THE ORGANIZATION AS A GENDERED ENTITY: A RESPONSE TO PROFESSOR SCHULTZ'S *THE SANITIZED WORKPLACE*

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In the two decades since the Supreme Court first recognized the legal harm of sex harassment[1] in *Meritor Savings Bank v. Vinson*,[2] the trajectory of sex harassment law and policy continues to be controversial, even among gender scholars who seek to advance workplace equality but disagree about how to accomplish this objective. In this piece, I wish to contribute to the larger debate by offering a response to Professor Vicki Schultz's provocative article, *The Sanitized Workplace*.[3] Her project builds upon her previous works on sex harassment[4] and the meaning of paid

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[1] I prefer to use the term "sex harassment" instead of "sexual harassment" to highlight the point that harassment is a form of sex discrimination under Title VII (42 U.S.C. § 2000e-2(a)(1) (2000), the antidiscrimination statute that governs the workplace), whether or not the harassment is rooted in sexual desire. *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"). I have used this term in my previous work on this subject. *See* Rebecca K. Lee, *Pink, White, and Blue: Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment*, 70 BROOK. L. REV. 677 (2005); *see also* Vicki Schultz, *Reconceptualizing Sex Harassment*, 107 YALE L.J. 1683 (1998) (arguing for a broader understanding of sex harassment to include harassing behavior that is nonsexual but nonetheless occurs due to gender hostility in the workplace) [hereinafter Schultz, *Reconceptualizing*].

[2] 477 U.S. 57 (1986).

[3] Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

[4] Schultz, *Reconceptualizing*, *supra* note 1.

employment[5] to put forth an innovative argument with significant implications in the areas of law, workplace culture, and organizational theory. While I support her endeavor in its larger intent, I write this response to examine her arguments and recommendations critically as well as constructively in an effort to engage in the ongoing task of advancing women's aspirations in the work organization and the labor market.

In *The Sanitized Workplace*, Schultz argues that the feminist movement to address sex harassment in the workplace echoes the ideological underpinnings of classical-management theory in that they both advocate for an emotion-free workplace, without harmful distraction, to maximize employee efficiency.[6] She refers to a specific school of thought—the "scientific method" promoted by Frederick Winslow Taylor—to assert that the nascent organization was established as a rational space where laborers focused on production with little or no personal interaction.[7] These early laborers were male, and Schultz points to the later entry of women into the workforce as introducing sexual elements into the workspace that would disrupt the rationality of organizational life, presenting a dilemma for managers who had sought to create an asexual work environment.[8] As Schultz sees it, feminist reformers in our modern era ended up resuscitating the organizational practices of early bureaucratic leaders by similarly pushing for a desexualized workplace.[9] In making this novel link between classical-management theory and the anti-sex harassment movement, Schultz is troubled by what she perceives to be unduly restrictive sex harassment policies currently in place in many work settings that reflect management's early inclination to suppress laborers' personal interactions of all kinds.[10] According to her, sexual behavior should be allowed to openly flourish in the workplace, for she believes the freedom to express oneself in sexual terms enhances one's social development at work and improves one's productivity.[11] She therefore wants to counteract the recent

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[5] Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (arguing for the right to paid work as the institutional core for equal citizenship, including gender equality) [hereinafter Schultz, *Life's Work*].

[6] Schultz, *supra* note 3, at 2064.

[7] *Id.* at 2072-73.

[8] *Id.* at 2074.

[9] *Id.*

[10] *Id.* at 2164-66.

[11] *Id.* at 2166-67.

push for a return to the nonsexual workplace that supposedly predominated at the turn of the century.

In this work, I contest Schultz's argument that connects classical-management theory to sex harassment law and policy. As I argue in Part I, Schultz's characterization of the classical-management approach and its dominance in the field is overstated, as is the seeming alliance between the feminist movement and company management in shaping the workplace. Moreover, contrary to her depiction of the nascent organization as asexual due to its all-male labor force, I show that masculine sexuality thrives whether or not women are present and is institutionally expressed through sexually-oriented horseplay and customs. Understanding that sexuality is never truly absent from the work institution, we can see that the entry of women into the labor force and into the organization did not suddenly ignite a sexual energy that was previously nonexistent. Instead, women merely entered into the predetermined culture of the workplace and found themselves harmed by the masculine style of sexuality that dominated their work setting.

In Part II, I question Schultz's call for unrestricted sexual conduct in the workplace—what I term a sexuality-privileged organizational model—due to the probable harms that outweigh the possible benefits of allowing sexuality to prosper in the work organization. In contrast to her libertarian model, I defend the sexuality-constrained organizational paradigm in light of concerns regarding the role of work, on-the-job expectations, and larger workplace dynamics. Schultz is not uneasy about open sexuality at work because she believes that it is organizational sex-segregation that primarily gives rise to sex harassment. As a result, she advocates for gender integration at all levels of the organization to address sex harassment, recommending employer incentives in the form of differentiated employer liability rules according to the existing proportion of women in the organization. Gender integration is indeed a crucial objective, but I further consider whether the courts are best suited to implement her number-specific plan, as she suggests, by comparing the strengths of judicial lawmaking versus both agency expertise and legislative reform.

While Schultz's proposal for gender integration is important and necessary, I assert in Part III that her structural prescription nonetheless may be insufficient if we view the organization as an institution created and fundamentally shaped by masculine norms. I challenge whether an increase in the number of women alone will transform the work environment into an egalitarian and a more welcoming space. A numerical balance in gender is indisputably needed, but I hold that it is inadequate unless women, along

with their male counterparts, also actively reconsider their organizational cultures and traditions rather than continue, in their better positions of influence, the disparate legacy that masculine notions of work culture have imposed upon women (and gender-nonconforming men). To move toward genuine organizational progress, I advance a framework for organizational re-signaling and reformation by recommending certain steps that a leadership committed to gender equality can take to revise institutional norms and more vitally enhance the nature of women's work experiences.

I. SEXUALITY IN THE ORGANIZATION

In her latest work on sex harassment, Schultz describes the feminist push to address sex harassment in the workplace as an anti-sexuality campaign that she contends converges with early management's agenda to cleanse the organization of personal elements that could distract workers from their jobs.[12] Schultz asserts that along with the rise of the bureaucracy at the turn of the century came the rise of professional managers who espoused a rationality-dependent work ethic that separated emotions from work to promote maximum efficiency and productivity.[13] These managers perceived the work organization as a place where rationality was to be championed and human passions suppressed.[14] Through the division of work, they focused on applying their knowledge and expertise to map out the goals of the organization, using workers to simply serve as the human vehicles through which to implement them.[15]

Schultz argues by inference that classical-management theorists must have also banned sexuality in the early bureaucracy since it would disrupt the rationality of the organizational sphere and threaten the organizational order.[16] Understanding that sexuality is culturally incompatible with the "passionless logic" of the organization, Schultz concludes that early managers most likely tried to keep sexual elements outside the company.[17]

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[12] *Id.* at 2072-76.

[13] *Id.* at 2072-73.

[14] *Id.* at 2072.

[15] *Id.*

[16] *Id.* at 2073.

[17] *Id.*

The entrance of women into the labor force, however, created a problem for managers who feared that women's presence in the workplace would spark the sexual components they tried so hard to keep separate from the organization.[18] Schultz argues that feminists, in advocating for women's equality at work, adopted management's goal to rid the workplace of all sexuality rather than push for a new conception of the workplace that would embrace and celebrate sexuality.[19] Thus, by pursuing the former strategy, feminists sowed the seeds of the anti-sex harassment movement, which sought to address and curb men's sexual behavior at work that hindered women's opportunities for equal employment.[20] This movement, led by radical feminist lawyer and scholar Catharine MacKinnon, linked female subordination at work with unwanted sexual advances and advocated for the legal recognition of sex harassment as a form of sex discrimination.[21]

Schultz's argument that feminists have aligned themselves with management seems a bit odd because, even accepting her contention that feminist reformers adopted an approach *similar* to the one embraced by managers, their purposes for doing so clearly differ. Management sought to improve overall employee productivity, whereas feminist reformers sought to improve the working conditions of female employees. Viewed in this way, Schultz actually sits on the same side as MacKinnon's camp, as both are focused on worker rights in order to make the work environment a better place where women and men have the same opportunities to flourish. Recognizing then that Schultz and MacKinnon both share the same larger aspiration, Schultz's suggestion that the goals of the feminist movement lie on the managerial end of the workplace arena, far from aiming to protect and enhance employees' well-being, seems peculiar. Instead, the difference lies in their respective approaches to reaching the same employee-focused objective, demonstrated by Schultz's proposal for a laissez-faire policy regarding workplace relations in contrast to MacKinnon's more regulated stance.

We should further recall that the larger feminist movement has resisted and challenged the central force that rationality occupies in Western thought and practice, which favors "masculine" reason over "feminine"

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[18] *Id.* at 2074.

[19] *Id.* at 2074-75.

[20] *Id.*

[21] *Id.* at 2079-80; *see generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1976).

emotion.[22] As the oft-recited slogan indicates, the movement progressed from the conviction that "the personal is political," and feminist organizers and organization builders have encouraged group and organizational cultures that draw out and re-channel expressions of emotion toward female empowerment and socio-political change.[23]

Schultz acknowledges that feminists are not usually characterized as allies to company management, but suggests that their shared mission of purifying the workplace of sexuality is not so strange in light of our American work ethic that values the separation of work and sex.[24] She believes this work ethic stems from the organizational philosophy of early management theorists who developed a new way of managing workers during the emergence and rise of the bureaucracy at the turn of the twentieth century.[25] She highlights the management approach of Frederick Winslow Taylor, the engineer who became well-known for his theory of scientific management, as a prime example of this managerial method.[26] Schultz makes particular reference to Taylor's method as representative of classical-management theory and its related focus on rationality without passion. Taylor's theory included the practice of "stopwatch time study," in which work was disaggregated into simple steps, each of which was then timed to determine the most efficient production rate.[27] His approach also included an "incentive wage" system, which paid different wage rates according to the pace of production to motivate workers to produce output within the time frame deemed efficient for the task.[28] Schultz points to Taylorism to assert that early organizational managers banned all things not related to work, including all personal interactions that could slow down the operations of the bureaucratic machine.

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[22] *See, e.g.*, Verta Taylor, *Bringing Emotions into the Study of Feminist Organizations*, *in* FEMINIST ORGANIZATIONS: HARVEST OF THE NEW WOMEN'S MOVEMENT 223, 227 (Myra Marx Ferree & Patricia Yancey Martin eds., 1995).

[23] *See id.* at 228-32; *see generally* SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT & THE NEW LEFT (1980).

[24] Schultz, *supra* note 3, at 2063.

[25] *Id.* at 2064, 2072-73.

[26] *Id.* at 2072-73.

[27] DANIEL NELSON, FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT 39-41 (1980).

[28] *Id.* at 42.

A closer examination of Taylorism in actual practice, however, reveals that Taylor did not in fact abandon all personal aspects in his managerial style. Although exacting in form, he often demonstrated sympathy when interacting with his workers, taking the time to listen to their troubles.[29] As Taylor himself recognized, it was impracticable to neglect laborers' human dimensions at work, undercutting Schultz's emphasis on the entirely emotionless organization that Taylor supposedly upheld and reinforced.

While Schultz is correct in that Taylor's shop-management approach required its workers to function for the most part like robots at work, Schultz's focus on Taylorism as the uncontested managerial philosophy of its time is inaccurate. Although Taylor's scientific method did become well-known and was replicated to varying extents by factory managers, worker resistance remained an important obstacle to mass implementation of his system, even causing Congress to investigate Taylor's controversial practices.[30] In short, Schultz overstates the impact of Taylor and his approach, also overemphasizing contemporary management's return to Taylor's "passionless" organizational ways and the feminist movement's campaign to do the same.[31]

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[29] *Id.* at 39.

[30] *See* THOMAS C. COCHRAN, AMERICAN BUSINESS IN THE TWENTIETH CENTURY 76 (1972); ROBERT KANIGEL, THE ONE BEST WAY: FREDERICK WINSLOW TAYLOR AND THE ENIGMA OF EFFICIENCY 447-59 (1997). Further opposition to Taylor's method was demonstrated by Congress' attention to his system when government arsenals and shipyards began to seriously consider implementing the principles of scientific management. *Id.* at 448. Government workers asked legislators to investigate the system of scientific management which was alleged to harm "'the best interests of American workingmen.'" *Id.* at 447-48. Hearings were held by the House Labor Committee, during which the machinists' union president declared that "'[t]he whole scheme of the [Taylor] system is to remove the head of the workmen.'" *Id.* at 448. Eventually, after a worker strike at a government arsenal, a "Special Committee to Investigate the Taylor and Other Systems of Shop Management" was authorized and created by Congress. *Id.* at 449-59. This Committee ultimately issued a report criticizing Taylor's system for treating workers like machines but did not make any legislative recommendations. *Id.* at 482-83.

[31] Further, new schools of thought emerged in the decades after Taylorism, including the study of industrial human relations, which expressly took into account human behavior in organizational management and recognized that social factors are important and unavoidable in all situations where people are engaged in a cooperative enterprise. *See generally, e.g.*, CHESTER I. BARNARD, THE FUNCTIONS OF THE EXECUTIVE (1948); RESEARCH IN INDUSTRIAL HUMAN RELATIONS: A CRITICAL APPRAISAL (Conrad M. Arensberg et al. eds., 1957); ELTON MAYO, THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION (1946); F. J. ROETHLISBERGER & WILLIAM J. DICKSON, MANAGEMENT AND THE WORKER (1939); GORDON S. WATKINS ET AL., THE MANAGEMENT OF PERSONNEL AND LABOR RELATIONS (1950).

Schultz recognizes that human passions, including sexuality, cannot be fully expelled from the organization,[32] thus weakening the notion that sexuality was ever truly missing from the workplace, including in the early all-male organization. Given that sexuality is a basic human force, as Schultz also emphasizes,[33] sexual elements make their way into the organizational space regardless of whether women are present or not. She notes the presence of sexuality is not necessarily tied to the presence of women, and yet seemingly accepts that the early organization was or could have remained vacant of sexual features.[34] It is not surprising that instances of sexuality can be found in all types of organizations, long before women entered the workforce. Schultz, citing organizational theorists, suggests that our culture believes men are able to curb their sexuality while women unleash or exude it.[35] All-male environments, however, certainly are not devoid of sexuality simply because women are absent from them; on the contrary, all-men settings commonly exhibit intra-gender, sexually aggressive traditions. Consider, for instance, the masculine practice of horseplay, within both work and other settings, much of which involves highly sexualized behavior and language.[36] Evidence of strong sexuality in well-established, all-male institutions confirms that the presence of women is not required to render an environment sexually charged.[37] In the hostile environment sex harassment context, women's entrance into the institution

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[32] Schultz, *supra* note 3, at 2068.

[33] "In our culture, sexuality is seen as 'part of an animal nature—biologically or psychodynamically driven, irrational, innate—that exists prior to (and is at war with) civilization, society, and the forces that would repress or tame it.'" *Id.* at 2073 (quoting JAMES D. WOODS & JAY H. LUCAS, THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA 33 (1993)).

[34] *Id.* at 2075, 2082 (referring to "the age-old Taylorist dream of a sexless organization").

[35] *Id.* at 2074.

[36] *See* Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, *in* READER IN GENDER, WORK, AND ORGANIZATION 49, 56 (Ely et al. eds., 2003) (highlighting the fact that all-male organizations have always involved homoerotic behavior).

[37] This Article focuses on the role of sexuality vis-à-vis women and men in the hostile environment sex harassment context, but it is important to note that women's entry into the organization did trigger a different type of harmful sexual activity—coerced sexual relations in the form of quid pro quo sex harassment.

altered the targeting of sexual expression, but their entry hardly introduced it.[38]

The organizational culture of the military is a case in point. Male sexuality is widely infused into the combat culture in military units, as soldiers have long participated in sexual joking and explicit conversation as a way to forge personal closeness.[39] Even the Army leadership, believing this kind of bonding enhances unit performance, has openly allowed and endorsed sexually-oriented talk among its soldiers.[40] During the 1970s, the Army regularly featured in its official monthly magazine a picture of a pin-up girl as part of this sexualized culture,[41] and male soldiers stationed abroad could take part in officially sponsored trips to local red-light districts as breaks from training.[42] Training runs and marches provided further opportunity for military commanders to reinforce images of aggressive, masculine sexuality through the use of sexually graphic cadence calls.[43] Sexuality, in essence, was deployed as a way to control the troops.[44]

Military schools, which are still heavily male-dominated, likewise engage in and carry on traditions that are sexual in form. Despite being legally forced to accept women in the early 1990s, the Citadel, a publicly funded military academy, remains a nearly all-male institution, mainly because female cadets have suffered at the hands of their male classmates.[45]

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[38] *See* KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993, at 63-64 (1994) (describing the sexual stories and jokes that male plant workers shared during the Industrial Age in the early 1900s, as women entered these plants in small numbers); *see also* BARBARA A. GUTEK, SEX AND THE WORKPLACE 167 (1985) ("A work environment numerically dominated by men will be characterized by a sexual ambience and the expression of male sexuality. . . . When a woman enters such an environment, she becomes the target of much of the 'floating sexuality' already present.").

[39] LINDA BIRD FRANCKE, GROUND ZERO: THE GENDER WARS IN THE MILITARY 156-57 (1997).

[40] Fred L. Borch III, *Military Law and the Treatment of Women Soldiers: Sexual Harassment and Fraternization in the US Army*, *in* A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY 337, 337 (Gerard J. DeGroot & Corinna Peniston-Bird eds., 2000).

[41] *Id.*

[42] *Id.*

[43] FRANCKE, *supra* note 39, at 161-63.

[44] *See* MELISSA S. HERBERT, CAMOUFLAGE ISN'T ONLY FOR COMBAT: GENDER, SEXUALITY, AND WOMEN IN THE MILITARY 64 (1998).

[45] SUSAN FALUDI, STIFFED: THE BETRAYAL OF THE AMERICAN MAN 116-20 (1999).

Many of the traditions at this school are sexualized, such as the daily communal shower; "Senior Rip-Off Day," where senior cadets tear off one another's clothing, throw the clothes into a bonfire, and tumble and embrace on the ground; and the birthday tradition, which involves stripping the birthday cadet, tying him to a chair, and coating him with shaving cream.[46] Pictures of cadets casually participating in various forms of intimate behavior with one another, including many instances of hugging and kissing, abound in the school's yearbook.[47] The Citadel serves as an example of how sexuality figures significantly into the culture of an austere and hierarchical male-occupied institution where order and discipline are valued. Military customs are "driven by a group dynamic centered around male perceptions and sensibilities, male psychology and power, male anxieties and the affirmation of masculinity,"[48] all of which contribute to an open and explicit sexual culture among servicemen.

Other examples of all-male (or nearly all-male) sites with highly sexualized cultures include fire departments, where sexual pin-ups in lockers and sexual banter are regular sights and sounds,[49] and prisons, where rape and sexual aggression by male inmates as well as by male correctional officers are rampant and routine.[50] The sexually-oriented rituals and conventions that blatantly exist in these institutions demonstrate the ways in which sexual expressions frequently pervade men-only environments, contradicting Schultz's claim that the emerging organization was sexuality-free because it was entirely male-occupied. Men are sexual beings whether or not women are in their company, and thus it is inaccurate to suggest that women's entry into the work environment triggered a sexual energy that was allegedly latent or nonexistent in male-only settings. Instead, women's entrance into the workplace unleashed hostile behavior against them that commonly was sexual in character and form. At the

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[46] *Id.* at 131.

[47] *Id.*

[48] FRANCKE, *supra* note 39, at 152 (discussing the masculine group culture of the military and its role in creating a harassing atmosphere for women).

[49] *See* CAROL CHETKOVICH, REAL HEAT: GENDER AND RACE IN THE URBAN FIRE SERVICE 76-77 (1997).

[50] *See, e.g.*, James E. Robertson, *A Clean Heart and An Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433 (2003) (describing the male-on-male sexual aggressions that regularly take place in prison); J. C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 856-58 (2002) (citing studies reporting the frequency of coerced sexual encounters in prisons by male inmates and correctional officers).

Citadel, for example, female professors who joined the faculty endured lewd phone calls and obscene pictures and notes from men on campus.[51] Women who joined male institutions stepped into a predetermined workplace culture that was originally male-occupied and thus male-identified. Consequently, women found themselves harmed by male sexual demands that dominated their working space, harms that were eventually recognized as the legal injury of sex harassment.[52]

Many hostile environment cases show that sex harassment can result from sexual motives,[53] but sexual design is not a necessary precondition to render a charge viable under Title VII. As the Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.*,[54] sex harassment need not arise out of sexual desire; rather, it only must be "because of sex."[55] In this vein, Schultz has brilliantly pointed out in an earlier work that harassment is also used to conserve traditional spheres of male labor by undermining women's confidence and equal footing on the job and sabotaging their work performance.[56] Sex harassment is perpetrated along a range of gender-hostile discriminatory actions, including both sexualized and nonsexualized harassment, to prevent women from thriving and claiming a permanent place in male-dominated workplaces. Our attention to nonsexual forms of harassment, however, should not eclipse our awareness of sexual forms of harassment that have been and continue to be inflicted on many female (and male) workers. Against this backdrop, I next consider whether unrestrained sexuality at work is a beneficial policy.

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[51] Faludi, *supra* note 45, at 117.

[52] *See generally* MACKINNON, *supra* note 21.

[53] *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (describing how a male superior propositioned a female employee for a sexual relationship); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (involving a male company president who directed sexually-oriented comments to a female employee); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (depicting a work environment in which male supervisors subjected female subordinates to sexual touching and remarks); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (depicting a male supervisor who suggested that a female subordinate's job depended upon her acquiescence to his sexually-oriented behavior).

[54] 523 U.S. 75 (1998).

[55] *Id.* at 80-81.

[56] *See generally* Schultz, *Reconceptualizing*, *supra* note 1 (arguing that the "sexual-desire paradigm" of sex harassment is under-inclusive and instead offering her wider-ranging "competence-centered paradigm" to show that much harassment is targeted to prevent women from effectively performing their jobs).

II. MAPPING THE LINKS: SEXUALITY, SEX HARASSMENT, AND SEX SEGREGATION

Schultz argues that the current sex harassment movement is basically a movement to eradicate sexuality from the workplace that goes beyond what is legally required to address sex harassment.[57] She contends the legal focus on sexual conduct encourages organizations to shield themselves from liability by being over-cautious and prohibiting all forms of sexuality.[58] She finds the strict spotlight on sexual conduct problematic because it narrowly views sex harassment as sexually-defined rather than gender-grounded, when in fact she believes that harassment is largely perpetrated through nonsexual ways that try to portray women as incompetent on the job.[59] In her view, Human Resources (HR) managers of today are following in the footsteps of their managerial predecessors by attempting to stamp out sexuality from the workplace, now equipped with feminist arguments for such restrictive policies.[60]

Schultz points to empirical evidence, which she concedes is not entirely conclusive, to show that HR professionals define actions such as "sexual jokes, remarks, and teasing" as types of harassment, although this behavior on its own does not constitute harassment that is actionable under the law.[61] While isolated occurrences of this behavior may not amount to a hostile work environment under the current legal standard, such behavior likely would establish an actionable hostile environment if it frequently recurred over time or was coupled with other gender-biased behavior. In a hostile environment situation, it is important to look at the totality of factors, as the Supreme Court recognized in *Harris v. Forklift Systems, Inc.*,[62] rather than only individual episodes of harassment, because it is the

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[57] Schultz, *supra* note 3, at 2087.

[58] *Id.* at 2088-89.

[59] *Id.* at 2075-76, 2087.

[60] *Id.* at 2089.

[61] *Id.* at 2094-96; *see* SOC'Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 4, 7, 11 (1999) (conduct listed in survey was all sexual in nature).

[62] 510 U.S. 17 (1993). Currently, hostile environment sex harassment is actionable under Title VII if: (1) the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive," and (2) the plaintiff "subjectively perceive[s] the environment to be abusive," with no requirement that the plaintiff demonstrate psychological injury. *Id.* at 21-23.

working *environment* that must be abusive, and as such necessarily involves a diffuse but ubiquitous harmful atmosphere in which many female workers are forced to work. Hostile environment sex harassment is more prevalent than quid pro quo harassment,[63] an unsurprising statistic considering the latter is a palpable form of harassment that is easier to curb.

Schultz argues that personnel managers are overly restraining employees' sexual conduct by implementing overbroad policies, but policies that reach beyond what the law requires are not necessarily unfavorable if we view the law as providing only the minimum level of legal protection from harassment. Antidiscrimination laws, we should hope, do not limit all that we seek to achieve in improving workplace relations, and sex harassment law as currently understood should not prevent society from achieving a higher degree of mutual respect in all work organizations. Just as race discrimination law has helped bring about a greater awareness of both the obvious and subtle harms of racial prejudice, sex discrimination law—including sex harassment law—has brought about a greater understanding of the apparent and not-so-apparent abuses in gender relations. As a survey report put out by the U.S. Merit Systems Protection Board (MSPB), the federal agency charged to examine the incidence of sex harassment among federal employees, explains,

> focusing exclusively on sexual harassment so extreme as to meet a legal test was never the aim of the Government's information and prevention programs. 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.[64]

In line with this perspective, the legal standard simply lies on one particular end on the scale of harassing behavior, and we should endeavor to foster a more respectful work environment beyond what the law only requires.

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[63] *See* Ann Juliano & Steward J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 565 (2001). Quid pro quo harassment involves a supervisor's demand for sexual relations that has direct or indirect economic or employment consequences. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986). *See also* MACKINNON, *supra* note 21, at 32-40.

[64] U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 3 (Oct. 1995), *available at* http://www.mspb.gov/studies/sexhar.pdf [hereinafter SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE].

A. Promoting Cultural Sensitivity at Work

A large part of the debate, however, perhaps centers more on whether allowing open sexuality at work is a positive social objective, rather than on whether sex harassment policies should extend further than the law's narrow mandates. In addition to the sexual jokes and conversation that are being curtailed, Schultz is concerned about the limits on consensual romantic relationships that are being implemented through contemporary HR policies.[65] She points to the "zero-tolerance" approach adopted by some HR consultants—an approach that strongly dissuades employers from allowing their employees to engage in sexual or intimate behavior—and also notes the "no-dating policy" between supervisors and subordinates that may extend to relationships between coworkers as well.[66]

Schultz also describes what she calls the "cultural sensitivity" stance, which she maintains deviates from the zero-tolerance approach only in grades.[67] The sensitivity model recommends that supervisors and employees self-monitor their behavior and be prepared to cease any sexually-oriented conduct if they sense that their actions may have insulted another party.[68] This policy focuses on the effect of an individual's conduct on another person, rather than on intent, in determining the welcomeness of the behavior, and recommends that all employees take note of both verbal and nonverbal signs in interpreting the impact of their conduct.[69] While advocates of this perspective do not necessarily urge all consensual and intimate relationships in the workplace be prohibited, they warn that sexual involvement between employees and their supervisors are ill-advised, if not improper, and suggest that such relations between coworkers also can be difficult.[70]

Although Schultz believes the zero-tolerance and cultural-sensitivity approaches are more similar than different,[71] the latter is considerably less constraining as well as substantially more important in

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[65] Schultz, *supra* note 3, at 2092.

[66] *Id.* at 2099-101.

[67] *Id.* at 2101.

[68] *Id.*

[69] *Id.* at 2102.

[70] *Id.* at 2103.

[71] *Id.*

promoting self-awareness at work by encouraging employees to think about how others may be seriously affected by their indiscreet, even if unintended, actions. The sensitivity approach, unlike the zero-tolerance stance, does not automatically ban consensual coworker relationships, or even supervisor-subordinate relationships, but highlights the concerns employees should consider in deciding whether to enter such relations.

Admittedly, the zero-tolerance approach may be overly severe in that an outright prohibition on all consensual relationships between colleagues may not be needed, and may not even be practical. Accordingly, as Schultz's own empirical research shows, HR experts recommend a less strict approach when it comes to consensual coworker relationships.[72] The cultural-sensitivity perspective, on the other hand, is preferable to a no-sensitivity policy because the former recognizes that sexual conduct in the workplace can be harmful due to the still uneven gender relations that operate between women and men at work and in larger society. This approach emphasizes the importance of evaluating and calibrating our conduct in empathetic response to how an individual who is vulnerably situated might be injured by our actions. Further, this approach does not forbid all forms and degrees of sexual behavior at work, but provides reasons to keep such behavior in check because of the likely abuses that it can inflict on others. Some may be quick to dismiss the cultural-sensitivity model as simply a politically correct approach, but rejecting certain ideas or conduct by labeling it as "PC" only amounts to a hasty response that resists looking more deeply at the problem by stepping out of one's comfortable position to consider the less comfortable situation of another. Each individual should strive to understand the perspective of another, taking into account how her perspective is shaped by her identity and experience in a world that still remains largely unequal. The cultural-sensitivity approach seeks to promote this type of positive interpersonal understanding with the potential to reduce harassment and other forms of discriminatory behavior.

Schultz makes an eloquent appeal for viewing work as a site of important personal and social development for many people, emphasizing that such development is beneficial and hence should be encouraged.[73] I do not disagree with this worthy sentiment, but argue that the sexuality-constrained model does not take away from social engagement at work.

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[72] *Id.* at 2101-03. Moreover, workplace resource manuals put out by consultants do not necessarily advocate implementing a ban on all sexual behavior or relationships at work. *See, e.g.*, ANNE C. LEVY & MICHELE A. PALUDI, WORKPLACE SEXUAL HARASSMENT 91-101 (2d ed. 2002).

[73] Schultz, *supra* note 3, at 2164-65.

Allowing sexual energy to reign freely in the workplace is problematic because of the consequential harms that sexually-laden conduct currently has on many women in particular and on employees in general within the work setting. Granted, sexuality at work is not *per se* harmful, and sexuality can very well grow as a valuable dynamic between individuals at work under certain circumstances. At the same time, Schultz's laissez-faire recommendation is premature at best because we do not yet live in a fully egalitarian society where most women have been able to significantly remake their organizational cultures. Until we get closer to that point, I argue that unregulated sexuality at work is still too dangerous and risky a proposition. But rather than adopt an all-sexuality or no-sexuality stance, a practical middle ground will strive to take into account the good and bad reality of allowing sexuality to prosper in the workplace. Toward this end, the cultural-sensitivity approach aims to address these concerns, and should be accompanied by organization-wide sensitivity training to promote a better understanding of interpersonal workplace dynamics and encourage positive dialogue and reflection.

Schultz posits that viewing unconstrained sexual behavior as sexually offensive can lead to sex harassment claims against minority groups stereotypically labeled as hypersexual, including nonwhite and gay employees.[74] For example, sexual teasing that white employees might be willing to entertain from their also white colleagues may be unwelcome when it comes from minority coworkers.[75] To illustrate, she refers to a study in which white, female waiters remarked that they did not mind when their fellow white, male waiters joked with them in a sexual way, unlike when the kitchen cooks and busing staff, comprised of Mexican men, tried to engage in similar sexual gestures; the female waiters construed the behavior of the latter as sexually harassing.[76] Thus, Schultz concludes the racial identity and occupational position of the minority staff may have principally contributed to the white, female waiters' labeling of this behavior as sex harassment.[77]

Similarly, she notes sexual conduct on the part of openly gay coworkers also may be seen as sex harassment by heterosexual colleagues.[78]

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[74] *Id.* at 2158-63.

[75] *See id.* at 2159-60.

[76] *Id.*

[77] *Id.* at 2160.

[78] *Id.*

Straight men and women who might otherwise engage in sexual banter with other straight, same-sex coworkers may be offended when the same sexual teasing comes from homosexual, same-sex coworkers due to the exaggerated notion of gays and lesbians as being hypersexed.[79] Simply allowing sexuality at work, however, will not eradicate retaliation against minority and openly gay employees because the discriminatory attitudes of some unfortunately will persist regardless of the larger sexual culture. Even under Schultz's sexuality-privileged model, people of color and sexual minorities will not necessarily be able to engage equally in sexually-open conduct without risk of harassment complaints being lodged against them. Thus, the sexuality-privileged model would likely serve to privilege the behavior of heterosexual employees, as we can imagine that those who hold prejudicial views will continue to find sexual overtures from minority or gay coworkers offensive or unwanted. It would be more productive in these cases for HR administrators to squarely address the possibility of uneven accusations of sex harassment being leveled against people of color and against sexual minorities. A reflective workplace culture that takes into account people's varied and *nondiscriminatory* tastes with respect to sexual humor at work is a better calibrated approach than an all-or-nothing perspective.

B. Preserving Security and Stability on the Job

Perceptions of unfairness or conflicts of interest in the workplace should be carefully considered when contemplating consensual relationships at work, even if such relations are permitted. Consensual supervisor-subordinate relations pose a special kind of difficulty that stems from the difference in power, which affects the subordinate involved as well as other colleagues.[80] These relationships are especially tricky because other employees not involved in the relationship can be nonetheless affected by it if they believe the amorous subordinate is receiving preferential job treatment.[81] The perception of special treatment can spur a harassment complaint against the supervisor if a neglected bystander-employee feels that she was denied opportunities at work because she was not romantically

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[79] *See id.* at 2160-61.

[80] *See* Gary M. Kramer, *Limited License to Fish Off the Company Pier: Toward Express Employer Policies on Supervisor-Subordinate Fraternization*, 22 W. NEW ENG. L. REV. 77, 81-84 (2000).

[81] Schultz, *supra* note 3, at 2121; *see also* Timothy S. Bland, *Romance in the Workplace*, FED. LAW., July 2001, at 38.

involved with the decision-maker.[82] Aside from the dissatisfied coworker, problems can and frequently do flare up if the supervisor-subordinate relationship comes to an end, as the supervisor can be accused of harassment if the subordinate consented to the relationship for work-related perks, or if the supervisor tries to reignite the relationship or decides to reassign the subordinate.[83] All of these reasons may counsel against permitting this type of cross-power relationships.

Since perceptions of favoritism have both real and anticipated effects on the attitudes and behaviors of others in the work setting, such perceptions should be neither easily ignored nor dismissed.[84] Both the organizational setting and the chain of command are exactly what create the difference in power between the would-be lovers, and adding sexual intimacy against this predetermined, hierarchical backdrop is complicated. Additionally, women continue to be relatively less powerful in contemporary organizations, where men by and large still occupy top positions of power and authority, and women are judged more harshly than their male paramours.[85] The intersection of power dynamics with respect to work status as well as gender renders supervisor-subordinate relationships a matter of concern.

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[82] Schultz, *supra* note 3, at 2121; *see also* Miller v. Dep't of Corr., 30 Cal. Rptr. 3d 797, 814-16 (Cal. 2005) (holding that, under California's Fair Employment and Housing Act, widespread favoritism in the workplace based on consensual supervisor-subordinate sexual affairs can constitute a hostile work environment, and a plaintiff employee may bring a sex harassment claim on this basis regardless of whether any harassing behavior was directed at her). The plaintiffs in this case were two female prison employees who alleged that the favoritism resulting from the prison warden's widely-known consensual relationships with several female subordinates created a hostile environment. *Id.* at 801. In explaining its ruling, the court found support in the EEOC's policy guidance on the issue of sexual favoritism under Title VII. *Id.* at 811-13. Rejecting the employer's argument that private, consensual relationships should be left unregulated, the court stated that the law addresses "not the relationship, but its effect on the workplace" where sexual favoritism occurs frequently. *Id.* at 818.

[83] Schultz, *supra* note 3, at 2122; *see also* Kramer, supra note 80, at 87-91.

[84] Schultz notes that employee favoritism also can result from nonsexual fraternization between supervisors and supervisees and among coworkers, where women are often excluded from male-oriented social activities and hence lose out on this important aspect of informal job networking. Schultz, *supra* note 3, at 2189. To address this type of social bonding and favoritism, whether conscious or unconscious, the best remedy is likely to be what Schultz recommends: integrating women fully at all levels of the work organization to allow for different socializing opportunities at work.

[85] *See* Kramer, *supra* note 80, at 83 ("[A]n apparent double standard often views women participants in [power-differentiated] relationships more negatively than the men.").

In some cases, relationships across ranks may prove to be worth pursuing for the individuals involved, even after weighing such considerations. For instance, Professor Robin West argues that welcome sexual relations between individuals of different rank should be understood differently from unwanted sexual conduct that is at the core of sex harassment if we consider the different type of harms that each may bring about.[86] She maintains that unwanted and unwelcome sexual relationships are harmful in that they damage women's dignity and self-understanding as persons with their own preferences for what they experience as sexually desirable and as physically painful.[87] On the other hand, West asserts that wanted and welcome sexual relationships between unequal parties do not create the same particular harm described above because, in these situations, the woman is actually indulging in her own pleasures and desires, rather than catering to that of another without regard to, or at the expense of, her own.[88] She does not suggest that no harm flows from such relationships, and fully recognizes that these relationships can be quite injurious—but injurious for reasons outside of what should be viewed as sex harassment, which is essentially about unwelcome sexual advances.[89]

Although the harm stemming from a welcome relationship between differently positioned individuals may be uncertain and less obvious, talking about such relationships in the context of work presents a particular set of issues as the workplace is an important site of economic dependency.[90] In addition to the possible exploitation of those involved in the relationship, others in the work environment may experience negative effects because their sense of fairness on the job is undermined and their sense of security destabilized.[91] Employees' ambitions and future plans with respect to the specific employer (as well as other employers) may also be

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[86] Robin West, *Unwelcome Sex: Toward A Harm-Based Analysis*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 138-52 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

[87] *Id.* at 144.

[88] *Id.* at 145.

[89] *Id.* at 145-51.

[90] *See* Mark Berger, *Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee*, 16 YALE L. & POL'Y REV. 1, 22 (1997) (noting the importance of employment security and economic dependency of employees on their jobs).

[91] *See* Margarita Bauza, *Cupid and the Cubicle: Office Romances Increase*, CONTRA COSTA TIMES (Walnut Creek, CA), Aug. 3, 2005, at F4.

negatively altered, and it should not be assumed that most people can easily change jobs, or that the burden should automatically fall on them to do so.[92]

The arguments against consensual supervisor-subordinate relationships may not apply as strongly in the case of similarly positioned colleagues who wish to willingly initiate a romantic relationship, and accordingly HR personnel are not as strict about limiting the latter type of liaisons.[93] Although Schultz concedes that most organizations do not completely proscribe all kinds of intimate relations at the workplace, she remains uneasy about stifling sexuality at work.[94] For one thing, she is concerned that individuals will not be able to find sexual mates outside of work, especially in our modern economy where people put in long hours at their jobs.[95] But employees surely have a sense that mixing work with sex or love can be difficult, regardless of the type of fraternization policy in place.[96] And many people may prefer to keep their romantic lives private and separate from the workplace to avoid being the subject of gossip or to avoid having attention to their work compromised.[97]

Another drawback to coworker relations, albeit a less compelling consideration, is reduced productivity. Unlike what Schultz maintains, decreased focus at work can result from open sexual behavior in the workplace: romantically-involved coworkers can become less focused at work because they cannot leave their relationship highs and lows outside of the work setting.[98] Rather than try to mix all aspects of our lives with work at the workplace, we as a society should instead aim to spend less time at work so that we can share moments with our loved ones, engage in public service, and pursue personal interests and other valuable endeavors outside of work. In her earlier piece on the value of paid work in promoting equal

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[92] *See* Cindy M. Schaefer & Thomas R. Tudor, *Managing Workplace Romances*, SAM ADVANCED MGMT. J., Summer 2001, at 4.

[93] Schultz, *supra* note 3, at 2125; *see also* Schaefer & Tudor, *supra* note 92.

[94] Schultz, *supra* note 3, at 2130-31.

[95] *Id.* at 2165-66.

[96] *See, e.g.*, Risa Brim, *Complexities of Corporate Couples: Office Dating, Marriage Have Their Own Set of Issues, But It Does Work Out for Some Pairs*, SAN DIEGO UNION-TRIB., Feb. 25, 2002, at E9.

[97] *See id.*

[98] *See* Cynthia Billhartz, *Office Romance: What's A Company To Do When Water-Cooler Chats Turn into Pillow Talk?*, ST. LOUIS POST-DISPATCH, Apr. 3, 2005, at E1; *see also* Schaefer & Tudor, *supra* note 92.

citizenship, Schultz agrees that American workers currently log in too many hours at their jobs and consequently advocates for legislative amendments to decrease the standard workweek for full-time employees to facilitate a new work-family-life balance for both women and men.[99] Even as Schultz believes that people should not expend all of their energies at work, she nevertheless insists that people should be encouraged to incorporate the full range of human experiences at work, including expressions of sexuality, to create a workplace that embraces both emotionality and sexuality.[100] I share her vision of a modified work model consisting of fewer hours and also support policy changes to restructure today's work requirements and expectations. While I do not seek to suppress all human attributes in the work environment, I nonetheless do not believe we need or should seek to satisfy all of our human impulses at work, particularly sexual impulses, given the fragile dynamics that make up the workplace.

C. The Meaning of Work

Schultz's view of work is a substantively appealing one and is worth considering more fully. As she has elaborated in her previous writing on this subject, work has transformative effects on individuals who find meaning and a sense of agency in their daily labors when they are allowed to pursue paid work opportunities without hindrance.[101] She stresses that one's work acutely frames one's identity, noting that people frequently describe who they are according to their particular work or vocation.[102] Work is fundamentally important on both a day-to-day and lifelong level, Schultz explains, because people need projects to sustain and engage them over the long-term that gives them a sense of leaving their mark on the larger world.[103] In *The Sanitized Workplace*, she continues to expound upon the value of work in people's lives, focusing on the interpersonal aspects of

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[99] *See* Schultz, *Life's Work*, *supra* note 5, at 1956-57 (positing that a reduced full-time workweek will help redistribute paid jobs for everyone and in this way will promote equal citizenship based on a foundation of paid work).

[100] *Id.* at 1958-59; *see also* Schultz, *supra* note 3, at 2165-67.

[101] Schultz, *Life's Work*, *supra* note 5, at 1891-92.

[102] *Id.* at 1892.

[103] *Id.* at 1928.

working alongside others in pursuit of shared goals and forging meaningful ties along the way.[104] As she puts it,

> [w]ork isn't just a way to make a living; it's a way to create something of value, to struggle with our capacities and limits, to make friends and form intimate relationships, to contribute to our communities, to leave our imprint on the world, and to know ourselves and others in the way that humans can only be known through struggle and (sometimes) success. . . . Even for those who aren't fortunate enough to hold jobs that can foster self-realization, work remains vitally important to how they understand life."[105]

Schultz argues that work engenders an intensity and intimacy among fellow colleagues that should be allowed to flourish whether or not this connection is fueled by an erotic energy.[106] In light of the value she assigns to paid work, Schultz envisions a workplace where people's human expressions and interaction complement what they do at work, and affirmatively includes sexuality to the mix of what can deepen the work experience.[107]

Work indeed figures prominently into people's daily lives and into their individual aspirations, offering meaning and a sense of order that come with work's routine and related expectations. People depend on work in terms of availability, opportunity, pay, and advancement, and this is precisely why working conditions should remain dispassionate, even if the substance or purpose of the work is not. The dispassionate work structure is what allows the passionate worker to fully pursue her projects without worry that a free-for-all work environment will disrupt her community relations and her steady and earned claim to her chosen work. Schultz's vision of a sexuality-privileged workplace is, unsurprisingly, quite seductive, but herein lies the danger: allowing sexual conduct to thrive with few boundaries in the workplace can harm employees by disturbing their working conditions and threatening their ability to flourish or even stay on the job—paradoxically upsetting the continuous stability and purpose that work was intended to provide and sustain.

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[104] Schultz, *supra* note 3, at 2164.

[105] *Id.*

[106] *Id.* at 2165-67.

[107] *Id.*

Further, individuals who find greater-than-average satisfaction in their work should not have to worry about unchecked sexual tendencies or unconsidered conflicts of interest in the workplace hampering their ambitions or goals. Schultz believes that anti-harassment policies operate to hinder even the formation of close, nonsexual associations.[108] But a comprehensive survey of federal employees regarding their views on sex harassment over sequential time periods indicates that women and men are increasingly seeing eye-to-eye about the kinds of conduct that amount to harassment.[109] In light of the heightened awareness around sex harassment, the most recent survey found that "[o]nly 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."[110] According to the results of this study, the sexuality-constrained model currently in place in federal worksites is not causing significantly awkward or diluted workplace relations as Schultz fears. Where there is a common understanding of what constitutes nondiscriminatory and appropriate workplace behavior, women and men work well together. Any kind of social awareness campaign can provoke resistance among some, but backlash is not an uncommon response to a movement for social change.[111] The degree of backlash is indicative of how deeply entrenched some group attitudes are, and how much additional effort will be needed to bring about actual and long-lasting reformation. Unlike Schultz, I believe curbing unwanted sexual behavior on the job can lead to more secure friendships and social relations in the workplace. Implementation of carefully calibrated workplace policies will foster egalitarian and comfortable interactions, in terms of both peer and mentoring relationships, thereby creating a trusting and relaxed environment for all workers.

Although work can be about more than earning a livelihood, many people work for practical rather than romanticized reasons, particularly

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[108] *Id.* at 2166-67.

[109] SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 64, at 5.

[110] *Id.* at 9.

[111] *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1009 (2002) ("[A]s is often the case, moments of major social reform precipitate diverse forms of containment and backlash.").

where the job offers minimal intrinsic satisfaction.[112] Schultz rightfully urges us to recognize that all types of work are valuable, including low-status and low-pay work, and to respect all workers for their labors.[113] But even in accepting this positive outlook, I doubt the majority of people would label what they do for wages or salary as a true calling or something akin to it.[114] In focusing primarily on compensated work, Schultz neglects the importance that volunteer or unpaid work may hold for a number of individuals. Some people may not value what they do at their official place of work as contributing to their highest sense of self and community.[115] They engage in paid work because they are expected to and need to earn a living, and would likely point to something else—for instance productive hobbies, community work, or family relationships—that more meaningfully defines for them who they are and how they would like to be known by others.[116] This is not to say people do not self-identify at all with the work they perform for wages—they do, as Schultz accurately points out. But they may not self-identify with their paid jobs in the all-encompassing fashion that she asserts. Schultz distinguishes paid work from unpaid activities by noting the greater clout and esteem conferred on the paid worker when compared to her unpaid counterpart in our market-based society.[117] It is true that wage work is valued in large part for this reason and should be available for everyone to claim, but this does not rule out the importance of

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[112] *See generally* KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY (1999) (describing the job-related experiences and motivations of fast-food workers in the inner city).

[113] Schultz, *Life's Work*, *supra* note 5, at 1943-44. Schultz also highlights the dignity, structure, and social interactions that benefit the working poor through their low-wage work. *Id.*

[114] *See, e.g.*, Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 836 (2002) (commenting that individuals may find their most fulfilling work outside of their paid jobs, noting for example that Wallace Stevens and T.S. Eliot are both known for their poetry rather than for what they did at their paid jobs) [hereinafter Rhode, *Balanced Lives*].

[115] *See id.* ("Many women, and an increasing number of men, do not define themselves exclusively or even primarily in terms of what they do for a living.").

[116] *See* STEVEN M. GELBER, HOBBIES: LEISURE AND THE CULTURE OF WORK IN AMERICA 11-12, 32 (1999) (discussing how productive or "worklike" hobbies that develop expertise can be rewarding and provide a sense of personal accomplishment, similar to the feeling of satisfaction that results from engaging in paid work); Rhode, *Balanced Lives*, *supra* note 114, at 837-38 (noting the value of volunteer work and family in providing fulfillment in people's lives).

[117] Schultz, *Life's Work*, *supra* note 5, at 1945.

non-wage work that can supplement an individual's larger sense of purpose and fulfillment.

Schultz strongly believes that work and sexuality can exist harmoniously in that people find satisfaction and value in both, and that all workers, regardless of gender, race, class, or sexual orientation, can be regarded simultaneously as serious workers and as sexual beings at work.[118] One can endorse the perspective that the workplace serves as a locus for human flourishing and valuable community interaction, and yet it does not follow that sexuality needs to be present in the workplace to make one's work a fully satisfying experience. To the contrary, one study showed that women who received sexual comments or compliments at work reported lower levels of job satisfaction than women who did not receive such comments, while men's job satisfaction level remained unaffected by sexuality at work.[119] Further, more men reported that they would be flattered by a woman's sexual advance in the workplace, whereas more women said they would be insulted by a man's sexual advance.[120] Predictably, women targeted by men's sexual advances worked in environments where sexuality was encouraged.[121] Privileging sexuality at work, therefore, is likely to add to or have no effect on men's experiences, while seriously detracting from women's experiences. In light of this uneven distribution of positive, neutral, and negative effects, the optional preferences of some should not outweigh the injuries others will suffer.

The public world of work has historically been a male-dominated domain organized around gendered norms involving sexual as well as nonsexual content, all of which function to keep women less-than-fully integrated. Men's competence or natural position at work is unquestioned while women's foothold in the labor market is less securely rooted, an imbalance that Schultz has argued comes about when men discriminate against women to garner work's advantages and rewards.[122] Departing from

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[118] Schultz, *supra* note 3, at 2166-68.

[119] Gutek, *supra* note 38, at 114-15 (based on a study of female and male workers through telephone interviews in the Los Angeles area using a random sample).

[120] *See id.* at 96-97 (reporting that "67 percent of the men in the Los Angeles County survey said they would be flattered by a proposition made by a woman at work, but only 17 percent of the women said they would be flattered by a proposition from a man. Whereas most women said that sexual advances are insulting to them, only a minority of men apparently feel this way . . . .").

[121] *Id.* at 122.

[122] *See generally* Schultz, *Reconceptualizing*, *supra* note 1.

this common ground, I argue that working men who engage in sexual conduct will de facto be seen as workers first and as sexual *subjects* second, whereas working women who openly engage in sexual behavior will be viewed as sexual *objects* first and as workers second, and even then perhaps not as competent or serious workers.[123] Surely, women should be free to take charge of their sexuality and act on their own sexual desires, but in doing so they should carefully reflect upon current sexual practices and desires in the workplace that have long been masculine in character before routinely adopting them as their "own."

Women are more frequently sexually objectified than men in our society and as a result are still disproportionately harmed and influenced by masculine-defined sexuality. Although sexuality is a natural human force that plays an important part in people's lives, this does not mean open sexuality should be a part of everyone's work environment. The line between welcome sexual conduct at work and unwanted sex harassment remains blurry and differs according to different people's perspectives. Advocating for a sexuality-constrained organizational model is not a view that seeks to avoid "messy" sexual desire, but instead a perspective that attempts to take into account the harmful toll that masculine-driven sexual behavior has had and continues to have upon working women as well as on gender-nonconforming men.

D. Schultz's New Liability Rules

Schultz argues that the purpose of Title VII is not to "police sexuality" because she does not believe sexual behavior is what significantly contributes to sex discrimination.[124] On the contrary, she asserts that sex harassment is primarily linked to sex segregation on the job.[125] She perceives the problem of sex harassment as a problem of structural inequality: having men significantly outnumber women at the worksite allows the former to preserve the environment as a male sphere

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[123] Gutek, *supra* note 38, at 100-01 (emphasizing that men, unlike women, are automatically viewed as serious workers and hence do not need to be as concerned about attention directed to their sexuality). Although sex harassment can center on a female worker's supposed incompetence at work rather than on her sexuality, as Schultz has rightly argued, I suspect that women employees who actively engage in sexual banter will, if they are harassed, be harassed in a likewise sexualized way.

[124] Schultz, *supra* note 3, at 2131.

[125] *Id.* at 2132.

where women do not belong.[126] Sex segregation allows sex harassment, whether sexual or nonsexual in form, to thrive and harm, and the harassment in turn maintains sex segregation by keeping nonconformists away.[127] Thus, under Schultz's view, sex harassment is structurally rooted in the absence of numerical parity. But she points out that if women were to make up a greater proportion of the workforce so that the work environment were truly egalitarian, then women would be in a position to mold the work environment and culture to their own preferences.[128] In such an environment, Schultz posits, sexual conduct would not have the same injurious effect that it otherwise has in a sex-segregated setting because women would perceive the behavior differently if more of their own gender were present in the work organization.[129]

In emphasizing this link between sex segregation and sex harassment, Schultz contends that employers should de-emphasize sensitivity training[130] and instead be given incentives to integrate their respective workforces.[131] Toward this end, she proposes differentiated employer liability rules under Title VII depending on the proportion of women in the particular work setting, modeled on the different burdens of proof used in disparate impact and disparate treatment law.[132] For harassment suits involving highly segregated work environments, where women make up less than fifteen percent of the relevant positions in the workforce, her proposal follows the model of disparate impact law, which requires an employer to hire a balanced workforce or show that despite an imbalance, the employer used valid selection procedures or had a business necessity.[133] Under this model, plaintiffs would have an easier time proving a hostile environment sex harassment claim. Such a claim would create a rebuttable presumption that the harassment, either sexual or nonsexual in form, was because of sex and thus actionable under Title VII. On the other

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[126] *Id.*

[127] *Id.*

[128] *Id.* at 2174.

[129] *Id.*

[130] *Id.* at 2071.

[131] *Id.* at 2173.

[132] *Id.* at 2174-76.

[133] *Id.* at 2175.

end of the scale, for suits involving fully balanced work environments, where women make up forty to fifty percent of the relevant positions, Schultz recommends following the model of disparate treatment law, which requires the plaintiff to demonstrate both discriminatory intent on the part of the employer and a material change in the terms or conditions of employment.[134] In these cases, plaintiffs would have a greater burden of proof than is currently required for hostile environment sex harassment claims.[135] For suits involving all other work environments, where women make up fifteen to thirty-nine percent of the relevant positions, the employer would be subject to the current rules governing sex harassment.[136] She suggests that these rules would be easy to implement, as the Equal Employment Opportunity Commission (EEOC) could recommend them through its interpretive guidelines, and the courts could apply them as a matter of statutory interpretation.[137]

Schultz's proposal is important in that gender integration is necessary to curtail harassment on the job. It is logical that sex harassment is likely to thrive in an environment where few women are represented in both employee and supervisory positions, because where women are few in number, they lack the group and institutional power to resist the hostile environment and are more easily targeted for behavior that insults their sense of personhood as women and their sense of worth as workers.[138] At the same time, Schultz's proposal raises questions about the efficacy of a plan that focuses only on numbers without a concurrent focus on modifying the institutional norms of the work organization. Gender integration is an imperative goal, but I challenge whether this alone will adequately counter masculine forms of sexual expression within the workplace, an issue I take up in the next section regarding the gendered model of the organization.

Apart from the evidentiary benefit of allowing a female plaintiff working in a mostly male environment to more easily make a case for hostile environment harassment, disparate impact claims neither entitle the

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[134] *Id.* at 2176, 2180.

[135] *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), discussed *supra* Part II (providing the current legal standard for sex harassment claims).

[136] Schultz, *supra* note 3, at 2176.

[137] *Id.* at 2181.

[138] *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 208-09 (1977) (discussing the significance of the ratios of different group types and the proportions needed for a group to be able to exert influence over the organizational culture).

plaintiff to a jury trial nor permit the plaintiff to recover compensatory and punitive damages under the Civil Rights Act of 1991, which amended Title VII to provide for jury trials and such damages only in *intentional* discrimination cases.[139] The types of damages that would follow from Schultz's recommendation appear to be incongruous: an employer with a highly segregated workforce would be shielded from all liability for money damages under a disparate impact claim, while the employer with a well-integrated workforce would be exposed to both compensatory and punitive damages under a disparate treatment claim. Further, the plaintiff bringing a disparate impact suit would not have the advantage of having a jury make the findings of fact—not a small detriment to the plaintiff if the judge presiding over the case tends to dismiss the notion that mostly male environments produce uneven discriminatory effects on women.[140]

Another implication of Schultz's proposal is the respective institutional competence of the federal courts, the EEOC, and Congress to formulate and implement new legal rules under Title VII. Sex harassment law has been and most likely can continue to be court-made, but we should inquire whether this is the proper and desirable function of the courts. Although the federal courts have made important inroads in establishing sex harassment law, it is not entirely clear that the federal judicial arena is where this area of the law should continue to be developed. While the federal courts may be better positioned to develop sex harassment law through case-by-case analysis and adjudication, the EEOC, as the agency charged with enforcing Title VII, may be technically superior to the federal courts in examining and recommending Schultz's number-specific liability standards. Further, there are strong arguments for bringing the issues of sex harassment to the attention of Congress to promote equality for women while enhancing women's political experience and power.

Accepting as a first step that Schultz's proposal is in large measure a good one, how then should the new rules be implemented? Schultz

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[139] *See* 42 U.S.C. §§ 1981a(a)(1), (c) (2000); *see generally* Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87 (2004) (exploring the advantages and difficulties in applying the disparate impact model to hostile environment claims).

[140] *See, e.g.*, Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 343 n.6 (4th Cir. 2003) (en banc) (Williams, J., dissenting) (plainly stating that applying a protective standard for women in the workplace is "paternalistic" and concluding that the female plaintiff was not entitled to recover any damages for her sex harassment claim alleging a hostile environment, notwithstanding the record which demonstrated that graphic sexual conduct was carried out in the plaintiff's presence as well as directed toward her in her male-dominated work setting).

maintains that congressional action would not be needed to codify these rules because the EEOC could simply recommend their implementation through its interpretive guidelines, and the courts could apply them through its case-by-case method.[141] As a possible concern, Schultz admits an important question might exist as to whether employers would be able to lawfully institute voluntary affirmative action programs to recruit more women employees.[142] But she believes her proposed evidentiary standards could be adopted in conjunction with the relevant legal precedent, noting the Supreme Court has held in *United Steelworkers v. Weber*[143] and *Johnson v. Transportation Agency*[144] that employers could engage in voluntary race- or sex-based affirmative action under Title VII if they could show the jobs were sufficiently segregated.[145] The Equal Protection Clause of the Fourteenth Amendment, however, imposes a stricter standard on public employers who wish to engage in remedial action, at least for race-based remedial programs.[146] The Supreme Court has not directly spoken on the issue of sex-based remedial action by public employers, and the federal appellate courts disagree as to whether the applicable test is strict or intermediate scrutiny.[147]

Can and should the federal courts simply implement the proposed liability rules as a matter of judicial interpretation under Title VII? Schultz's proposal calls for preventative measures rather than simply remedial action in addressing sex discrimination, and the Supreme Court

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[141] Schultz, *supra* note 3, at 2181.

[142] *Id.* at 2193 n.470.

[143] 443 U.S. 193 (1979); *see also* discussion *infra* notes 149-164 and accompanying text.

[144] 480 U.S. 616 (1987); *see also* discussion *infra* notes 165-176 and accompanying text.

[145] Schultz, *supra* note 3, at 2193 n.470.

[146] *Id.*; *see also* City of Richmond v. Croson, 488 U.S. 469 (1989) (requiring the state to show firm evidentiary basis for a determination that historical discrimination caused the under-representation of minorities); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to "all racial classifications, imposed by whatever federal, state, or local governmental actor").

[147] Schultz, *supra* note 3, at 2193 n.470 (citing Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993); Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989); Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 909 (11th Cir. 1997); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579 (11th Cir. 1994)).

has stated that Title VII is mainly meant to serve as a proactive enforcement tool, not solely a mechanism for redress.[148] Thus far, the Court has addressed the issue of voluntary affirmative action programs under Title VII in only two cases, both of which may not actually bear directly on whether the federal courts can impose affirmative action plans on employers according to Schultz's differentiated liability rules.

In *United Steelworkers of America v. Weber*,[149] a voluntary, private employer affirmative action plan to recruit more black employees was challenged as unlawful under Title VII's antidiscrimination provisions.[150] The employer entered into a collective bargaining contract with the union, an agreement that provided for a plan to racially integrate the employer's almost all-white craft-work division and to work toward hiring a percentage of black craft-workers that matched the percentage of blacks represented in the local workforce.[151] On-site training programs were created to enable both black and white unskilled laborers to become craft-workers, with a minimum of half of these training positions set aside for black workers until the proportion of blacks in craft-work positions approached the proportion of blacks in the local workforce.[152] Pursuant to the plan, black employees with less seniority were hired for these training openings over more senior white employees.[153]

The respondent, a white employee, filed a class-action suit alleging the plan was impermissible under §§ 703(a) and (d) of Title VII, as it discriminated against him and similarly situated white employees.[154] Justice Brennan, writing for a 5-2 majority, pointed out that this plan was a voluntary one implemented by a private employer, and hence the Court was not determining what Title VII required.[155] The Court, rather than accepting

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[148] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[149] 443 U.S. 193 (1979).

[150] *Id.* at 197.

[151] *Id.* at 198.

[152] *Id.* at 198-99.

[153] *Id.* at 199.

[154] *Id.* at 199-200.

[155] *Id.*

the respondent's argument that the plain meaning of §§ 703(a)[156] and (d)[157] of Title VII makes it impermissible to discriminate because of race in employment and in training programs, instead looked to the legislative history and background context of the statute's enactment to ascertain the spirit of the Act, which the Court found to be in accord with the employer's plan to "eliminate traditional patterns of racial segregation."[158] The Court also examined the language and legislative background of § 703(j):[159] "The Section provides that nothing contained in Title VII 'shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of' a de facto racial imbalance in the employer's work force."[160] Given that this provision uses the word "require" and not "permit," the Court inferred that Congress only wished to ban all forms of *mandatory* race-based affirmative efforts.[161] The

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[156] § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (2000), in its entirety, states: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[157] § 703(d) of Title VII, 42 U.S.C. § 2000e-2(d) (2000), in its entirety, states: "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

[158] *Id.*

[159] § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) (2000), in its entirety, states: "Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

[160] United Steelworkers of Am. v. Weber, 443 U.S. 193, 205-06 (1979).

[161] *Id.* at 206.

Court found that this reading of § 703(j) was in harmony with Congress' intent to minimize federal regulation of private employers, as well as in harmony with the Act's goals.[162]

Although the Court did not provide a clear standard of what constitutes a lawful affirmative action plan, the Court highlighted the following three features of the plan at issue to show that the plan fell within the permissible scope of Title VII: (1) the plan was structured to "break down old patterns of racial segregation and hierarchy" by making available job opportunities for blacks in areas that had been historically unavailable to them; (2) the plan did not "unnecessarily trammel the interests of the white employees," in that it did not call for the firing of current white employees in order to replace them with black workers, nor did it "create an absolute bar to the advancement of white employees," since the plan did not prevent the upward job mobility of white employees; and (3) the plan was "a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance," assuring the Court that the affirmative efforts would cease once the percentage of black workers in the desired occupation reached the percentage of blacks in the local workforce.[163] Accordingly, the Court upheld the voluntary, private employer affirmative action plan as valid under Title VII.[164]

Weber remains good law, as confirmed in *Johnson v. Transportation Agency*,[165] which involved another affirmative action program, this time implemented by a public employer.[166] This plan allowed the county agency to take into account, among other factors, the sex of a qualified applicant when deciding promotions involving job categories in which women had been historically underrepresented, but unlike in *Weber*,

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[162] *Id.* at 206-07.

[163] *Id.* at 208.

[164] *Id.* at 209. In his concurrence, Justice Blackmun advocated for a narrower standard, asserting that the voluntary affirmative action plan should be examined according to whether it is a "reasonable response to an 'arguable violation' of Title VII," as opposed to the Court's more expansive holding that allows for affirmative efforts if the profession has been a historically segregated occupation. Nonetheless, Justice Blackmun joined in the Court's opinion and judgment because he viewed the Court's reasoning as a fair and practicable extension of the "arguable violation" approach. *Id.* at 209-16 (Blackmun, J., concurring).

[165] 480 U.S. 616 (1987).

[166] *Id.* at 619.

the plan did not reserve a specified number of positions to be filled by women.[167]

Johnson, a male employee, filed suit under Title VII, alleging discrimination on the basis of sex, after a female colleague was given a promotion for which he had applied.[168] Even though this case involved a public employer, Johnson did not raise a constitutional claim but only proceeded with his statutory claim.[169] The majority opinion, again authored by Justice Brennan, held that the proper analysis of a voluntary affirmative action program by a public employer under Title VII was not the same as it would be under the Constitution.[170]

The Court then looked to *Weber* as the proper precedent in deciding this case.[171] The first question the Court examined was whether there was a "'manifest imbalance'" in the representation of women in the particular job category in question due to historical segregation.[172] Because the agency

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[167] *Id.* at 619-22.

[168] *Id.* at 625.

[169] *Id.* at 664 (Scalia, J., dissenting) (noting this fact).

[170] *Id.* at 628 n.6. The Court disagreed with Justice Scalia who argued in his dissent that the constitutional standard set forth in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), should be applied here. The Court differentiated the contexts of Title VI (the statute at issue in *Wygant*) and Title VII, noting that the former involved the use of federal power and federal money whereas the latter "'was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*' . . . . The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution." *Id.*

[171] *Id.* at 627-28. Interestingly, not a single party in this case briefed, argued, or even raised the point that *Weber* should be overruled, either in the Supreme Court or in the lower federal courts. *Id.* at 648 (O'Connor, J., concurring).

[172] *Id.* at 631. In showing that this manifest imbalance warrants affirmative efforts, the employer can make the appropriate comparison to the outside labor force depending on the skill level of the job at issue: a comparison can be made to the local labor force or the population at large if the job involves no special skills or is part of a training program meant to impart skills, but if a job involves particular skills, then the appropriate comparison is with workers in the labor market who are actually qualified for the job. *Id.* (citing Teamsters v. United States, 431 U.S. 324 (1977) (finding that racial imbalance in truck driver jobs was properly demonstrated by comparing the proportion of blacks employed with the proportion of blacks in the general population); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (holding that to demonstrate the under-representation of black teachers in the employer's workforce, the proper comparison is with the percentage of blacks in the local labor force with the relevant teacher qualifications). The Court pointed out that this

plan did not command "blind hiring" based on numbers, but authorized the consideration of a variety of factors when hiring, including the gender of the qualified applicants, the plan satisfied the first prong of *Weber*.[173] The Court also found that the plan met *Weber*'s second requirement, as it did not unnecessarily trammel the rights of male workers since no quotas were encouraged, and the plan did not create an absolute bar to Johnson's advancement since he had never been guaranteed to be hired for the job.[174] Lastly, the Court was assured that the agency plan was not meant to be permanent, given the absence of set-aside numbers and the agency's incremental approach to balancing its workforce, thus satisfying the third element of the *Weber* analysis.[175] The Court again upheld the employer-initiated affirmative action program, this time according to the program's asserted goal of promoting qualified women employees, as lawful under Title VII.[176]

As in *Weber*, *Johnson* centered on the Court's interpretation of Title VII and the judiciary's role in advancing antidiscrimination law. The voluntary sex-conscious affirmative action plan was judicially approved

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imbalance would not need to, although it could, constitute a prima facie case of discrimination as required under the Constitution, reiterating that Title VII does not impose identical obligations on the employer as dictated under the Constitution. *Id.* at 632-33.

[173] *Id.* at 637.

[174] *Id.* at 637-38.

[175] *Id.* at 639. The Court did not find it problematic that the plan had no end date, "for the Agency's flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers." *Id.* at 639-40.

[176] *Id.* at 641-42. Justice Stevens concurred in the Court's opinion due to his adherence to the principle of stare decisis under the precedents of Regents of University of California v. Bakke, 438 U.S. 265 (1978), and *Weber*, although he disagreed with the Court's reading of Title VII as giving white employees a different level of protection against discrimination. *Johnson*, 480 U.S. at 642-44 (Stevens, J., concurring). Justice O'Connor also wrote a separate concurring opinion, respecting the precedent set by *Weber* but asserting that the lawfulness of an affirmative action plan instituted by a public employer should be examined under the Equal Protection Clause as articulated in *Wygant*. *Id.* at 649 (O'Connor, J., concurring). In her view, public employers under Title VII should follow the same obligations as mandated under the Constitution; specifically, they must have a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice discrimination claim. *Id.* at 649. Because she found that the plan in *Johnson* satisfied these requirements, she concurred in the Court's judgment. *Id.* at 657.

under the statute, thus confirming the power of the federal courts to establish and entrench the legality of such employer efforts. The *Johnson* Court may have approved sex-conscious affirmative action plans voluntarily initiated by private or public employers under Title VII, but Schultz's proposal appears to go a step further by recommending that federal courts try to compel employers to do so by imposing different evidentiary standards according to the degree of gender integration within a particular organizational level. We might then assume that employers would have to implement sex-based affirmative action programs in order to recruit and promote qualified women and to benefit from the relaxed evidentiary standard that would apply to a gender-balanced workforce. Although Schultz's proposal does not explicitly require that an employer implement a plan to recruit more women, employers presumably would want to minimize their risk of liability by instituting exactly such a plan. In fact, plaintiff employees who felt harassed in a workplace where no sex-conscious affirmative action plan existed might more readily bring a charge of sex harassment against the employer under Schultz's proposal, especially if the workforce was not well-integrated with respect to gender.

The scenario under Schultz's liability rules differs from the factual scenarios in *Weber* and *Johnson*, in which the employers on their own initiative implemented affirmative action plans without a clear threat of legal consequences if they had chosen not to do so. Therefore, these cases do not directly speak to whether Schultz's plan would also be judicially upheld, since her proposal appears to compel the implementation of affirmative action programs, rather than merely permit them, on the part of employers. Moreover, if Schultz's plan were understood to mandate employers to initiate such programs, then the holdings and reasoning of *Weber* and *Johnson* would likely cut against her proposal, as the Court was careful to only address what Title VII permits and not requires. Indeed, the Court concluded from the plain language of § 703(j) that Congress intended to prohibit all mandatory affirmative action efforts.[177]

On the other hand, Schultz's differentiated liability rules may be understood as not necessarily requiring employers to implement affirmative action programs because her proposal does not recommend full- or zero-liability, but rather different degrees of liability depending on the proportion of women in the work organization. In this way, her plan only encourages employers to adopt such plans, but regardless of whether they do or not, plaintiff employees would still have to meet some evidentiary burden in

[177] *See* discussion *supra* notes 149-176 and accompanying text on *Weber* and *Johnson*.

proving a charge of hostile environment sex harassment. In addition, Schultz asserts that most employers would not actually need to implement sex-conscious programs to desegregate their workforces, but could just take steps to prevent intentional or unintentional discrimination based on sex.[178] Such measures might include "reducing the level of subjectivity in the selection and evaluation processes, providing more and better-quality information about members of discriminated-against groups who are hired, and requiring supervisors to be accountable for the treatment and performance of such employees."[179] More research needs to be conducted to determine whether these measures would sufficiently achieve gender desegregation in most workplaces, or whether sex-conscious affirmative efforts would need to be expressly adopted. If the latter, then it still remains an unsettled question as to whether Schultz's proposed employer liability rules for sex harassment could be applied and codified by the courts, even under the precedents set by *Weber* and *Johnson*.

In making the interpretive leap from upholding the plan in *Johnson* to implementing Schultz's proposed liability rules, the federal courts could engage in a form of judicial activism by advancing public values in statutory construction, an approach advocated by Professor William Eskridge to render judicial decisions justifiable.[180] In the area of antidiscrimination law, he suggests that society's understanding of discrimination has progressed over the years and that courts should be able, and are expected, to take these recently shared public values into account to avoid producing an outmoded decision.[181] He contends that statutory interpretation evolves as our knowledge and perception of the problem

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[178] Schultz, *supra* note 3, at 2181 n.470.

[179] *Id.* at 2179 n.465 (citing Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319 (2000)).

[180] William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1067 (1989). *But cf.* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002) (describing how the Court selectively decides when to actively construe a federal regulatory scheme and when to leave that task up to Congress).

[181] Eskridge, *supra* note 180, at 1067-68. *But see* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2431 (2003) (arguing for legislative superiority when construing statutes, asserting that the original legislative process in enacting statutes needs to be respected and conserved, even if following the clear textual mandate would result in an absurd policy).

evolve and as new actors construe the issue in consideration of the interpretations made before them.[182] As Eskridge explains:

> The purpose of a statute changes over time as the targeted problem changes, often negating the assumptions critical to the original formulations of that purpose. Statutory purpose also changes as new interpreters approach the issue, often reacting to problems they perceive in prior interpretations. And Congress itself provides feedback, signals that approve or disapprove of the way the agency or the Court is developing the statutory policy or purpose.[183]

Eskridge believes the Court in *Weber* correctly infused contemporary public values into its interpretation on the question of affirmative action, thereby arguably lending support to a likewise move by the federal courts to infuse public values in addressing sex harassment by encouraging gender desegregation according to Schultz's rules.

Taking into account contemporary social values in judicial interpretation does not necessarily upset the balance of power between the judiciary and legislature if the relationship between the branches is perceived as a check on the process of lawmaking, rather than a clear separation of powers.[184] In this way, the whole process of lawmaking, whether legislature-enacted or judge-made, operates in a dynamic fashion as Eskridge suggests.

Both *Weber* and *Johnson* support the proposition that Title VII permits preventative rather than purely remedial affirmative action because the employers in these cases were attempting to ameliorate the under-representation of blacks and women in their workforces, and not

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[182] WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 31 (1994).

[183] *Id.* at 30-31.

[184] *But see* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56-102 (2001) (asserting that our nation's history supports the view that federal judges should act as the "faithful agents" of Congress in our constitutional system founded on a principle of separation of powers). *See also* William N. Eskridge, *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776-1806, 101 COLUM. L. REV. 990, 1030-87 (2001) (challenging Manning's historical defense of the modern faithful-agent theory by offering his own historical account of the Founders' approach to statutory interpretation and their focus on a system of checks and balances rather than a strict separation of functions, thereby upholding the view of federal judges as "partners" in the lawmaking process).

specifically to address past discrimination by the employer per se.[185] In neither case did the Court require evidence of the employer's past pattern or practice of discrimination to find the affirmative action plans lawful. In cases of pattern and practice discrimination, the Court requires the plaintiff to make a prima facie case of discrimination by showing that the employer discriminated by under-hiring the protected class of employees as compared to their percentage in the relevant labor market.[186]

To show a manifest imbalance, however, the *Johnson* Court stated that the plaintiff need not make a prima facie case of discrimination.[187] Thus, where the employer is implementing a voluntary affirmative action plan to avoid rather than remedy sex discrimination, the employer might only have to show a numerical disparity in the workforce, without the necessary comparison to the percentage of women in the relevant job pool.[188] As Schultz argues, the presence of only a few women in the work environment renders them especially vulnerable targets for discrimination because they are in a position of structural weakness—either isolated from other women or not in a position to exert control or influence over their work settings.[189] To make this point, Schultz relies on social scientist Rosabeth Moss Kanter's pioneering study on women and men in the corporation.[190] Kanter's study finds that employees who make up less than fifteen percent of the relevant positions in the workforce are members of a "skewed" group because, within this range, they are subject to the practices of the numerically "dominant" group.[191] Consequently, at this level, Schultz advocates for the judicial application of the less employer-friendly rules for highly segregated workplaces. On the other hand, employees who make up forty to fifty percent of the relevant positions are part of a gender-balanced

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[185] *See* discussion *supra* notes 149-176 and accompanying text on these cases; *see also* Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385, 1408-09 (2003).

[186] Johnson v. Transp. Agency, 480 U.S. 616, 632-33 (1987).

[187] *Id.*

[188] *See* Yelnosky, *supra* note 185, at 1418.

[189] Schultz, *supra* note 3, at 2171-72.

[190] *Id.* at 2180 (citing ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977)).

[191] *Id.*

group,[192] and in such situations the employer would benefit from a stronger burden of proof required of the plaintiff under Schultz's rules. Employees who comprised fifteen to thirty-nine percent are part a "tilted" group,[193] and in this case the employer would be subject to the current rules governing hostile environment sex harassment. Schultz adopts Kanter's figures to demarcate the percentage targets that courts should use in deciding the level of sex harassment liability to be imposed on the employer.[194]

The Court has held that an employer affirmative action plan, while lawful in its aspiration for a balanced workforce based on race or sex, becomes unlawful if it becomes a permanent plan.[195] The Court determined that the affirmative action plans in *Weber* and *Johnson* were meant to achieve a more representative workforce but not to retain the balanced representation, and thus did not trammel the rights of the nonprotected majority group. As one scholar critically observes, because employers can attain but not maintain a balanced workforce through affirmative efforts, Title VII does not fully allow for a sustained and "integrative model of affirmative action."[196]

Under Schultz's proposed rules, employers could institute policies or programs to encourage and work toward gender integration at all levels, but would have to discontinue their affirmative efforts once they achieved a fully gender-balanced workforce. It remains debatable, however, whether the statutory precedents set by *Weber* and *Johnson* indicate that Schultz's proposed liability rules can be implemented by the courts.

E. Comparative Institutional Competence

The federal courts may not even be the best institution to implement Schultz's proposal, which involves numerical line-drawing for employer liability. Drawing such lines cannot be mathematically precise, and this type of standard—before being implemented—perhaps should be studied in a setting that allows for a thorough analysis of the available data, including careful consideration of the arguments for and against such a

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[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] Johnson v. Transp. Agency, 480 U.S. 616, 639-40 (1987).

[196] Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1215 (2002).

proposal. Particularly because this number-specific proposal is intended for general application, the EEOC may be better suited than the federal courts to amass and examine large-scale data that could inform the adoption of Schultz's recommendation. The EEOC is more technically competent vis-à-vis the courts to consider this proposal since the agency can draw upon its broader experience in addressing sex discrimination and sex harassment.

Furthermore, the agency has shown that it is not averse to urging numerical guidelines when it adopted the "four-fifths rule" in recommending the level of disparity that would be sufficient to show a disparate impact.[197] The Supreme Court, on the other hand, has opted to simply survey the numbers in determining whether the impact is disparate.[198] Whereas courts might shy away from adopting Schultz's number-specific guidelines, the EEOC has the interest and expertise that lends itself well to evaluating and adopting Schultz's recommendation. Disparate impact discrimination has been firmly established as a cause of action under Title VII in both federal common law and statutory law, and the EEOC has played a role in supporting this development. Considering that it would be unacceptable for the agency to abandon or retreat from this position in the face of clear legislative directives and judicial precedents, the EEOC could study the connection between sex segregation and sex harassment and then build upon its approach to both disparate impact discrimination and sex harassment to advocate for gender integration along the lines advocated by Schultz.[199]

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[197] The EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1993), provide that a sufficient amount of impact will be shown where the "selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate." This "four-fifths rule" means that disparate impact could be shown where an employer hires more men than women, and the hiring rate for women is less than eighty percent of the hiring rate for men.

[198] *See* Griggs v. Duke Power, 401 U.S. 424 (1971) (first establishing systemic disparate impact discrimination); Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975) (building upon the holding in *Griggs* to establish a three-step burden-shifting approach for disparate impact cases). Congress amended Title VII with the Civil Rights Act of 1991 to add a new provision, § 703(k), specifically governing disparate impact, to codify the basic three-step analysis from *Griggs* and *Albemarle Paper*. 42 U.S.C. § 2000(e)-12(a) (2000). This amendment also modified the Supreme Court's refusal in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), to allow the use of bottom-line statistics to show disparate impact by creating an exception that permits the plaintiff to use such statistics to make a prima facie case of disparate impact discrimination. 42 U.S.C. § 2000(e)-12(a) (2000).

[199] A possible concern is that the EEOC may be less committed to effective enforcement in politically conservative administrations and hence less inclined to adopt these rules where there is a lack of executive support, especially since EEOC members are appointed by the President with the advice and consent of the Senate. *See* 42 U.S.C. § 2000e-

Still yet, the national legislature rather than the federal courts may be the proper institution to consider and implement Schultz's liability rules due to the scarcity of statutory guidance on sex harassment and the difficulty in fully addressing the complicated nature of this phenomenon. Under the legislative-supremacy model, it is preferable to have the problem of sex harassment examined by Congress through informed hearings and debate, in order to foster a national dialogue on the issue and to promote democratic deliberation. Particularly since sex harassment law and its attendant policies are controversial and imprecise due to the diffuse and wide-ranging nature of the problem, it may be desirable to ventilate these subjects in congressional hearings that could lead to legislation and create some form of public consensus and support around these issues. Congress, with its resources and democratic accountability, may be in a better position than the federal courts to carefully study the problem of sex harassment and endorse new legal standards. If there is adequate political support for Schultz's theory of sex harassment and her proposed liability rules, then Congress will enact them into law, providing an explicit congressional directive for the courts to implement uniformly when adjudicating sex harassment cases.

Further, federal legislation would be appropriate to clarify sex harassment law because Title VII is federal law. State legislatures could then supplement federal legislation with extra-statutory provisions governing sex harassment if they choose. This legislative approach to sex harassment law might be more profitable than piecemeal adjudication because the former would have political legitimacy, whereas the latter is subject to the policy preferences of individual district court judges.[200] Moreover, federal judges, many of whom are elite white males, may be less empathetic toward Title VII plaintiffs who tend to be minority and female, rendering the federal courts less likely to be favorably disposed toward effectively upholding or strengthening sex harassment laws.[201] While lawmakers are also predominately male and white, they are nonetheless

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4 (2000). The political climate and timing therefore may be important when enlisting the help of the EEOC in considering these proposed rules.

[200] *See* Theodore F. Claypoole, Comment, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151 (1987).

[201] *See, e.g.*, Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1681 (1991) (arguing that judicial hostility toward Title VII plaintiffs may discourage many would-be plaintiffs from bringing cases).

accountable to their constituents, including their many female constituents who can apply political pressure.[202]

Indeed, Professor Mary Becker argues that women, as a majority group, should learn to increase their political influence and deploy it to bring about real change in relations between the sexes.[203] She further argues that binding court decisions can obstruct and interrupt political movements, especially when the Supreme Court hands down successful but inefficacious rulings.[204] As Becker sees it, if women had spent their time and energy in recent decades on legislative improvements rather than on judicial review in the area of sex equality, then women today could have had "more political experience and power" and "ended up in different places in important institutions."[205] In light of the evolving nature of sex harassment law, federal legislation may be further advantageous compared to court-created law because the former can initiate change and progression, while the latter is bound by tradition and precedent. Additionally, legislative mistakes—legislation that harms women—can be rectified more easily through the legislative process, as compared to the extreme difficulty of persuading the Supreme Court to reverse its judicial precedents.[206]

In support of judge-made law in the area of sex harassment, Catharine MacKinnon argues that individual litigation and the common-law approach are what have allowed sex harassment law to be created and developed.[207] She believes that the case-by-case method proves itself to be particularly beneficial for women because it allows for a careful, searching examination of the harm of sex harassment in the everyday lives of women.[208] While recognizing that common law in general, and early sex harassment common law in particular, were not always on women's side, MacKinnon nonetheless asserts that once the cases came before forward-

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[202] *See* Mary E. Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 989 (1993) (advocating for legislative change rather than judicial review in advancing women's equality).

[203] *Id.* at 992-98.

[204] *Id.* at 996-97.

[205] *Id.* at 997.

[206] *Id.* at 1010.

[207] Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 831-32 (2002).

[208] *Id.* at 832.

looking and perceptive federal judges, sex harassment law was finally established and developed.[209]

MacKinnon does not deny the importance of equality-promoting legislation, but raises the sobering question of whether a "legislature would pass a civil code provision giving women the scope of coverage of sexual harassment in rule form that common law case developments have so far given them by interpretation."[210] With respect to Schultz's recommendation, it may be that members of Congress would not be willing to touch, much less legislate on, the heated issue of sex harassment. Congress may much rather continue to leave this issue to be decided by the courts, unless women agitate for legislative attention to this issue as Becker argues they should.

Schultz's proposal that employers be given legal incentives to make their work organizations structurally egalitarian for women is important if sex harassment at work is to be eliminated. Her express recommendation for different employer liability rules according to the percentage of women employees in relevant positions within the organization is connected to her implied recommendation for sex-based affirmative action policies at work. It is arguable, however, whether the federal judiciary, the EEOC, or Congress is best situated to implement these rules. These important questions of institutional competence need to be further considered as we chart the future of sex harassment law.

III. THE GENDERED MODEL OF THE ORGANIZATION

Women should be allowed to help determine their workplace cultures by promoting their full integration in the organization. But I challenge whether simply integrating women into the workforce will be sufficient to address masculine forms of sexual expression because the workplace is traditionally a male realm shaped by masculine norms of conduct, much of which involves a sexual nature.[211] These sexualized

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[209] *Id.* at 819-26.

[210] *Id.* at 831.

[211] *See* Lee, *supra* note 1 (arguing that the problem of workplace sex harassment is fundamentally linked to long-entrenched masculine normative behavior in the work setting, regardless of whether the work environment is blue-collar or white-collar); *see also* SU MADDOCK, CHALLENGING WOMEN: GENDER, CULTURE AND ORGANIZATION 91 (1999) (stating that sexuality is an "important feature of the work culture" and that there exist "few public or private organizations which are not dominated by male values . . . and where male cultures do not invade the attitudes of men and women in their judgments about women and their approach to organizing within the workplace"); *see also* Kolb et al., *Making Change: A Framework for Promoting Gender Equity in Organizations*, *in* READER IN GENDER, WORK,

modes of expression will continue to harm women workers, even if the gap between the number of women and men in the work organization were to narrow, because these norms were established and persisted in the organization *for men by men*.[212] As Professor Katherine Franke has theoretically advanced, sex harassment regulates gender norms by identifying "women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects," reinforcing the stereotypical image of the male as the sexual aggressor.[213] While improving women's power and position within the organization along with numerical parity are relevant and important to benefit women in the workplace, expansively advocating for open sexuality will undercut the goals of eradicating on-the-job sex harassment.[214] Rather, as women join the organization in greater numbers, incidents of sex harassment will more likely decline if women, together with their male colleagues, act to reform workplace culture meaningfully to encourage an inclusive environment where all members can thrive.[215] While Schultz also wants to open the way for the creation of a variety of work cultures that either encourage or limit sexuality according to an integrated structural process, she nonetheless hopes the sexuality-privileged organizational model will be more than just a viable option—she would like

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AND ORGANIZATION, *supra* note 36, at 10, 13 (maintaining that organizations are "inherently gendered" in that the values and practices of the organization mirror the values and practices of men from a masculine viewpoint); *see generally* Ann C. McGinley, *Masculinities At Work*, 83 OR. L. REV. 359 (2004) (advocating that courts look to masculinities theory and research to better comprehend the gendered nature of work when adjudicating sex discrimination claims under Title VII).

[212] *See* Myrtle P. Bell & Mary E. McLaughlin, *Sexual Harassment and Women's Advancement: Issues, Challenges, and Directions*, *in* ADVANCING WOMEN'S CAREERS: RESEARCH AND PRACTICE 83, 89 (Ronald J. Burke & Debra L. Nelson eds., 2002) (noting a study which found a correlation between a sexually-charged work environment and sex harassment, adding that "[w]ork environments that are sexualized or unprofessional clearly would appear to increase the opportunity for sexual harassment and other harmful behaviors, regardless of the overall sex-ratio of the environment").

[213] Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997).

[214] *See* Bell & McLaughlin, *supra* note 212, at 90 (stating that, based on empirical data, women's advancement and sex harassment in particular are affected by the following three features: "women's organizational power and status; sex-ratio; and professionalism or sexualization of the work environment").

[215] *See* Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 643-53 (2005) (explaining how work cultures centered around a white, male norm disadvantage women and people of color in the workplace).

it to be the preferred one.[216] To illustrate how this model can flourish in a fully mixed-gender or all-female work environment, Schultz describes the sexually-infused workplace norms among editors at two publications, both of which regularly feature articles on sexual issues.[217] These work settings, however, are unique in that engaging in issues of sexuality is a key component of the work the editors do—simply put, sexual talk for these editors is an on-the-job requirement.[218] The sexuality-privileged model has been adopted in these particular settings because sexuality is a substantial part of the official work product. Even here, the editors qualified the appropriateness of their workplace sexual norms: at the all-women staffed magazine, some of the female editors admitted that their personal and sexually-explicit exchanges did not feel like sex harassment because the conversations took place among only women. Similarly, at the gender-integrated magazine, although both the female and male editors engaged in sexual dialogue relevant to their work, they strictly refrained from talking about their personal lives.[219] These workplace examples, unusual considering their involvement with work-related sexual issues, still neither exemplify nor aspire in full form to the sexuality-privileged model that Schultz envisions.

The majority of workplaces do not involve sexuality as part of the job, and hence the sexuality-privileged model should be considered in the more common organizational context. Within most work environments, encouraging women to promote sexuality on the job may be little more than endorsing the adoption of conventional masculine practices as women's "own," serving to validate and perpetuate male-coded characteristics of workplace interaction. Whether many men genuinely prefer a sexualized workplace culture or reflexively act as if they do is also worth further discussion. The male workplace prototype reinforces stereotypical, hypermasculine behavior among men that regulates their gender identities as well and harms gender-nonconforming men in particular.[220] By

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[216] *See* Schultz, *supra* note 3, at 2071, 2143-52.

[217] *Id.* at 2145-49 (discussing the work atmospheres at the female-targeted, feminist magazine "Womyn" and the male-targeted, pornographic magazine "Gentleman's Sophisticate").

[218] *See id.*

[219] *Id.* at 2146-47.

[220] *See* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 75 (1998) (involving a male-on-male hostile environment suit where male coworkers employed in an

understanding sex harassment as a practice that disciplines gender performance, as Professor Franke argues, we need not view traditional masculinity as the inevitable presentation of maleness.[221]

Even in a gender-integrated environment, we can imagine that incidents of sex harassment would continue to take place as certain individuals will persist in engaging in harassing behavior if they know they can do so without likely repercussions. Schultz acknowledges that harassment may not be eliminated from integrated environments, but suggests that the harassment will not be quite as damaging because it will be less threatening in a gender-mixed environment. Schultz argues that sex segregation, and not the cultural insensitivities of men, leads to sex harassment,[222] but a study that looked at every federal court decision on workplace sex harassment during the decade following *Meritor*[223] found that hostile environment and quid pro quo claims more than occasionally arose out of mixed-sex workplaces, where over half of these mixed-gender cases involved hostile environment claims and where a sizeable percentage also involved quid pro quo claims.[224] Hence, even better-integrated environments still suffer from the problem of harassment. The problem likely persists because harassment is viewed as less offensive or less threatening only if the harassee knows there are avenues for redress open to her and that her concerns will be taken seriously. Having women in leadership positions may help, but targets of harassment will not feel any more secure if they do not believe they can safely broach the issue or if they do not know how to raise the grievance for effective redress.[225]

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oil rig allegedly violently and sexually harassed a nonconforming male crew member and other crew members in this all-male setting).

[221] *See* Franke, *supra* note 213, at 765.

[222] Schultz, *supra* note 3, at 2134, 2144.

[223] 477 U.S. 57 (1986).

[224] Juliano & Schwab, *supra* note 63, at 556, 565-66 (examining 502 district court opinions and 164 appellate court opinions and finding that "[i]n 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.").

[225] *See* Bell & McLaughlin, *supra* note 212, at 90 (referring to a study which found that women's lack of awareness about their organization's sex harassment policy was one of the key predictors of sex harassment in the workplace).

Take, for instance, the climate at the Boalt Hall School of Law at the University of California at Berkeley in 2002, when sex harassment allegations were filed against Dean John Dwyer by a recent female law school graduate.[226] The alleged incident of harassment and assault occurred while the woman was still in law school, after Dwyer offered to drive the student home from the bar where they had been drinking.[227] According to the student, she fell fast asleep upon arriving home, only to wake up later in the night to find Dwyer molesting her in her bed.[228] In response to the student's complaint filed two years later, Dwyer admitted to this single episode but asserted that the relationship was consensual and stressed the fact that no intercourse was alleged.[229] Nonetheless he resigned from his post as Dean and from the faculty, acknowledging that the behavior reflected poorly on his judgment.[230] Notably, the woman filed her formal sex harassment complaint only after graduating from Boalt.[231] Soon after the incident had occurred, the student approached several faculty members about what had happened, including sex discrimination specialist and Boalt professor Linda Hamilton Krieger.[232] While the student received support and sympathy from Krieger, she failed to receive clear guidance on how this matter should be handled because the school lacked adequate sex harassment grievance procedures.[233] In fact, the law school faculty had not received any training in sex harassment issues.[234]

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[226] *See, e.g.*, Deborah L. Rhode, *Professor of Desire*, NAT'L LAW J., Jan. 27, 2003, at A17 [hereinafter Rhode, *Professor of Desire*]; Renee Deger, *Boalt Law School Dean Resigns After Claim of Sex Harassment*, LAW.COM, Dec. 2, 2002, at http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1036630510731&t=LawArticle.

[227] Rhode, *Professor of Desire*, *supra* note 226.

[228] *Id.*

[229] Deger, *supra* note 226; *see also* Press Release, John Dwyer, Dean of UC Berkeley's School of Law, Resigns (Dec. 2, 2002), *available at* http://www.berkeley.edu/news/media/releases/2002/12/02_dwyer.html.

[230] *See* Press Release, supra note 229.

[231] *Id.*

[232] Maura Dolan et al., *Woman Sought UC Berkeley's Help Before Accusing Dean*, L.A. TIMES, Dec. 3, 2002, at Metro 1, *available at* http://www.chesslaw.com/dwyer5.htm.

[233] *Id. See also* Rhode, *Professor of Desire*, *supra* note 226.

[234] Rhode, *Professor of Desire*, *supra* note 226.

It may seem surprising that no sex harassment complaint procedure was in place at a law school where the former long-term dean was Herma Hill Kay, a scholar specializing in sex discrimination law.[235] Dwyer succeeded Kay as Dean in July 2000,[236] and the alleged incident took place the following semester in December 2000.[237] It is troubling that, up until the time this incident occurred, the school did not have a clearly established grievance process for sex harassment, including harassment of a student by a professor. Even Krieger, an expert on women's rights, did not know the in-house procedure to follow in addressing the student's situation.[238] With or without formal faculty training, professors should be held accountable for engaging in sexual impropriety, and Dwyer himself immediately and voluntarily resigned from his positions as both Dean and as a faculty member at the school.[239] But faculty members, school administrators, and students still need to be made aware of the institution's sex harassment policy and procedure to know how these kinds of difficult situations will be handled. Admittedly, even with such a protocol in place, there will continue to be individual "bad seeds" who will act inappropriately. The expectations of everyone in the institution, however, will improve if serious attention is given publicly to this issue. Having a woman in an organizational leadership position may indicate to members that sex harassment complaints likely will be taken seriously, but the environment will not change unless the organization's leaders make it a public priority to rid the workplace of sex harassment and other forms of discrimination and inequality. This institutional re-signaling is important and needs to be made

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[235] Harriet Chiang, *Berkeley Law Dean Quits in Scandal: Sex Harassment Charges by Student from 2 Years Ago,* S.F. CHRON., Nov. 28, 2002. In the context of legal academia, what effect does a female dean have on the law school in particular and on legal education as a whole? Dean Kay poses this question herself in her research on women law school deans. Herma Hill Kay, *Women Law School Deans: A Different Breed, Or Just One of the Boys?*, 14 YALE J.L. & FEMINISM 219 (2002). She raises the question that the difference in management and efficacy might lie in whether the woman dean is considered "feminist" and produces gender-conscious scholarship. *Id.* at 237-38. As she notes, the current sample size of women law school deans unfortunately is too miniscule to determine at this juncture whether there is indeed a correlation. *Id.* at 238.

[236] Chiang, *supra* note 235.

[237] Press Release, *supra* note 229.

[238] Dolan et al., *supra* note 232.

[239] Press Release, *supra* note 229.

clear,[240] regardless of whether the message comes from female or male leaders.

It may be expected that a female law school dean such as Herma Hill Kay, who writes about gender equality, will make this a part of the institutional agenda while in her decanal position, but the controversial problem of sex harassment needs to be addressed specifically and unequivocally by the leadership for complete equality in the workplace to take hold. Particularly in the case of sex harassment, organizational re-signaling is needed through formal sex harassment procedures that are well-advertised and enforced.[241] Predictably, lower incidence of sex harassment complaints has been strongly correlated with having strict policies and consequences in place.[242] Such policies, to be most effective, need to be supported and communicated by the organization's management and incorporated into a progressive model of organizational norms and values.[243]

Sex harassment will not subside without organizational re-signaling and institutional reformation, and we cannot assume that these conventions will change merely because more women are present in, or even lead, the institution. Rather, a woman's particular stance will largely determine her leadership style, organizational priorities, and goals.[244] The limited body of

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[240] The importance of this "signaling effect" has arisen, for instance, in the recent push at Harvard University for institutional attention to faculty diversity in light of the decline in the number of tenure offers given to women. In a letter to the University's administration by twenty-six professors regarding this issue, they "highlighted the 'signaling effect' of leaders' expressed priorities." *Tenure and Gender*, HARVARD MAG., Jan-Feb. 2005, at 64-66. The letter further states: "'According to many studies on diversity issues, statements from university leaders that regularly affirm a strong institutional commitment to diversifying the faculty are central to mobilizing support and energy at the departmental level . . . .'" *Id.* at 66. I assert the same argument can be made for affirming a solid organizational commitment to addressing sex harassment, whether within an academic or work organization.

[241] *See* Bell & McLaughlin, *supra* note 212, at 90.

[242] *See id.*

[243] *See* Green, *supra* note 215, at 678-83 (proposing judicial or administrative oversight as a way to push for similar employer reforms to address discriminatory work cultures, highlighting the potential of connecting diversity management efforts to civil rights issues).

[244] *See* Daniel McGinn, *In Good Company*, NEWSWEEK, Oct. 24, 2005, at 68-69 (reporting that Xerox offers a more woman-friendly work culture under its female CEO, who is particularly conscious about the need to support and promote women employees at the company), *available at* http://www.msnbc.msn.com/id/9709961/site/newsweek/.

research examining the effect of gender on leadership suggests that women currently do not lead very differently than men.[245] Furthermore, many high-ranking women in sectors such as law, business, and politics have not publicly pressed for gender equality.[246] Genuine changes in organizational culture will not come about without active deliberation of the organization's gendered values and practices that have long been embedded according to traditional masculine preferences. The effect of gender on organizational behavior, for example, can be seen in the model of feminist organizations, which tend to embrace a collective and participatory structure that emphasizes group process in decision-making, in contrast to the formal and hierarchical structure of male-dominated institutions, although some feminist groups have incorporated bureaucratic elements to promote organizational accountability and efficacy.[247] In rethinking whether the conventional paradigm of the organization effectively encourages women's participation, women in the feminist movement established an alternative model of organizational activity that resisted adherence to male-established institutional norms—norms which were not initially designed to take into account women's satisfaction and advancement.

Women who enter long-established organizations, however, face a greater yet seemingly less obvious challenge. Due to the entrenchment of the pre-existing culture of an organization, female members may easily contribute to or reenact the customs of the organization because such conformity is rewarded.[248] Women are pressured to conform to the traditional expectations of the organization by downplaying their female-associated attributes, a cultural demand that Professor Kenji Yoshino calls "covering."[249] As he insightfully explains, women who enter the work sphere often receive the message that they need to underemphasize or cover their female identities to be valued as workers because the standard by

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[245] Deborah L. Rhode, *The Difference "Difference" Makes*, *in* THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 3, 20-21 (Deborah L. Rhode ed., 2003) (noting that, on the question of whether women have different leadership priorities than men, "some women [do] some of the time") [hereinafter Rhode, *The Difference*].

[246] *Id.* at 22-23.

[247] *See* Suzanne Staggenborg, *Can Feminist Organizations Be Effective?*, *in* FEMINIST ORGANIZATIONS: HARVEST OF THE NEW WOMEN'S MOVEMENT 339, 342-43 (Myra Marx Ferree & Patricia Yancey Martin eds., 1995).

[248] *See* Rhode, *The Difference*, *supra* note 245, at 23.

[249] *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 147-64 (2006) (describing sex-based covering).

which they are measured is a male-modeled one.[250] Yoshino also points out that women are required to "reverse-cover" at work by retaining some stereotypically feminine characteristics, leaving them in a double bind regarding how to successfully negotiate their identities in the work domain.[251] These covering and reverse-covering directives commonly imposed by men prevent women from excelling in the organization on their own terms. Instead, women who meet these demands will be rewarded by the organization's higher-ups as they continue to abide by the organization's male-centered conventions and assumptions, rendering it difficult for other women to campaign for new ways of carrying out the organization's functions. More than a few women have entered the upper ranks or were promoted precisely due to their willingness to adjust to the firm's standards.[252] Some may argue that covering is important, perhaps even necessary, for a woman to get her foot in the door and demonstrate that she "fits in" and can do the job as currently defined and expected, before she can successfully suggest and implement reforms to the organization's customs.[253] In other words, women may first need to rise to influential positions within the organization through traditional means to be able to exert influence and effect change from the inside.

But if women (and progressive men) do not push for change sooner rather than later, then we should remain concerned that the path to success is actually a path of inculcation, a route along which women may begin to find the institution's powerful ways less damaging than they did upon entry.[254] There remains a tension between conforming to the expectations of

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[250] *Id.* at 147-49.

[251] *Id.* at 145-64 (describing how women are required to cover and reverse-cover in a number of ways, including with respect to their appearance, demeanor, and child-care duties).

[252] *See* Rhode, *The Difference*, *supra* note 245, at 23.

[253] *See* Debra E. Meyerson & Maureen A. Scully, *Tempered Radicalism: Changing the Workplace from Within*, *in* READER IN GENDER, WORK, AND ORGANIZATION, *supra* note 36, at 266 (describing "tempered radicalism" as a practical approach to changing the organization's processes from the inside through an insider's influence).

[254] For instance, in the law school context, one study used survey data to document how female students during their 1L year held a more negative view than their male peers of the adversarial, Socratic, and individualistic mode of law school learning, but by their 3L year had come to accept the legal academy's masculine-model of a "successful" aspiring lawyer. *See* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

the organization in order to excel within it and retaining one's outsider perspective and motivation to want to change it.[255] Women who rose to the top "the hard way" may simply expect others to do the same, without seeing a need to change the process or system at all, based on a belief that success is attainable if one is willing to work for it without claiming that one's female gender operates as a disadvantage.[256] Thus, women in this camp may laugh off sexually-oriented jokes or teasing at work and expect other women to develop "a tough skin" to be seen as serious players within the organization. Additionally, they may view hostile environment sex harassment as a trivial workplace problem. All of this demonstrates that women, with their male colleagues, need to be professionally invested in issues of gender equity for organizational cultures to change and progress. In addressing sex harassment, Schultz's prescription to have more women along the organization's hierarchical ranks is an important step. But this step must be accompanied by a commitment to reshape the gendered nature of their organizational cultures to allow substantive as well as numerical gender equality to become the new norm.

Therefore, an employer should have to show more than only a gender-balanced workforce to benefit from a lenient evidentiary standard for sex harassment liability if Schultz's recommendations are to be adopted. In addition to numerical parity, employers must also demonstrate that they are working toward accountable organizational evaluation and reformation to eliminate sex harassment and promote gender equity. Schultz recommends that "organizations abandon sensitivity training in favor of incorporating their harassment policies into broader efforts to achieve integration and equality throughout the firm."[257] Instead, such sensitivity training and deliberative sessions need to be incorporated into integration efforts to explore the gendered nature of organizational forces. To both signal and act on this commitment, an employer might create an internal gender task team or hire an external consultant to collect data regarding existing sex harassment and other workplace policies that particularly affect women employees and study how these policies function in practice. As demonstrated in the recent situation at Boalt Hall, common problems that organizational members encounter in raising incidents of sex harassment

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[255] *See* Rhode, *The Difference*, *supra* note 245, at 33; *see also* Anna Quindlen, *The Value of the Outsider*, NEWSWEEK, Oct. 24, 2005, at 86, *available at* http://www.msnbc.msn.com/id/9707660/site/newsweek/.

[256] Rhode, *The Difference*, *supra* note 245, at 23.

[257] Schultz, *supra* note 3, at 2071.

include lack of clarity in policy, limited access to information, and lack of education on this issue. In addition to the specific organizational policies in place, the general workplace climate for women should also be critically examined for an overall understanding of the organizational culture. In crafting both short-term and long-term recommendations to improve the recruitment, promotion, and retention of qualified women, the gender task team or consultant should confer with organizational leaders and employees at all levels to determine how best to meaningfully advance the interests of women employees within the organization. Consulting a cross-section of the organization is key to the effort, because the various individuals who make up the organizational entity need to feel invested in the project in order for them to be motivated to implement the final recommendations adopted by the organization's decision-makers. The new example of organizational culture, to be successfully executed, must be modeled by organizational leaders and reinforced from all directions and among all ranks through informative workshops to foster communication and understanding.

IV. CONCLUSION

Although Professor Schultz claims that the anti-sex harassment movement to regulate sexuality in the workplace is reminiscent of classical management's goal of keeping all things nonrational outside of the work organization, she overemphasizes management's impulse to maintain a work environment free of all passion or human elements, and likewise overstresses the feminist movement's alignment with management. In order to advocate for the rights of women employees, feminists pressed for the recognition of sex harassment as a problem at work, undermining Schultz's depiction of the feminist movement as allying its mission with management's agenda. Further, contrary to the picture that Schultz suggests, male-only organizations display sexualized cultures—notwithstanding women's absence from these settings—because the organization is a gendered space in which masculinity and male-oriented sexuality have taken root and grown. Women's entry into the organization may have changed the targeting of sexual expression, but women did not introduce sexual behavior. An examination of all-male institutions graphically illustrates the highly sexualized cultures of these organizations, demonstrating that masculine-driven sexuality thrives whether or not women are in their company.

Schultz's sexuality-privileged organizational model too easily discounts the damaging legacy of masculine traditions of work culture, and neglects to give appropriate weight to the real and anticipated harms that

stream from a laissez-faire workplace policy on sexual behavior and relations. Although Schultz's recommendation for gender integration at work is laudable as it seeks to remedy women's structural weakness that contributes to sex harassment, it is uncertain whether her number-specific guidelines can or should be implemented by the courts. Further, gender integration within the organization as a lone prescription is inadequate in light of our understanding of the organization as a gendered entity that has been created and maintained by traditional masculine norms and expectations. Gender equality in terms of numerical parity at work is needed, but must be supplemented by organizational re-signaling and reformation that is led and implemented by a committed leadership seeking to substantially advance the interests of all its organizational members.