINITY, AND WORKPLACE CULTURE 105 (1992).

²⁶² CHETKOVICH, *supra* note 223, at 33-35 (discussing how firefighters use teasing, joking, and storytelling to entertain, release tension, and deal with the demands of a hazardous job).

²⁶³ COLLINSON, *supra* note 261, at 105-06.

²⁶⁴ See Diane L. Rosenfeld, *Why Doesn't He Leave?: Restoring Liberty and Equality to Battered Women*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 535, 536-37 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing "the penumbral area of abuse [including domestic violence and sex harassment] that is legally prohibited but widely understood to be unpoliced").

their partners or coworkers simply because men need to release stress.

Notably, studies about the shopfloor also suggest that male humor may actually heighten, rather than mitigate, hostility between men and women in the blue-collar sector, confining women to the role of "outsiders" to the group masculine culture.²⁶⁵ This humor is used to trivialize the harmful animosity truly at issue, so that women are accused of "not getting the joke."²⁶⁶ The fact remains that female employees in the blue-collar workforce do not necessarily share the masculine humor that dominates their workplaces,²⁶⁷ and may often find the "humorous" practices more intimidating and threatening than entertaining, thereby deriving no benefit from such an atmosphere and instead suffering injury.²⁶⁸ Whether or not crude humor increases male productivity at work, male-oriented jokes or comments that objectify and malign women will likely cause female employees to become less productive. This result then fails to promote the general social order in the blue-collar workplace, and rather serves to promote the *masculine* social order of the workplace. Within this masculine realm, women then have to walk a fine line between being likable and being distant because women cannot engage in this type of teasing with men in the same manner that men can joke with one another.²⁶⁹ A woman who teases back can be perceived as someone who is "easygoing" or "can take it," thus possibly opening herself up to more extreme behavior.²⁷⁰

Workplace humor, however, can still flourish without causing workplace abuse if it incorporates the humor of women. If women are to feel comfortable and encouraged to enter highly masculine fields, they need some indication that the workplace has improved in terms of work behavior and culture. Many women who would otherwise enter male-dominated trades decide not to do so because of the harassing

²⁶⁵ COLLINSON, *supra* note at 261, at 76-77.

²⁶⁶ See MACKINNON, *supra* note 6, at 52 ("Trivialization of sexual harassment has been a major means through which its invisibility has been enforced. Humor, which may reflect unconscious hostility, has been a major form of that trivialization.")

²⁶⁷ See, e.g., Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1009-11 (7th Cir. 1994).

²⁶⁸ See West, *supra* note 173, at 81 ("[A] man may experience as at worst offensive, and at best stimulating, that which a woman finds debilitating, dehumanizing or even life-threatening.")

²⁶⁹ See CHETKOVICH, *supra* note 223, at 78-79.

²⁷⁰ *Id.* at 79.

behavior that permeates these workplaces.²⁷¹ But this fact should not suggest that women who do enter these fields consent to being harassed. Rather, they may take the jobs because they refuse to be deterred from doing the work they want to do or because they cannot afford *not* to take the jobs.²⁷² Poor women especially may seek to enter male-dominated trades such as construction and precision repair because these jobs offer higher economic rewards and good benefits.²⁷³ But they should not have to pay such a high price for their "choices." Indeed, Title VII was enacted to enhance employment opportunities for women and to break down the long-existing barriers to economic entry and advancement.

VII. CONCLUSION

Harassment is a murky phenomenon precisely because it is diffuse and fluid, infecting one's surroundings like bad air. And like dirty air, harassment smothers those whom it touches, harming their ability to thrive in the place from where the harassment emanates. As the Fifth Circuit recognized in *Rogers v. EEOC*, a hostile environment case involving race discrimination, "[o]ne can readily envision working environments so *heavily polluted* with discrimination as to destroy completely the emotional and psychological stability of minority group workers"²⁷⁴ Just as environmental law aims to curb pollution, anti-harassment law must strive to curb harassment. Title VII was intended to address the effects of harassment and sex discrimination by striking at the core of gender stereotypes and gender hostility. When considering hostile environment harassment claims, courts need to re-think workplace culture as not concerning job-specific culture, but involving masculine culture traditionally associated with the workplace. Only by recasting the discussion to focus on masculine norms within the workplace can we return to the

²⁷¹ See D'Vera Cohn & Barbara Vobejda, *For Women, Uneven Strides in Workplace; Census Data Reflect Decade of White-Collar Progress, Blue-Collar Resistance*, WASH. POST, Dec. 21, 1992, at A1 (stating that women may refrain from becoming firefighters or construction workers because of "strong group cultures that can encourage hostility and harassment from men").

²⁷² See Law, *supra* note 259, at 48.

²⁷³ See *id.*

²⁷⁴ *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (emphasis added).

original understanding and purpose of sex harassment law under Title VII: to help female workers achieve true equal employment opportunity.

