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TAKING DISCRIMINATION SERIOUSLY: ONCALE AND THE FATE OF EXCEPTIONALISM IN SEXUAL HARASSMENT LAW

Steven L. Willborn*

In both the case law and the literature, sexual harassment is treated as an exceptional and unique form of discrimination. In this Article, Professor Willborn expands on the Supreme Court's recent decision in Oncale v. Sundowner Offshore Services, Inc. to argue that this exceptionalism should be rejected and that harassment law should return to its roots in the broader body of antidiscrimination law. Professor Willborn begins by articulating the contours of a discrimination-centered model of sexual harassment and explaining how it differs from currently accepted views. He then reviews the Supreme Court's recent cases on sexual harassment, concluding that they support a discrimination-centered model of harassment, but are inconsistent in important ways with standard current views. Finally, Professor Willborn examines academic theories about sexual harassment law through the lens of the discrimination-centered model, and concludes that the model both applies more widely and is more broadly protective than the visions of harassment forwarded in the academic literature.

* * *

The story of the development of sexual harassment law generally begins with Catharine MacKinnon's *Sexual Harassment of Working Women: A Case of Sex Discrimination*,¹ an extended discussion of why harassment is discrimination. One of the ironies in the development of the law since the publication of MacKinnon's book is the submergence of the discrimination element. Prior to the Supreme Court's recent decisions, some courts and commentators defined sexual harassment as unwelcome sexual conduct that either results in an adverse employment decision or is severe or pervasive.² Under this view, discrimination is nowhere to be seen.³ Other courts and commentators have added a requirement that the harassment be

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

² See *infra* notes 19-26 and accompanying text.

³ At the least, discrimination is not an explicit element of the cause of action. Some might argue that discrimination still must be proven, but that proof of "sexual conduct" serves as an acceptable proxy for direct proof. As discussed later, however, this is a weak argument. See *infra* text accompanying notes 20-26.

“based on sex,” but the element generally has been a mere formality. The oft-noted “heterosexual presumption” means that the element is met without evidence in most cases.⁴

The Supreme Court’s recent decision in *Oncale v. Sundowner Offshore Services, Inc.*⁵ is important because it brings discrimination back into sexual harassment law. The holding in *Oncale* was that same-sex harassment is cognizable under Title VII, but the rationale and emphasis in the decision was on the need to show discrimination to make out a sexual harassment case. Same-sex harassment, the Court said, presents just as viable a claim under Title VII as other types of harassment *so long as discrimination can be shown*. In one sense, this Article is about what that requirement means. How would taking discrimination seriously affect sexual harassment law? How would it affect academic theorizing about sexual harassment law? How would it affect the ability of sexual harassment law to withstand scrutiny under the First Amendment?

This Article also uses *Oncale* to ask a more basic question: should sexual harassment be treated, as it was prior to *Oncale*, as an exceptional type of discrimination which requires its own set of principles, justifications, and legal standards, or should it be treated as one instance of a type of discrimination that is well-recognized elsewhere in discrimination law? In a broader sense, this Article is an extended argument against exceptionalism and for bringing harassment law back into the familiar territory occupied by the rest of discrimination law.

In Part I of this Article, I review *Oncale* and its important suggestion that discrimination should be taken more seriously in sexual harassment cases. In Part II, I follow up on that suggestion by considering what a discrimination-centered approach to sexual harassment would look like and by comparing it with the current approach, which minimizes the role of discrimination. In Part III, I analyze the Supreme Court’s sexual harassment cases to determine the extent to which they support or undermine the discrimination-centered and current approaches. I conclude that the cases generally support the discrimination-centered approach, but are inconsistent with the current approach in important ways. In Part IV, I consider current academic theorizing about sexual harassment. The discrimination-centered approach is used both as a lens through which to view and critique these theories and as an object which can be brought into better focus by observation through the lens of the theories. Also in Part IV, I consider First Amendment criticisms of sexual harassment law, concluding that a discrimination-centered approach to sexual harassment greatly weakens this type of attack on harassment law. Finally, in Part V, I conclude with some broader arguments in support of a discrimination-centered approach to sexual harassment.

⁴ See *infra* text accompanying notes 27-32.

⁵ 118 S. Ct. 998 (1998).

I. *ONCALE* AND TEA LEAVES

Oncale, like many sexual harassment cases, presents an appalling set of facts.⁶ Joseph Oncale was a member of an eight-man crew working on an oil platform in the Gulf of Mexico. While on the platform, he was subjected to several humiliating, sex-related actions, physically assaulted in a sexual manner, and threatened with rape, all by his male coworkers. He complained to supervisors, but they did nothing. Then he quit, and sued.⁷

The district and appellate courts dismissed Oncale's claim because "same-sex harassment claims are not viable under Title VII."⁸ The Supreme Court reversed, finding unanimously that "same-sex sexual harassment is actionable under Title VII."⁹ At its most basic level, then, *Oncale* simply is about same-sex harassment: the Court held that same-sex harassment claims are cognizable under Title VII. The only necessary consequence of the *Oncale* holding, narrowly construed, is that people may bring harassment claims when they are harassed by people of the same sex.

The Court's rationale, however, hints of broader implications. The primary emphasis in the majority opinion was on the need to show "discrimination because of sex" to establish a sexual harassment case. In the unanimous opinion, Justice Scalia began by citing the statutory requirement of "discrimination . . . because of . . . sex"¹⁰ and then repeatedly referred to the requirement throughout the opinion.¹¹ At one point, he said flatly that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex.'"¹² Justice Thomas filed a concurring opinion in which he made clear that he agreed with the majority only because the Court "stresse[d]" that sexual harassment cases require discrimination "because of . . . sex."¹³ The Court reversed the Fifth Circuit because its holding that same-sex harassment claims are never cognizable under Title VII was erroneous: discrimination is a possibility in same-sex

⁶ The case was presented to the Court after the lower courts granted and affirmed summary judgment for the employer. Consequently, the Supreme Court accepted as true the facts as alleged by the plaintiff. See *Oncale*, 118 S. Ct. at 1000. The case later was settled on the eve of trial. See Heather Bodell, *Sexual Harassment: Parties Settle Same-Sex Harassment Suit Just Short of Trial Before Federal Jury*, Daily Lab. Rep. (BNA) No. 209, at A-4 (Oct. 29, 1998).

⁷ See *Oncale*, 118 S. Ct. at 1000-01.

⁸ *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996).

⁹ *Oncale*, 118 S. Ct. at 1003.

¹⁰ *Id.* at 1001 (citing Civil Rights Act of 1964, Title VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1994)).

¹¹ The discussion portion of the majority opinion was less than three pages long. In that space, Justice Scalia referred to the "discrimination because of sex" requirement seven times. See *id.* at 1001-03.

¹² *Id.* at 1002 (emphasis omitted).

¹³ *Id.* at 1003 (Thomas, J., concurring).

harassment cases just as it is in same-sex discrimination cases that do not involve harassment.¹⁴ But to say that discrimination is a possibility is not to say that it always is present. The thrust of the Court's rationale in *Oncale* was that an explicit finding of discrimination is required, in harassment cases as in others.¹⁵

The Court was much less clear, however, on what it would mean for sexual harassment doctrine to take the discrimination element seriously. In one paragraph of the opinion, the Court gave some examples of how the discrimination element might be met, but that was the extent of its discussion.¹⁶ In sum, the tea leaves left by *Oncale* indicate that the discrimination element is to be taken seriously, but provide little guidance on how renewed attention to the element will affect sexual harassment doctrine.¹⁷

¹⁴ The Court cited *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), and *Castaneda v. Partida*, 430 U.S. 482 (1977), as examples of nonharassment cases in which the Court rejected a presumption that a member of one protected group would not discriminate against a member of that same group. See *Oncale*, 118 S. Ct. at 1001-02. Relying on these cases, the Court then held that nothing in Title VII bars a claim of discrimination "merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Id.*

¹⁵ This emphasis in the Court's opinion was foreshadowed by the oral argument in the case in which virtually all of the questioning focused on the discrimination element. See Transcript of Oral Argument, *Oncale*, 118 S. Ct. 998 (1998) (No. 96-568), available in 1997 WL 751912 (Dec. 3, 1997).

¹⁶ The Court stated:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] . . . because of . . . sex."

Oncale, 118 S. Ct. at 1002 (quoting Title VII, 42 U.S.C. § 2000e-2(a)(1) (1994)).

¹⁷ Plaintiff's attorney, Nicholas Canaday III, complained about this lack of clarity. In an interview with the Bureau of National Affairs, he said that the opinion left him "wondering what the court meant about the standards of proof in a same-sex setting. . . . How does one

II. TAKING DISCRIMINATION SERIOUSLY IN SEXUAL HARASSMENT LAW

Oncale notwithstanding, the current approach to sexual harassment pays little attention to the discrimination element. Under some articulations of this approach, no direct attention whatsoever is paid to the issue of whether discrimination is present; under other articulations, *formal* attention is paid to the issue, but in most cases a presumption of discrimination applies which makes actual proof of the element unnecessary. Because they are so widely accepted, I call these variants of the current approach the "standard model" of sexual harassment. This section will present and examine these aspects of the standard model, and compare the standard model with a revised, discrimination-centered model of sexual harassment which takes the discrimination element more seriously.

A. *Discrimination and the Standard Model of Sexual Harassment*

The standard model comes in two basic forms, but both underemphasize the discrimination element. In the first form of the standard model, followed in the Ninth Circuit, discrimination is not even an explicit element of a sexual harassment cause of action. In the second form, discrimination is listed as one of the elements of a cause of action, but in most cases the presence of discrimination is assumed. More specifically, in this second form, if the harassment involves a person of one sex harassing someone of the opposite sex, discrimination is assumed. Although this assumption covers the vast majority of the cases, it is what caused the problem in *Oncale*. The problem in *Oncale*, which had split the circuits, was what to do with the assumption of sex discrimination when the harassment involved people of the same sex.¹⁸

The standard model, as applied in the Ninth Circuit, eliminates discrimination as an element of a sexual harassment cause of action. In the Ninth Circuit, the elements are:

prove the 'because of sex' requirement?" Bodell, *supra* note 6, at A-4.

¹⁸ Prior to the Court's decision in *Oncale*, some circuits had held that same-sex cases never could present a cognizable harassment case under Title VII. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996), *rev'd and remanded*, 118 S. Ct. 998 (1998); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). Others had held that same-sex cases could present cognizable harassment claims if the harasser were homosexual. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996). Still other circuits had held that harassment that is sexual in content would be actionable regardless of the harasser's sex or sexual orientation. See *Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998). The Court in *Oncale* cited all of these cases. See *Oncale*, 118 S. Ct. at 1002.

- 1) that the plaintiff was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;
- 2) that the conduct was unwelcome; and
- 3) that the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.¹⁹

In this version of the standard model, the first element is the only one that potentially addresses discrimination. But that element addresses discrimination only very indirectly. The question asked is not “is there discrimination?,” but rather “is there verbal or physical contact of a sexual nature?” The focus is on the *content* of the words or conduct, not on whether the actor *discriminated* on the basis of sex.

Because “verbal or physical conduct of a sexual nature” also may be evidence of sex discrimination, one could argue that discrimination *is* required in this version

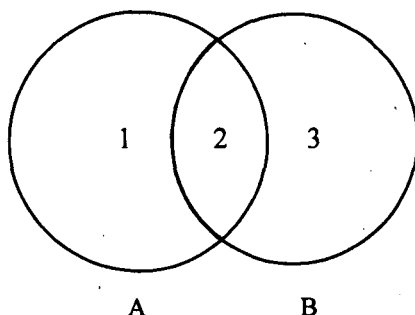
¹⁹ See *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991); *Jordan v. Clark*, 847 F.2d 1368, 1373 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). These, obviously, are the elements of a hostile environment sexual harassment claim. The elements of a quid pro quo claim are the same, except that the last element requires proof that the harassment affected a tangible aspect of employment, rather than proof that the harassment was severe or pervasive. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264 (1998). That change does not affect the model’s treatment of the discrimination element. Influential commentators also have failed to include discrimination when listing the elements of a harassment cause of action. See 1 CHARLES A. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* § 8.7, at 357 (2d ed. 1988) (“[S]exual harassment exists when there is a pattern of sexually oriented conduct, ranging from offensive touchings to sexually related comments and jokes that create a ‘contaminated work environment’”); REBECCA HANNER WHITE, *EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION* 95-96 (1998) (“A hostile work environment claim is stated if the plaintiff can show unwelcome sexual conduct that is . . . ‘severe or pervasive’”).

Two points are worth noting here on the distinction between quid pro quo and hostile environment cases. First, the Supreme Court’s criticism of the distinction in two of its recent decisions was directed at its use in determining employer liability for illegal harassment, not its use in determining whether harassment exists. In both cases, the Court recognized the utility of the distinction in deciding whether harassment had occurred, even though it was determined to be largely irrelevant to the issue of employer liability. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292-93 (1998); *Ellerth*, 118 S. Ct. at 2264-65. Second, the distinction between quid pro quo and hostile environment cases depends on whether a “tangible” aspect of employment has been affected by the discrimination. “Tangible” is used here as a term of art deriving from the Supreme Court cases and referring to any concrete employment practice, such as “hiring, firing, promotion, compensation, and work assignment.” *Faragher*, 118 S. Ct. at 2284. The distinction between quid pro quo and hostile environment cases is not watertight and an argument can be, and has been, made that the distinction should be rejected, see Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL’Y 307 (1998), but consideration of that issue is beyond the scope of this Article.

of the standard model. Rather than requiring direct proof of discrimination, the model allows proof of a proxy—"verbal or physical conduct of a sexual nature"—instead.²⁰ This argument is weak, however, because the "verbal or physical conduct" requirement is an imperfect proxy for discrimination.²¹ On the one hand, much conduct "of a sexual nature" is not discriminatory. For example, the Loch Ness Monster of harassment hypotheticals—the bisexual supervisor who makes sexual advances toward both male and female employees—involves conduct which is very much "of a sexual nature," but which is not discriminatory because, by assumption, the supervisor approaches men and women equally.²² Similarly, if the harassing conduct is the ubiquitous display of sexually suggestive posters,²³ the conduct certainly would fall within the category of conduct "of a sexual nature," but

²⁰ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1746-47 (1998).

²¹ A Venn diagram provides a useful way of thinking about this concept. Circle A, below, represents every situation in which there is "verbal or physical conduct of a sexual nature." Circle B represents every harassment situation in which there is discrimination on the basis of sex. If the two circles overlapped completely, the "of a sexual nature" element would be a perfect proxy for discrimination. The rest of the paragraph in the text, however, explains why the two circles do not overlap completely. Area 1 in the diagram represents situations in which there is conduct of a sexual nature that is not discrimination. Area 3 represents situations in which there is discrimination that is not conduct of a sexual nature. The larger those two areas are, in relation to the area of overlap (Area 2), the less perfect the proxy.



²² This is the Loch Ness Monster of sexual harassment law because, even though the issue is discussed often in the literature and occasionally in the case law, a real-life bisexual harasser has yet to be sighted. Courts have considered, with mixed results, the analogous situation of a supervisor who, although not bisexual, is equally obnoxious to both sexes. Compare *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995), and *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993) (finding discrimination), with *Johnston v. Tower Air, Inc.*, 149 F.R.D. 461 (E.D.N.Y. 1993) (finding no discrimination).

²³ See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), discussed *infra* note 184.

whether there is discrimination is a much closer question.²⁴ The match between “verbal or physical conduct of a sexual nature” and discrimination also is quite imperfect on the other side of the equation: much harassing conduct that is discriminatory is not “verbal or physical conduct of a sexual nature.” The cases provide many examples, such as the female plumber who had cockroaches placed in her hair and pants and was presented with a decapitated cat,²⁵ and the female police officers whose skin was burned when lime was placed in their uniforms.²⁶

The second form of the standard model requires proof of an additional element—that the discrimination is “based on sex.”²⁷ Although this form of the model, in contrast to the first form, requires attention to discrimination as an element of a harassment cause of action, the attention usually is only formal. When the harassment is opposite-sex²⁸ and the conduct is of a sexual nature,²⁹ courts apply the

²⁴ See *infra* text accompanying notes 182-86.

²⁵ See *Egger v. Local 276, Plumbers & Pipefitters Union*, 644 F. Supp. 795, 798 (D. Mass. 1986), *aff'd sub nom. Hallquist v. Local 276, Plumbers & Pipefitters Union*, 843 F.2d 18 (1st Cir. 1988).

²⁶ See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1474 (3d Cir. 1990). For other examples, see *Schultz*, *supra* note 20, at 1762-69.

²⁷ This is the version of the standard model followed in most jurisdictions. See 15 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 88.04, at 88-233 to 88-234 (1998) (citing supporting cases from every federal circuit except the Fifth and Ninth Circuits).

²⁸ See, e.g., *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 574-75 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998). The Seventh Circuit commented:

Title VII bars an employer from discriminating against an employee because of her sex, and thus . . . courts typically require a plaintiff complaining of sex discrimination, including sexual harassment, to demonstrate that the discrimination occurred “because of” her gender. This requirement has not detained courts long in cases of opposite-sex harassment; it is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against “because of” her sex. But courts by and large have been unwilling to make the same assumption when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of an explicitly sexual nature. They have looked instead for proof, above and beyond the sexual content of the harassment itself, that the plaintiff was singled out for harassment because of his gender.

Id. (citations omitted); see also *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.5 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996).

²⁹ See, e.g., *Spain v. Gallegos*, 26 F.3d 439, 449 (3d Cir. 1994). The Third Circuit noted: In reaching our conclusion . . . we have paid particular attention to the distinction . . . between sexual misconduct in which the intent to discriminate “is implicit, and thus should be recognized as a matter of course” and “actions [which] are not sexual by their very nature.” . . . Accordingly, where an employee claims sex

oft-noted heterosexual presumption.³⁰ That is, courts find that the “based on sex” element is met without any proof of actual discrimination. As Professor Schultz has noted, this approach has resulted in a two-tiered model of sexual harassment in which a presumption that the harassing conduct is “based on sex” applies in most, but not all, cases.³¹ As indicated, the cases that cannot take advantage of the presumption are same-sex cases and cases involving conduct that is not “of a sexual nature.” In those cases, some actual proof of discrimination is necessary to establish a cause of action.³²

Analytically, it is useful to consider separately the two categories excluded from the heterosexual presumption: cases in which the conduct is not “of a sexual nature” and same-sex cases. The first category emphasizes the extent to which the “of a sexual nature” element substitutes for proof of discrimination. If the conduct *is* “of

discrimination predicated on sexually neutral conduct it may be necessary for the employee to establish that the employer’s motives for its actions were sexual. If the discrimination of which Spain complained was predicated merely on the demands for loans, her case might be of that nature.

However, Spain’s allegations are not predicated on sexually neutral conduct. Rather, she alleges that the harassment resulted from the rumors that she was having an affair with Nelson. Thus, the harassment directed against her as a woman had a sexual orientation by its very nature.

Id. (quoting *Andrews*, 895 F.2d at 1482 n.3) (citation omitted). In full, the *Andrews* note reads:

The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.

Andrews, 895 F.2d at 1482 n.3.

³⁰ See SULLIVAN ET AL., *supra* note 19, § 8.7.1 (2d ed. Supp. 1996); Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375 (1995); Ramona L. Paetzold, *Same-Sex Sexual Harassment: Can It Be Sex-Related for Purposes of Title VII?*, 1 EMPLOYEE RTS. & EMPL. POL’Y J. 25, 48-56 (1997); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 736-42 (1998). Cf. Leigh Megan Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN’S RTS. L. REP. 39 (1990) (criticizing feminist legal theorists for unconsciously employing a presumption of heterosexuality).

³¹ See Schultz, *supra* note 20, at 1739-44.

³² Narrowly read, the *Oncale* decision does nothing to undermine this two-tiered structure. *Oncale* holds only that there must be actual proof of discrimination in *same-sex cases*, which always was the case under the two-tiered structure. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998). *Oncale* does not say directly that the presumption of discrimination cannot apply in other cases. This Article argues that *Oncale* should be read to require proof of discrimination in *every* harassment case, not only in same-sex cases.

a sexual nature," then by presumption discrimination also exists. On the other hand, if the conduct is *not* "of a sexual nature," one is left with a simple disparate treatment case in which discrimination must be proven in some other way. The second category illustrates the intuition underlying the heterosexual presumption: discrimination occurs between people of the opposite sex, not between people of the same sex.³³ As a result, conduct "of a sexual nature" is sufficient to justify a presumption of discrimination in opposite-sex cases, but not in same-sex cases. In same-sex cases something more is required: actual proof of discrimination.³⁴

Ironically, when the heterosexual presumption does not apply, courts often require discrimination to be proven *too* exactly. Rather than applying the mixed-motives model used elsewhere in discrimination law,³⁵ courts often closely parse the possible motivations for the harassment and reject discrimination as the cause if other plausible motivations exist. In *McWilliams v. Fairfax County Board of Supervisors*,³⁶ for example, a male was harassed by other males. They teased him, asked him about his sexual activities, exposed themselves to him, put a condom in his food, and physically assaulted him.³⁷ Instead of allowing the jury to decide whether the conduct was motivated at least in part by sex,³⁸ the court affirmed summary judgment for the employer:

We believe this result compelled by a commonsense reading of the critical causation language of the statute: "because of the [claimant's] sex". As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be "because of the [target's] 'sex.'" Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focused speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity.

³³ The majority in *Oncale* specifically rejected this intuition. See *Oncale*, 118 S. Ct. at 1001-02.

³⁴ Professor Paetzold has rejected this line of reasoning, concluding that conduct of a sexual nature justifies a presumption of discrimination in *both* opposite-sex and same-sex cases. See Paetzold, *supra* note 30, at 61-62. As discussed below, I also reject this line of reasoning, but my conclusion is that the *presumption* should be rejected in both cases; in both cases, discrimination is a crucial element and should be proven directly. See *infra* text accompanying notes 60-61.

³⁵ For an application of the mixed-motives model in sexual harassment cases, see *infra* text accompanying notes 45-56.

³⁶ 72 F.3d 1191 (4th Cir.), *cert. denied*, 519 U.S. 819 (1996).

³⁷ See *id.* at 1194.

³⁸ This is the question that would be asked under the mixed-motives model. See *infra* text accompanying notes 46-53.

Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's *sex*.³⁹

This type of searching inquiry for the "true" reason for the conduct is not what occurs elsewhere in discrimination law when conduct potentially is driven by multiple motives. Elsewhere, if the conduct was motivated in part by sex and in part by the victim's prudery and vulnerability, then the plaintiff would have presented a *prima facie* case and the burden would shift to the employer to prove that the same conduct would have occurred even absent sex as a motivation.⁴⁰ At the very least, when sex and other plausible reasons for the harassing conduct exist, a jury should be permitted to determine if sex was a motivating factor.⁴¹

In sum, two forms of the standard model for proving sexual harassment exist. The first form eliminates the discrimination requirement entirely. The second form retains discrimination as a formal element in the model, but fails to calibrate the discrimination inquiry appropriately. In most cases, courts use the heterosexual presumption to eliminate any need to present independent proof of discrimination. In other cases, courts should use the mixed motives model to analyze the discrimination issue, but reject discrimination if any other plausible motivation exists.⁴²

The under-emphasis on discrimination in the standard model has caused commentators, with justification, to treat sexual harassment as a completely separate model of discrimination with its own principles, justifications, and legal standards.⁴³ Sexual harassment is neither disparate treatment nor disparate impact, but a cause of

³⁹ *McWilliams*, 72 F.3d at 1195-96. For another case using an overly exacting inquiry, see *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993).

⁴⁰ See *infra* text accompanying notes 45-58.

⁴¹ See *Gallagher v. Delaney*, 139 F.3d 338, 342-43 (2d Cir. 1998) (arguing that juries are the appropriate fact-finders in sexual harassment cases because of the highly contextualized nature of the inquiry).

⁴² It is important to note that these categories are not airtight. Even though in many cases courts use the heterosexual presumption and require little or no proof of actual discrimination, in other cases that might fall into the category courts have attempted to determine if discrimination is present. See, e.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); *Wimberly v. Shoney's, Inc.*, 39 Fair Empl. Prac. Cas. (BNA) 444 (S.D. Ga. 1985). Similarly, in cases that fall outside the normal scope of the heterosexual presumption, courts sometimes use a similar presumption. See, e.g., *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996). The categories discussed in the text provide a useful way of organizing the bulk of the cases, but many cases defy the general rules.

⁴³ See RAMONA L. PAETZOLD & STEVEN L. WILLBORN, *THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES* § 1.10, at 1-23 (1996); SULLIVAN ET AL., *supra* note 19, § 8.7, at 255-56 (2d ed. Supp. 1996); Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 829 (1988).

action independent of their requirements and, indeed, independent from the language of Title VII. The standard model treats sexual harassment law as exceptional.

B. *A Discrimination-Centered Model of Sexual Harassment*

Oncale suggests a refocus on discrimination in sexual harassment cases. This section follows that suggestion by presenting a model of sexual harassment that treats discrimination seriously. This discrimination-centered model reconnects harassment law to the language of Title VII and, in doing so, to the concepts of discrimination that apply elsewhere in discrimination law. This section first presents the discrimination-centered model affirmatively and then considers the extent to which the elements of the standard model of harassment survive within a model that emphasizes discrimination and fidelity to the statutory language.

As with any statutory cause of action, the place to begin is with the language of the statute. Sexual harassment cases are based on section 703(a)(1) of Title VII: it is illegal for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex"⁴⁴ This language contains two elements that must be satisfied in every Title VII case: (1) discrimination on the basis of sex, and (2) an effect on compensation, terms, conditions, or privileges of employment. The first step in reconnecting sexual harassment law to the rest of discrimination law is to consider what a sexual harassment cause of action would look like if it followed the Title VII framework.

Courts using a discrimination-centered approach to sexual harassment would use the same framework for analyzing the discrimination element that they use in other disparate treatment cases.⁴⁵ Specifically, they should use Title VII's mixed-

⁴⁴ 42 U.S.C. § 2000e-2(a)(1) (1994).

⁴⁵ The disparate impact model is generally inapplicable in harassment cases. The courts have recognized this implicitly by basing their decisions in harassment cases on § 703(a)(1) of Title VII, the section that prohibits disparate treatment discrimination, rather than § 703(a)(2), which prohibits disparate impact discrimination. See *infra* note 76 and accompanying text. But, even if that were not the case, the disparate impact model generally does not apply to harassment situations because it is ill-suited to them. The first step in a disparate impact case is to identify a factor that is sex-neutral on its face, such as a test or a height and weight requirement. See *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (disparate impact cases "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another"). This step is important because it differentiates between employers who are entitled to the more lenient business necessity defense and employers who are subject to the more stringent bona fide occupational qualification defense. See SULLIVAN ET AL., *supra* note 19, § 3.6.1, at 105. Harassment cases fail to satisfy the first step of the disparate impact model because the conduct being challenged generally is not sex neutral. Harassment cases also fit poorly into later steps of a disparate impact analysis. A disparate impact generally is shown by

motives model,⁴⁶ which permits plaintiffs to prevail partially if they can demonstrate

demonstrating that women are disproportionately screened out by the neutral factor. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), for example, height and weight requirements eliminated a much higher proportion of women than men from the positions in question. It is conceivable that plaintiffs could attempt to show that "neutral" harassing conduct disproportionately affected women. For example, if an employer permitted a work environment to be plastered with sex-oriented posters, women could attempt to demonstrate that women quit in disproportionate numbers because of the environment or that women, but not men, perceived the posters to be sufficiently severe or pervasive to alter the working environment. But I know of no harassment case that has attempted to establish disparate impact in such a manner, in part because the claim of disparate treatment discrimination is much more straightforward, and in part because evidence of this type of disparate impact is difficult to gather and present. Finally, the business necessity stage of a disparate impact case simply does not compute as applied to harassment situations. It is difficult to imagine any harassing conduct that could be "job related for the position in question and consistent with business necessity." Title VII, § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁴⁶ This model derives from the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and was modified and codified by the Civil Rights Act of 1991, Title VII, §§ 703(m), 706(g)(2)(B), 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

The mixed-motives model is one of two models that apply to individual disparate treatment cases. The other model is the "pretext" model based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The mixed-motives model is the appropriate one to use in this context, however, because it applies when multiple motives may have caused the conduct in question. Multiple potential motives always are present in sexual harassment cases. Cases subsequent to *Price Waterhouse* also have held that the mixed-motives model applies only when "direct evidence" of discrimination is present. See *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078 (6th Cir. 1994); *Hook v. Ernst & Young*, 28 F.3d 366 (3d Cir. 1994). See generally Steven M. Tindall, Note, *Do As She Does, Not As She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 BERKELEY J. EMP. & LAB. L. 332 (1996) (examining case law applying Justice O'Connor's "direct evidence" standard and arguing that she did not intend the traditional meaning of "direct evidence" to apply, but rather intended "direct evidence" to mean evidence of an employer's discriminatory perspective which is related both temporally and logically to the employment decision); *Developments in the Law: Employment Discrimination*, 109 HARV. L. REV. 1568, 1581-86 (1996) (discussing recent application of the direct evidence standard and stating that "the vast majority of cases that follow the direct [evidence] route [of showing disparate treatment in employment discrimination cases] fall under the 'mixed motives' paradigm." *Id.* at 1581.). Although this is an incorrect reading of *Price Waterhouse* and the Civil Rights Act of 1991, see *infra* note 50, the "direct evidence" distinction also indicates that the mixed-motives model ought to apply in sexual harassment cases. These cases almost always involve "direct evidence" of discrimination, often in the form of sexually suggestive conduct.

Although the subject is beyond the scope of this Article, I agree with those who argue that the mixed-motives model makes the *McDonnell Douglas* model superfluous and, consequently, that the *McDonnell Douglas* model should be rejected. See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2311-24 & n.291 (1995).

that sex was a “motivating factor for any employment practice.”⁴⁷ The model, however, permits an employer to avoid full liability if the employer can demonstrate that it would have made the same employment decision even if sex had not entered into the decision-making process.⁴⁸

The mixed-motives model, however, must be applied with care because it was developed in a different context and with a particular issue in mind.⁴⁹ The plaintiff bears the initial burden of proving discrimination: the plaintiff must show that sex was a motivating factor for an employment decision. This is a generous interpretation of the burden to prove discrimination. The plaintiff need not prove that sex was a tipping or even a predominant factor in the decision, only that it was a “motivating” factor.⁵⁰ Harassment cases requiring an overly exacting proof of discrimination should be rejected in favor of the “motivating” standard of the mixed-motives model.⁵¹ But to say that the burden of proving discrimination is generous is *not* to say that it need not be proven. The “heterosexual presumption” also should be rejected.⁵² Discrimination must be proven in harassment cases in the same way it is in other cases—generally, by careful consideration of whether women are or would be treated differently than similarly situated men. The sexual content of the conduct

⁴⁷ Title VII, § 703(m), 42 U.S.C. § 2000e-2(m).

⁴⁸ See *id.* § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B).

⁴⁹ As noted, the seminal case on the mixed-motives model was *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The factual context of *Price Waterhouse* involved not harassment, but promotion to partnership. The primary issue in the case was the proper analysis when two or more plausible motives may have caused an adverse outcome. In contrast, in many hostile environment harassment cases, the primary issue is whether a legally cognizable adverse outcome is present, that is, was the harassment sufficiently severe or pervasive to qualify as an adverse outcome.

⁵⁰ Title VII § 703(m), 42 U.S.C. § 2000e-2(m). In enacting this language, Congress adopted the standard used by the plurality in *Price Waterhouse*. See *Price Waterhouse*, 490 U.S. at 250-52. By choosing that standard, Congress rejected the alternative standard proposed by Justice O'Connor in her concurrence: “direct evidence that an illegitimate criterion was a substantial factor in the decision.” *Id.* at 276 (O'Connor, J., concurring). As a result, a motivating factor can be based on “indirect” evidence and does not need to be a “substantial factor” in the decision. At the same time, however, both the plurality and Justice O'Connor agreed that evidence of isolated or “stray” remarks about a person's protected status would not meet the motivating factor standard. See *id.* at 251-52 (Brennan, J., plurality opinion); *id.* at 277 (O'Connor, J., concurring).

⁵¹ See *supra* notes 35-41 and accompanying text.

⁵² See *supra* notes 30-34 and accompanying text. Similarly, the claim that the heterosexual presumption should be *extended* to all harassment cases, instead of being confined only to opposite-sex cases, also should be rejected. See Paetzold, *supra* note 30. The central claim of this Article is that presumptions of discrimination should be rejected in all harassment cases. Instead, discrimination in harassment cases must be proven as it must be in all other types of discrimination cases and in the same way that it is proven in other types of cases.

normally would be a relevant factor in making the discrimination determination, but it is only a factor; the issue is whether sex motivated the conduct. The ultimate issue is whether discrimination was present.⁵³

The employer's burden in a mixed-motives case goes to the second element of a Title VII cause of action—the discrimination must affect a term or condition of employment—but, in this context, it is important to specify carefully the relationship between the two. Because the plaintiff recovers in a mixed-motives suit even when the employer successfully meets its burden,⁵⁴ the model recognizes that conduct can meet Title VII's "affect" requirement even if no employment decision would have been different if sex had not been considered. Sex "affected" a term or condition of employment when the employer used it as a motivating factor in making the employment decision. No additional proof is required. The employer's burden, which is in the remedies section of Title VII, merely acknowledges that a plaintiff cannot recover *damages or other personal relief* for an employment decision, even though it was "affected" by sex, unless the employer's consideration of sex also changed the decision.

In the typical mixed-motives case, no dispute exists about whether an adverse employment decision has been made. For example, in *Price Waterhouse v. Hopkins*,⁵⁵ the seminal mixed-motives case, it was undisputed that the plaintiff was denied partnership. The central issues in the typical case are whether sex played a role in the decision and, if so, whether the same employment decision would have been made even if sex had not played a role. Quid pro quo harassment cases fit very nicely into this framework. Generally, there is no dispute that the employer has made an adverse employment decision, for example, to deny a pay raise or promotion. The relevant questions are the same as in other mixed-motives cases: did sex play a role in the employment decision and, if so, would the employment decision have been the same even if sex had not played a role? Quid pro quo cases, then, are like *Price*

⁵³ Although it is crucial to ask the right question, I do not mean to imply at all that answering the question always will be easy. Fact-finders often will be called upon to make very subtle distinctions in deciding whether sex was a motivating factor. See, e.g., *Penry v. Federal Home Loan Bank*, 155 F.3d 1257, 1258 (10th Cir. 1998) (holding that acts of describing a mall roof in sexually-suggestive terms and taking plaintiff to a Hooters restaurant was relevant in determining whether conduct was motivated by sex); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000-01 (10th Cir. 1996) (finding sexual harassment, even though the ultimate reason for the harassment was professional jealousy, because the form the abuse took was motivated in part by the plaintiff's sex); *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167-68 (7th Cir. 1996) (holding that the words used to abuse the plaintiff, such as "sick bitch," were not sufficiently gendered to constitute sex discrimination).

⁵⁴ See Title VII § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B).

⁵⁵ 490 U.S. 228 (1989). See discussion *supra* notes 46, 49-50.

Waterhouse itself, in which it was undisputed that a term or condition of employment was affected; the crucial issue was what motivated the employment decision.⁵⁶

Hostile environment cases, on the other hand, often will present the issue of whether any employment practice was affected by the conduct at issue. By definition, no tangible aspect of employment has been affected. But the standard model of sexual harassment correctly recognizes an alternate route for meeting the "affect" element: harassment can be sufficiently severe or pervasive to "affect" the working environment. Thus, if the harassing conduct was discriminatory (in the sense that sex was a factor motivating the conduct) and if it was sufficiently severe or pervasive to affect the working environment, both elements of a discrimination-centered model of sexual harassment have been met.⁵⁷ On the other hand, if the conduct was not sufficiently severe or pervasive, no harassment cause of action would exist *even if the harassment was motivated by sex*.

This analysis of quid pro quo and hostile environment cases emphasizes that a Title VII cause of action requires proof of two basic elements: discrimination and an effect on a term or condition of employment. In quid pro quo cases, it is undisputed that a term or condition of employment has been affected.⁵⁸ The only remaining question is whether discrimination caused the change: was sex one of the factors motivating the change in the term or condition? If it was, the employer is liable, although it can reduce the extent of its liability by proving that the same change would have been made even if sex had not been a causative factor. In hostile environment cases, in contrast, the issue of whether the conduct affects a term or condition of employment is in dispute. The plaintiff must prove the element by demonstrating that the conduct was severe or pervasive. Even if the harassing

⁵⁶ This point is not undermined by the existence of mixed-motives or quid pro quo cases which contain a dispute about whether a term or condition of employment has been affected. Such cases undoubtedly exist. The point here is not that such cases do not exist, but rather that the crucial issue in these cases generally lies elsewhere.

⁵⁷ At this point in the mixed-motives model, the employer would have an opportunity to limit its liability by proving that the same employment outcome (the abusive working environment) would have occurred even if sex had not motivated the conduct. Although theoretically possible, it is quite unlikely that an employer would ever be able to meet this burden. The employer would have to prove that the environment would have been abusive even if the severe or pervasive harassing conduct had not occurred.

⁵⁸ In a very real sense, of course, this determination is merely definitional: a case is a quid pro quo case only if a term or condition of employment has been affected; otherwise it is a hostile environment case. This merely serves to emphasize the primary point, however. The attempt to fit a case within the quid pro quo paradigm should be viewed as one part of the plaintiff's attempt to prove the "affects" element of a Title VII case. (The other part is to prove causation.) If the plaintiff fails to fit within the quid pro quo paradigm, he or she must prove that a term or condition of employment has been affected by demonstrating that the sex-based conduct was severe or pervasive.

conduct was motivated by sex, if it did not affect a term or condition of employment (if it was not severe or pervasive), it does not violate Title VII.

This discrimination-centered model of sexual harassment requires a reconsideration of the elements in the standard model. As just indicated, the "severe or pervasive" element in the standard sexual harassment analysis is easy to place within the discrimination-centered model. This element is used only in hostile environment cases, as the alternative to the "affect a tangible aspect of employment" element in quid pro quo cases. Consequently, it addresses the second element of a Title VII cause of action. Not all discrimination necessarily "affects" a term, condition, or privilege of employment. In quid pro quo cases, the claim is that discrimination directly affected a term or condition. Otherwise, the conduct must rise to a certain level—to the level of "severe or pervasive" conduct—to meet Title VII's requirement of affect on a term or condition of employment.⁵⁹

The requirement of "sexual conduct" in the standard model relates to Title VII's discrimination element. But, as noted above, the requirement does not correlate very well with the "discrimination" element: "sexual conduct" can occur when no "discrimination" is present, and "discrimination" can occur when no "sexual conduct" is present.⁶⁰ "Sexual conduct" should be rejected as an element of a harassment cause of action in favor of discrimination. This proposition does *not* mean that "sexual conduct," as the term is understood in the standard model, is irrelevant. Instead, it means that sexual conduct is relegated from an *element* of a harassment cause of action to one type of *evidence* relevant to the discrimination issue.

Similarly, the "based on sex" element in most articulations of the standard model should be retained, but strengthened. Instead of relying on the heterosexual presumption in most cases, actual proof of discrimination should be required in every case. But it is very important to emphasize how lenient the standard is to prove discrimination. If sex is a motivating factor, then the discrimination element is met. Courts need not and should not carefully sort the possible motivations and reject a finding of discrimination if another possibility exists.⁶¹ Instead, courts merely should determine if sex was one of the motivating factors. At that point, the employer bears the burden of proving that the same employment result would have occurred even if sex had not entered into the decision. In a quid pro quo case, this would require a showing that the employer's decision regarding promotion, pay, or other tangible effect would have been the same even if sex had not affected the decision-making. In hostile environment cases, the employer's burden would be the impossible one of

⁵⁹ The Supreme Court has been quite clear that this is the role played by the "severe or pervasive" element. See *infra* notes 79-80, 88-89, 99-100 and accompanying text.

⁶⁰ See *supra* notes 20-26 and accompanying text.

⁶¹ See *supra* notes 35-41 and accompanying text.

proving that the work environment would have been abusive even if the severe or pervasive conduct had not occurred.⁶²

The “unwelcomeness” element is the most difficult to place within the discrimination-centered framework. In the standard model, the element applies in both quid pro quo and hostile environment cases. Because it applies in quid pro quo cases in which a term or condition of employment is affected by definition, the element appears to address the discrimination element instead.⁶³ But this result raises two independent problems. First, as a part of the discrimination element, unwelcomeness focuses on the wrong party. Instead of focusing on the actions of the perpetrator to determine if they are the product of discrimination, it focuses on the reactions of the victim. Precisely the same conduct undertaken with the same intent by a perpetrator may or may not be discrimination, depending on whether the conduct was or was not welcomed by the victim.⁶⁴ This does not fit within the normal or legal understandings of the meaning of discrimination, which focus on the perpetrator’s conduct. Second, when the perpetrator’s conduct *is* discriminatory but *not* unwelcome, the element becomes, in effect, a consent defense to conduct that

⁶² See *supra* note 57. The focus here is only on the discrimination element and, thus, assumes that the “affects” element has been met by proving that the conduct was severe or pervasive.

⁶³ Unwelcomeness may have an impact on the “affecting a term or condition” element of a Title VII action in hostile environment cases. The rationale may be that even severe or pervasive sexual conduct does not adversely affect the work environment if the plaintiff is an active participant in the conduct who does not find it unwelcome. See *Reed v. Shepard*, 939 F.2d 484, 491 (7th Cir. 1991); *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539 (S.D. Fla. 1995). If this were the role of unwelcomeness in harassment analysis, however, the requirement would not be applied in quid pro quo cases, in which the “term or condition” requirement is met directly.

⁶⁴ It is worth noting that this discrepancy would not be a problem if unwelcomeness went to the “affects” element of a Title VII claim. On that element, the focus appropriately is on the victim: has a “tangible aspect” of the victim’s employment been affected? Has the victim’s working environment been adversely affected? But, as noted in the text and the preceding footnote, unwelcomeness applies in both quid pro quo and hostile environment cases and, hence, cannot be limited to the “affects” element.

otherwise would be illegal discrimination.⁶⁵ In every other context, victim consent is not a defense to a claim of discrimination.⁶⁶

In a discrimination-centered framework, unwelcomeness is viewed most appropriately as a factor relevant, not to the discrimination element, but to the "affects" element.⁶⁷ This would mean that unwelcomeness would have no role in

⁶⁵ Another way to think about these two problems with the "unwelcomeness" element is to consider all four possibilities:

	Discrimination	No Discrimination
Unwelcome	A	B
Not Unwelcome	C	D

In Box A, the conduct is illegal because it is both unwelcome and discriminatory. Box B illustrates the first problem with the unwelcomeness element: if conduct falling into the box *is* harassment, then the unwelcomeness element is a substitute for the discrimination element even though it focuses on the wrong party. Box C illustrates the second problem with the unwelcomeness element: if conduct falling into the box is *not* harassment (because it fails the unwelcomeness element), then unwelcomeness is a defense to conduct that would otherwise be illegal discrimination. In Box D, there would be no claim because neither element is satisfied.

⁶⁶ The only possible exception to this rule are the very carefully crafted and limited waiver provisions of the Older Workers Benefit Protection Act ("OWBPA"). See Age Discrimination in Employment Act § 7(f), 29 U.S.C. § 626(f) (1994) ("ADEA"); see also Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1272-73 (1993) (asserting that the waiver provisions of the OWBPA "reflect a general acceptance of . . . age-based exit incentives," which "can be an effective means of thwarting achievement of the ADEA's goals"). Waiver under the ADEA clearly is distinguishable from the implicit waiver of the unwelcomeness requirement. Under the ADEA, waiver is authorized explicitly by the statute, in response to narrow and specific employer concerns, and subject to a long list of specific notice and other requirements. None of these factors are present in the unwelcomeness element.

⁶⁷ Another way of thinking about this relationship is that unwelcomeness is relevant to the issue of whether harm has occurred. As in many tort-based actions, harm is an essential element of an harassment cause of action. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984) (discussing the elements of negligence-based causes of action). In quid pro quo cases, the unwelcomeness inquiry is irrelevant because harm has been proven directly by showing that a "tangible aspect of employment" has been adversely affected. In hostile environment cases, the claim would be that a plaintiff who welcomes harassing conduct has not been harmed by the harassment. Similarly, an analogy could be made to assault in tort law in which the responses of the victim must be taken into account in determining liability. See Richard A. Epstein, *A Theory of Strict*

quid pro quo cases. Proof that discriminatory conduct adversely affected a tangible aspect of employment is direct and sufficient proof that the element has been met. Whether the victim welcomed the discriminatory conduct is irrelevant. Unwelcomeness, however, would play an indirect role in hostile environment cases. When the claim is that the discriminatory conduct is sufficiently severe or pervasive to alter the working environment, the environment of a victim who welcomes the conduct may not have been altered sufficiently to meet the "affect" element.⁶⁸ Consequently, as with "sexual conduct," unwelcomeness should be viewed as a factor relevant to an essential element of a harassment cause of action (the "affect" element), rather than as an element itself.⁶⁹

In summary, a discrimination-centered model of sexual harassment would focus on the two elements required in every Title VII cause of action: discrimination and an effect on a term or condition of employment.⁷⁰ Discrimination would be analyzed

Liability, 2 J. LEGAL STUD. 151, 172-73 (1973). Limiting the relevance of unwelcomeness also makes sense from this tort perspective because, as with intentional torts, the costs to the injurer of avoiding the injury are negative. Even if there is only limited harm to the victim because the conduct is not unwelcome, society gains if the law discourages injurers from expending resources to inflict such harm. See William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981).

⁶⁸ Analyzed in this way, the unwelcomeness inquiry merely is one application of the now familiar principle that relational problems should be viewed reciprocally. That is, one should analyze relational problems by considering both the actor "causing" the problem and the susceptibility of the other actor. Cf. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). The situation here is the converse of the normal situation in which the principle is applied. Ordinarily, the principle is applied to limit the ability of overly susceptible plaintiffs to recover. See KEETON ET AL., *supra* note 67, §§ 10, 12. In sexual harassment cases, the principle normally would be applied to preclude recovery by women who are especially resistant to the defendant's conduct. The overarching principle, however, is the same: the situation should be analyzed considering both actors.

⁶⁹ This position is similar to the well-known position of Professor Susan Estrich that unwelcomeness should be rejected as an element in both quid pro quo and hostile environment cases. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 826-34 (1991). I agree that unwelcomeness should be rejected as an element in both types of cases. In addition, Professor Estrich and I agree that unwelcomeness should be irrelevant in quid pro quo cases. In contrast to Professor Estrich, however, I recognize that evidence of unwelcomeness may be admissible in hostile environment cases because it is relevant to the issue of whether a term or condition of employment has been affected.

⁷⁰ This straightforward interpretation of the elements of a Title VII cause of action also help to explain the "romance" cases, cases in which discrimination claims grow out of an office romance. The leading romance case involved a claim by men who did not get a promotion because it was given to a woman who was romantically involved with the supervisor. The court held that this was not illegal sex discrimination. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir.), *cert. denied*, 484 U.S. 825 (1986); see also *Thomson v. Olson*, 866 F. Supp 1267 (D.N.D. 1994), *aff'd*, 56 F.3d 69 (8th Cir. 1995) (rejecting a claim that a supervisor's affair with another employee was sex

using the mixed motives model in the same way it is used in other types of discrimination cases. The “affects” element would be met directly in quid pro quo cases through proof that a tangible aspect of employment was adversely affected. In hostile environment cases, the element would be met through proof that the discriminatory conduct was sufficiently severe or pervasive to alter the working environment. As a result, the discrimination-centered model would modify the

discrimination). *But see* King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985) (finding sex discrimination when a male supervisor passed over a more qualified female in favor of a woman with whom he was having an affair). The other major category of cases within this class involves women who bring claims after they are denied benefits (such as a job or promotion) because they end or refuse to begin a romantic relationship with the supervisor. The courts generally hold that this is sex discrimination. *See* Dirksen v. City of Springfield, 842 F. Supp. 1117 (C.D. Ill. 1994); Babcock v. Frank, 729 F. Supp. 279 (S.D.N.Y. 1990). Finally, for purposes of discussion, consider a hypothetical claim brought by a woman who claims sex discrimination after she receives a promotion because of a consensual romantic relationship. Intuition tells us that this should not be a cognizable case of sex discrimination. (For obvious reasons, there has been no case like this, nor will there be.) Commentators generally have found the first two categories of these cases inconsistent and then argued that the *DeCintio* line of cases was wrongly decided. *See* MICHAEL J. ZIMMER ET AL., *TEACHER'S MANUAL FOR CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 67 (4th ed. 1997) (asserting that *DeCintio* is “clearly wrongly decided”); Mary C. Manemann, Comment, *The Meaning of “Sex” in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 662-63 (1989).

The analysis proposed in this section reconciles outcomes in the two (or three) situations. The first issue is whether there is discrimination. Focusing on the plaintiffs, was their sex a motivating factor for the decision? Would they have been treated differently if they had been of the opposite sex? In the first situation, the male plaintiffs cannot establish the discrimination element. If they had been of the opposite sex, they still would not have been selected for the job. They would have been in the same position as the many other women in the workplace who also were not selected. Their sex was not a motivating factor for placing them in the category of people who were not selected. This point clarifies that the focus should be on the sex of the plaintiff in the case: was his sex a motivating factor for the decision? The focus should not be on the role sex played in the outcome for someone else. On the other hand, the paramour herself in these examples *can* establish the discrimination element. Assuming a heterosexual supervisor, she would not have been selected for the relationship (in the second situation) or the promotion (in the third situation) had she been a man. Her sex was a motivating factor for the decisions. The paramour can establish a case of sex discrimination in the second situation because that discrimination is coupled with an adverse effect on a term or condition of her employment. Thus, she can establish both the discrimination and “affects” elements of a Title VII cause of action. On the other hand, the paramour cannot establish a case of sex discrimination in the third situation because, although there is discrimination, no term or condition of her employment has been adversely affected. By assumption, no “tangible” aspect of employment has been affected and, principally, because the conduct was not unwelcome, she cannot establish that the conduct was sufficiently severe or pervasive to have adversely affected her work environment. Thus, she cannot meet the “affects” element of a Title VII cause of action.

standard model of sexual harassment in several ways. First, unwelcomeness would not be an element of a harassment cause of action, although it might be relevant to the "affects" element in hostile environment cases. Second, sexual conduct would not be an element of the cause of action, but might be relevant to the discrimination element. Third, the "based on sex" element would be strengthened by requiring it in every circuit and rejecting both the heterosexual presumption and overly exacting parsing of motivation. Finally, the standard model's "severe or pervasive" element would be retained as an alternate way to satisfy the "affects" element in hostile environment cases.

III. THE DISCRIMINATION-CENTERED MODEL AND THE SUPREME COURT

The Supreme Court's sexual harassment decisions support a discrimination-centered model. Read closely, the cases carefully distinguish between the two basic elements of a Title VII claim and require proof of both. Equally significant, the cases fail to support the implicit claim of the standard model that a claim of sexual harassment should be treated as an exceptional type of discrimination claim.

The Supreme Court has decided only five sexual harassment cases under Title VII,⁷¹ but two of them are of limited use in analyzing the appropriate model of discrimination because they focus on the issue of employer liability.⁷² Nevertheless, despite the small number of cases, the Supreme Court has provided important guidance.

In *Meritor Savings Bank, FSB v. Vinson*,⁷³ the Supreme Court's first harassment decision, the Court began its discussion by citing section 703(a)(1) of Title VII.⁷⁴ The Supreme Court has begun each of its harassment decisions in this way.⁷⁵ This approach is significant for several reasons. First, it indicates that the Court is vitally interested in tying harassment law to the statutory language and, hence, to the rest of discrimination law. Second, it is this section of the statute that states clearly the two basic elements of a Title VII cause of action: discrimination and an effect on a term or condition of employment. These two elements define the essence of the discrimination-centered model of harassment, but are largely avoided and obscured

⁷¹ The Court also has decided one sexual harassment case under Title IX, 20 U.S.C. § 1681 (1994), but the holding of that case, like the two cases cited *infra* note 72, focused on the issue of employer liability and, as a result, is not relevant to this discussion. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998).

⁷² See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998).

⁷³ 477 U.S. 57 (1986).

⁷⁴ See *id.* at 63-64.

⁷⁵ See *Faragher*, 118 S. Ct. at 2282-83; *Ellerth*, 118 S. Ct. at 2264; *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor*, 477 U.S. at 63-64.

by the standard model. Third, the citations indicate that the Court views harassment as one type of disparate treatment discrimination. All disparate treatment cases are based on this language. The Court pointedly does *not* rely on section 703(a)(2) of Title VII, which is the statutory base for disparate impact discrimination.⁷⁶

Meritor begins Supreme Court consideration of sexual harassment by noting and distinguishing between the two basic elements of a Title VII claim. The discrimination element, the Court said, is met "without question" when a supervisor harasses a subordinate because of her sex.⁷⁷ The Court did not specify exactly why discrimination exists "without question" because the issue of whether discrimination was present in the case was not a contested issue.⁷⁸ Instead, the Court quickly turned to the question presented by the case: is a "tangible loss" necessary to meet the second element of a Title VII cause of action, effect on a term or condition of employment?⁷⁹ The Court held that it is not: "severe or pervasive" conduct is sufficient to meet the second element even if no tangible aspect of employment has been affected.⁸⁰ As a result, *Meritor* supports the discrimination-centered model both in the way the Court structured its decision and in the result.

Meritor is less clear on the role of unwelcomeness in harassment analysis. After spending the bulk of its decision considering whether an effect on a tangible aspect of employment was required to meet the second element of a Title VII cause of action, the Court turned to the district court's finding that no Title VII violation had occurred because the sexual relationship was "voluntary."⁸¹ The Court held that this was error. Voluntariness "in the sense of consent"⁸² is not a defense to a Title VII claim and so it was irrelevant.⁸³ At the same time, the Court said, the "gravamen of

⁷⁶ See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 n.13 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971). In 1991, Congress inserted into Title VII a more specific articulation of the disparate impact model of discrimination. See Title VII § 703(k)(1), 42 U.S.C. § 2000e-2(k)(1) (1994). The Court has not cited this provision in later sexual harassment cases either, again implying that sexual harassment is a variety of disparate treatment discrimination, not disparate impact discrimination.

I recognize that the claim that section 703(a)(2) is the statutory base of disparate impact discrimination is not an uncontroversial one, but it is unnecessary to examine this claim closely here. See, e.g., SULLIVAN ET AL., *supra* note 19, at § 4.2.1.2; Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 826-28 (1985). The point here is a modest one: this is one small piece of evidence that the Court views sexual harassment as one type of disparate treatment discrimination. If the piece is challenged, or even taken away entirely, the overall argument is largely unaffected.

⁷⁷ *Meritor*, 477 U.S. at 64.

⁷⁸ See *id.* ("Petitioner apparently does not challenge this proposition.").

⁷⁹ See *id.*

⁸⁰ *Id.* at 64-68.

⁸¹ *Id.* at 68.

⁸² *Id.* at 69.

⁸³ See *id.* at 68-69.

any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"⁸⁴

This language is unclear about the role of unwelcomeness in harassment law. One interpretation could be that unwelcomeness is central in both quid pro quo and hostile environment cases ("any sexual harassment claim") and, because it is the "gravamen" of the claim, that analysis in all harassment cases is quite distinct from analysis in other Title VII cases in which unwelcomeness is not an issue at all, much less the central issue. An alternate interpretation of the language would be that the Court was still talking, as it had been in the bulk of the decision, about the "affects" element of a hostile environment case: unwelcomeness is central to that element because, when no "tangible aspect" of employment has changed, the plaintiff's reaction to the conduct is crucial in determining whether it was sufficiently severe or pervasive to alter the working environment. The first interpretation supports the standard model of sexual harassment; the second interpretation supports the discrimination-centered model. Although the language admittedly is unclear, the second interpretation is better. Considering only *Meritor*, the first interpretation follows the language strictly and divorces this one sentence from the rest of the decision. The Supreme Court has cautioned against parsing language in court decisions as if they were statutes,⁸⁵ and only by doing that can one conclude that the language extends beyond the rest of the opinion, which focuses on the "affects" element. Indeed, to the extent the language applies to quid pro quo cases, it clearly is dicta. More significantly, however, the meaning of the language was clarified by the next harassment case decided by the Supreme Court, *Harris v. Forklift Systems, Inc.*⁸⁶

In *Harris*, the issue was whether serious damage to a plaintiff's psychological well-being was necessary to establish a hostile environment case. The Court held that it was not.⁸⁷ As in *Meritor*, the Court was clear that it was considering only the "affects" element of a Title VII cause of action—no dispute existed about the existence of discrimination.⁸⁸ To meet the "affects" element, the Court held, the plaintiff must establish that the conduct was sufficiently severe or pervasive to create a hostile or abusive environment both objectively to a reasonable person and subjectively to the individual plaintiff.⁸⁹ The Court's analysis supports the

⁸⁴ *Id.* at 68.

⁸⁵ *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.").

⁸⁶ 510 U.S. 17 (1993).

⁸⁷ *See id.* at 22.

⁸⁸ *See id.* at 21-23.

⁸⁹ *See id.* at 21-22.

discrimination-centered model, as in *Meritor*, by identifying the two elements of a Title VII cause of action and analyzing the case within that framework.

Harris also helps to resolve uncertainties about the Court's treatment of the unwelcomeness concept in *Meritor*. In *Harris*, the Court never used the word "unwelcome." This implies that unwelcomeness is not an element of every sexual harassment case; if unwelcomeness were an element of every sexual harassment cause of action, one would have expected the Court to at least mention the concept in its discussion. Instead, the Court clearly cited only the two elements in the discrimination-centered model: discrimination and an effect on a term or condition of employment.⁹⁰ Nevertheless, the Court alluded to unwelcomeness when it held that the victim subjectively must perceive the environment to be abusive to establish a hostile environment case. Like unwelcomeness, this requirement focuses on the reaction of the victim, rather than the actions of the perpetrator. The Court made it clear, however, that this requirement applied only in hostile environment cases and was relevant only to establish the "affect" element.⁹¹

The *Oncale* decision itself provides the most support for the discrimination-centered model. As in the earlier decisions, the Court focused on the two elements apparent in Title VII's statutory language.⁹² This, by itself, provides soft support for the discrimination-centered model. But, unlike the earlier decisions, *Oncale* focuses on the discrimination element, rather than the "affects" element. The decision strongly supports the discrimination-centered model, while severely undermining the standard model.

On discrimination, *Oncale* began by relying on nonharassment cases to inform the meaning of discrimination in harassment cases. In cases other than harassment

⁹⁰ See *id.* at 21 ("When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." (citations omitted)).

⁹¹ The concurring opinions of Justices Scalia and Ginsburg also focused on the "affects" element. Justice Scalia, however, made one statement which tends to support the standard model of sexual harassment: "As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." *Id.* at 24 (Scalia, J., concurring). This statement supports the standard model primarily because it does not mention discrimination as an element of the cause of action, but instead requires only "sex-related conduct." For two reasons, however, the language should not be overemphasized. First, it appeared in an opinion that focused on the "affects" element. Justice Scalia was not attempting to define precisely all the elements of a cause of action; instead, his statement was intended as an expression of concern about the vagueness of the standard for meeting the "affects" element. Second, in a later majority opinion, Justice Scalia made it clear that discrimination (not "sex-related conduct") was central to a harassment cause of action. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002-03 (1998).

⁹² See *Oncale*, 118 S. Ct. at 1001-03.

cases, the Court said, it had never found preclusive the fact that the alleged discriminator was of the same sex or race as the purported victim.⁹³ As a result, the Court held that that would not be a determinative factor in harassment cases either.⁹⁴ For our purposes, this analysis has significance beyond the holding because it indicates that, to the Court, discrimination is the same in harassment cases as it is in other cases. This supports the discrimination-centered model, which adheres to that position, but not the standard model, which analyzes discrimination in harassment cases differently than in other cases.

The Court then went on to discuss affirmatively the meaning of discrimination in harassment cases. In determining the appropriate model for analyzing sexual harassment cases, this discussion is important in two respects. First, in three different places, the Court flatly rejected the "sexual conduct" element of the standard model.⁹⁵ Indeed, the Court stated that the sexual content of the conduct was not the issue; instead, the issue was whether the conduct, regardless of its sexual content, constituted "*discrimina[tion]* . . . because of . . . sex."⁹⁶ Second, the Court's discussion of discrimination in harassment cases closely tracked the meaning of discrimination in other cases, without actually delineating a single model of analysis. The Court's discussion indicated a willingness to find discrimination using a type of but-for test: would the conduct have occurred if the victim were of the opposite sex?⁹⁷ But the Court also alluded to the mixed-motives model: was the conduct motivated

⁹³ See *id.* at 1001. For this proposition, the Court cited *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), and *Castaneda v. Partida*, 430 U.S. 482 (1977).

⁹⁴ See *Oncale*, 118 S. Ct. at 1002.

⁹⁵ See *id.* ("We have never held that workplace harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations." "[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex"; but "the plaintiff . . . must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'").

⁹⁶ *Id.*

⁹⁷ The Court alluded to this test of discrimination in a couple of places. Quoting from Justice Ginsburg's concurrence in *Harris*, the Court said: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 1002 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Expanding on this concept, the Court said:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.

Oncale, 118 S. Ct. at 1002.

by sex?⁹⁸ The Court's discussion, then, tracked the treatment of discrimination elsewhere when the Court accepted different ways of proving disparate treatment discrimination, but insisted that discrimination, by whatever method, be proven.

In *Oncale*, the Court also discussed the "affects" element of a harassment action. The Court said that harassment cases would not expand Title VII into a "general civility code" because the "affects" element requires that the conduct be severe or pervasive.⁹⁹ This requirement is "crucial," the Court said, because it ensures that "courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'"¹⁰⁰ This discussion is significant both for what it says and what it fails to say. In the discussion, the Court clearly distinguished between the discrimination element, which it discussed earlier in the opinion, and the "affects" element, which it discussed here. Thus, the discussion is significant in what it says because it emphasized once again that harassment cases involve the same two elements as other discrimination cases, and not a different and unique set of elements. The discussion also is significant because of what it fails to say. Once again, as in *Harris*, the Court failed to mention unwelcomeness. The fall of unwelcomeness from the "gravamen" of a harassment case in *Meritor* to nary a mention in *Harris* and *Oncale* supports, once again, the central thesis of this Article: that harassment cases do not require a unique and idiosyncratic set of elements, but rather are merely one category of discrimination that can be fit into the general analytical framework of Title VII.

In sum, the Supreme Court harassment cases provide strong support for a discrimination-centered model of sexual harassment, while undermining the standard model. Read carefully, all of the Supreme Court decisions attend to the two basic elements of a Title VII cause of action: discrimination and an effect on a term or condition of employment. Only the earliest case, *Meritor*, seems to require a distinctive element—unwelcomeness—and the force of that language in *Meritor* has been undermined by inattention in later cases. The standard model finds little support in the Supreme Court decisions. In *Oncale* particularly, the Court explicitly rejected sexual conduct as a substitute for discrimination. Similarly, *Oncale* implicitly rejected the heterosexual presumption of discrimination by emphasizing the requirement that discrimination must be proven.

IV. THE DISCRIMINATION-CENTERED MODEL AND THE ACADEMIC LITERATURE

In this section, I will discuss two aspects of the vast academic literature on sexual harassment. First, I will discuss how the discrimination-centered model meshes with

⁹⁸ See *Oncale*, 118 S. Ct. at 1002.

⁹⁹ *Id.* at 1002-03.

¹⁰⁰ *Id.* at 1003.

the predominant theories of sexual harassment in the workplace. The short answer is: not very well. Viewing the academic theories of sexual harassment through the lens of the discrimination-centered model, however, facilitates a critique of those theories and helps to sharpen the meaning and scope of the discrimination-centered model. In this section, I also will discuss the literature that challenges sexual harassment law on First Amendment grounds. The discrimination-centered model fully addresses these concerns.

A. *Sexual Harassment Theory*

Sexual harassment has fostered a large body of scholarly work about its underlying theory. This section will consider three of the most important current approaches to the issue: the subordination approach, the respect approach, and the competence-centered approach.¹⁰¹ This section will critique these alternative approaches through the lens of the discrimination-centered model. In addition, because the discrimination-centered model of sexual harassment is different in significant ways from each of these approaches, the discussion will help to bring the discrimination-centered model into sharper focus.

1. The Subordination Approach

The subordination approach to sexual harassment is ubiquitous in the legal literature on the subject.¹⁰² Rather than attempt to survey all of it, this section will focus on the important, recent version articulated by Professor Katherine M. Franke.¹⁰³

¹⁰¹ For space and energy reasons, I have not considered other important approaches. See, e.g., Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151 (1995); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990).

¹⁰² Professor MacKinnon's seminal book, *Sexual Harassment of Working Women: A Case Study of Discrimination*, published in 1979, has been cited in 599 articles. Westlaw search, Journals & Law Reviews database (Nov. 30, 1998). Obviously, not all of these are supportive of the anti-subordination approach, nor are they all about sexual harassment, but the large number of citations does indicate that this general approach to discrimination is well-known and often discussed.

¹⁰³ Professor Franke's principal articles focusing on sexual harassment are: Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245 (1998) [hereinafter Franke, *Gender*]; and Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997) [hereinafter Franke, *What's Wrong*].

Important differences exist within the subordination approach. By emphasizing Professor Franke's work, I do not mean to diminish the important contributions made by many other scholars. Rather, my goal simply is to keep the discussion manageable and

The subordination approach, in general terms, contends that a theory focusing merely on differences in treatment is inadequate. Instead, sexual harassment is viewed as a structural problem in which society upholds and reinforces inferiority. In Professor MacKinnon's original version, the theory was conceptualized as men subordinating women.¹⁰⁴ Sexual harassment was one tool for enforcing that type of subordination.¹⁰⁵ Professor Franke's view is broader.¹⁰⁶ According to her, the subordination problem includes men subordinating women, but that is only one example of the broader problem: practices which maintain and enforce heteropatriarchal gender norms in the workplace.¹⁰⁷

A central part of Professor Franke's major work on sexual harassment is a critique of the but-for approach to determining whether harassment is discrimination: the harassment is discrimination if the harasser would not have engaged in the conduct "but for" the victim's sex.¹⁰⁸ At base, the but-for test of discrimination is problematic, according to Professor Franke, because it reduces the test of discrimination to a determination of whether the harasser sexually desired the victim. This equation of the but-for test with sexual desire produces an undue emphasis on sexual orientation and focuses attention on the subjective state of the harasser, rather than on the conduct as experienced by the victims. Professor Franke views these as serious problems.¹⁰⁹

Professor Franke's critique of the but-for approach to discrimination is problematic for two related reasons. First, she critiques the but-for test of discrimination even though it is not the appropriate test for use in harassment cases.

focused.

¹⁰⁴ See MACKINNON, *supra* note 1, at 4 (arguing that the antistatutory approach "understands the sexes to be not simply socially differentiated but socially *unequal*. In this broader view, all practices which subordinate women to men are prohibited.").

¹⁰⁵ See *id.* at 191-92 ("Sexual harassment is a clear social manifestation of male privilege incarnated in the male sex role that supports coercive sexuality reinforced by male power over the job.").

¹⁰⁶ Although Professor Franke critiques Professor MacKinnon's particular version of antistatutory, she nevertheless builds her vision of sexual harassment on an antistatutory base: "I regard the anti-subordination view of sexual harassment as the most principled account of the wrong of sexual harassment, [but it must be modified]." Franke, *What's Wrong*, *supra* note 103, at 730. See Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533, 1549 n.66 (1994) (reviewing KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS* (1993)); Franke, *Gender*, *supra* note 103, at 1250-54; Franke, *What's Wrong*, *supra* note 103, at 761-62.

¹⁰⁷ See Franke, *Gender*, *supra* note 103, at 1246; Franke, *What's Wrong*, *supra* note 103, at 772.

¹⁰⁸ See Franke, *What's Wrong*, *supra* note 103, at 729-59.

¹⁰⁹ See *id.*

In *Price Waterhouse v. Hopkins*,¹¹⁰ the Supreme Court considered and explicitly rejected the but-for test: "To construe the words 'because of' [in Title VII] as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."¹¹¹ The Court opted instead for a "motivating factor" test, which later was incorporated into Title VII: a plaintiff successfully proves discrimination when she proves that "her gender played a motivating part in an employment decision."¹¹² Professor Franke's failure to analyze the correct test is especially troubling because in *Price Waterhouse* the Court applied the motivating factor test in a factual context that, even though it did not involve sexual harassment directly, was analogous. The case involved both direct, blatant evidence of discrimination¹¹³ and sexual stereotyping,¹¹⁴ both of which often are present in harassment cases. In her lengthy critique of the but-for test,¹¹⁵ Professor Franke never mentions *Price Waterhouse*'s rejection of it as the appropriate standard (she never mentions the case at all), nor does she discuss the test which ought to be applied, the motivating factor test.¹¹⁶

Professor Franke's critique of the but-for test also is problematic because of its equation of the but-for test with sexual desire. Professor Franke moves much too quickly from asserting that sexual orientation under the but-for approach often "plays a central role in determining whether the offending sexual conduct was 'because of sex,'"¹¹⁷ to the claim that, under the but-for approach, "a harasser only sexually harasses members of the class of people that he or she sexually desires."¹¹⁸ Her assertion is that because *some* cases using the but-for approach focus on sexual orientation and sexual desire, therefore *all* sexual harassment cases depend on a showing of sexual desire. She escalates a factor that sometimes is used as evidence

¹¹⁰ 490 U.S. 228 (1989).

¹¹¹ *Id.* at 240.

¹¹² *Id.* at 258. See also Title VII § 703(m), 42 U.S.C. § 2000e-2(m) (1994).

¹¹³ Among other reasons, men evaluating the plaintiff for promotion in *Price Waterhouse* objected to her "because it's a lady using foul language" and advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse*, 490 U.S. at 235.

¹¹⁴ See *id.* at 235-36, 255-58.

¹¹⁵ Professor Franke's critique of the but-for test covered 18 pages. See Franke, *What's Wrong*, *supra* note 103, at 729-47.

¹¹⁶ Professor Franke's avoidance of the motivating factor test of *Price Waterhouse* is curious because, in another article, she lauds the case as an "inspiration." Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 95 (1995). Her position may be that the courts have not followed the guidance of *Price Waterhouse* appropriately in sexual harassment cases, and I would agree with that conclusion. But that position is quite a different type of argument than the one Professor Franke makes when she ignores this important strand in the law, while discussing another strand that has been explicitly rejected.

¹¹⁷ Franke, *What's Wrong*, *supra* note 103, at 732.

¹¹⁸ *Id.*

of discrimination ("we find discrimination because the perpetrator has sexual desire only for women and, therefore, would not have engaged in this conduct had the victim been a man") to a factor that defines the entire class of sexual harassment cases ("sexual harassment cannot have occurred because the perpetrator did not sexually desire the victim"). Setting up the problem in this way clearly is incorrect.¹¹⁹ Many cases find sexual harassment in the absence of sexual desire; sexual harassment also can occur because of misogyny,¹²⁰ to mark jobs as masculine,¹²¹ and for a host of other reasons.¹²² Moreover, it is quite ironic that Professor Franke would incorrectly state the problem in this way because she then proceeds to critique the but-for approach precisely because it is underinclusive. The but-for/sexual desire approach is erroneous because it fails to capture all the sexual harassment which should be prohibited.¹²³ To be sure, Professor Franke is correct in making that statement, but it is a telling point in her analysis only because she sets up the point by overstating the importance of sexual desire in sexual harassment cases generally. She very effectively blows over the straw figure she constructed for herself, but fails to consider the very real person standing nearby.

In addition to her critique of the but-for test of discrimination, Professor Franke also forwards an affirmative vision of the wrong of sexual harassment: "sexual harassment is sex discrimination . . . because its use and effect police hetero-partriarchal gender norms in the workplace."¹²⁴ But when she applies this standard to the three sets of cases around which she bases her critique of harassment law, she finds that it does not do a very good job. First, she applies her standard to situations in which a gay perpetrator harasses someone because of sexual desire. Her theory does not work here, she recognizes, because "no larger cultural gender orthodoxy is being policed, perpetuated or enforced."¹²⁵ Her solution is to fall back on the but-for test of discrimination, understood by her as discrimination because of sexual desire, which is the same test she criticized and found unacceptable earlier in the article.¹²⁶

¹¹⁹ See IRVING M. COPI, *INTRODUCTION TO LOGIC* 172 (3d ed. 1968) ("The conclusion of a valid argument can not go beyond or assert any more than is (implicitly) contained in the premises.").

¹²⁰ See, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991); *Morris v. American Nat'l Can Corp.*, 730 F. Supp. 1489, 1496 (E.D. Mo. 1989).

¹²¹ See, e.g., *Smith v. St. Louis Univ.*, 109 F.3d 1261 (8th Cir. 1997). See also the many cases cited by Professor Schultz in Schultz, *supra* note 20, at 1762-74.

¹²² See, e.g., *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996 (10th Cir. 1996) (discussing a plaintiff who was harassed because of jealousy about her success).

¹²³ See Franke, *What's Wrong*, *supra* note 103, at 734.

¹²⁴ *Id.* at 772. See also Franke, *Gender*, *supra* note 103, at 1246 (discussing Professor Kathryn Abrams's critique of Franke's vision of the wrong of sexual harassment as a gender-based harm).

¹²⁵ Franke, *What's Wrong*, *supra* note 103, at 767.

¹²⁶ See *id.* She attempts to justify this inconsistency by arguing that the but-for test is

In this circumstance, however, the victim should be able to use the but-for test and prove discrimination based on the perpetrator's sexual desire. Second, she applies her standard to same-sex harassment when the conduct is sexual in nature, but of the "rough house" or "horsing around" variety. Once again, Professor Franke recognizes that her theory does not apply very easily because it cannot be assumed, as it often can be in the opposite-sex equivalent, that the harassment is enforcing "larger cultural norms of women as sex objects and men as sex subjects."¹²⁷ In this case, Professor Franke argues that the victim must meet a higher standard of proof in demonstrating that there actually was a gender orthodoxy in the workplace which the conduct was serving to enforce. She recognizes that this higher burden means that some very objectionable conduct at work will not fall within her conception of sexual harassment, but calls for new laws (or more rigorous enforcement of old ones) to deal with that class of cases.¹²⁸ Third, she applies her standard to situations in which (usually) a gay man is targeted in the workplace because he fails to conform to hetero-masculine norms. Her theory applies in a very straightforward way to this situation, instructing that it is clearly illegal, which it ought to be.¹²⁹

Professor Franke's critique of the but-for approach to harassment and her affirmative theory provide a useful lens through which to view a discrimination-centered approach. First, her cramped view of the but-for test emphasizes the strength and expansiveness of the motivating factor test which ought to be applied in harassment cases. The correct inquiry is not whether the conduct was motivated by sexual desire, nor is the burden on the plaintiff to isolate sexual desire from the other possible motivating factors and prove that it, and not the others, was the true motivating factor. Rather, the plaintiff need merely prove that sex was one of the factors motivating the conduct. This approach to finding discrimination solves most of the problems Professor Franke noted with the but-for approach. For example, Professor Franke noted that the focus on sexual desire incorporated a hetero-sexist point of view because sexual desire tended to be assumed in opposite-sex cases, but needed to be proven in same-sex cases.¹³⁰ Properly applied, the motivating factor test would not do that. That the sex of the victim motivated the perpetrator would need to be proven in every case, including opposite-sex cases, and it could be proven in a wide variety of ways, including but not limited to proof of sexual desire. In

inappropriate elsewhere because it is too narrow a standard: sexual harassment should include instances of conduct because of sexual desire, but it should not be limited to those circumstances. *See id.* at 767 n.398. Nevertheless, as in the situation of harassment by a gay person because of sexual desire, the but-for test should be available as one avenue for proving discrimination. This argument depends on Franke's overly constricted view of the meaning of discrimination in the ordinary case.

¹²⁷ *Id.* at 769.

¹²⁸ *See id.* at 769-70.

¹²⁹ *See id.* at 770-71.

¹³⁰ *See id.* at 735-37.

particular, the three cases Professor Franke cites as problematic (cases of gay men being harassed) would be handled well by a motivating factor analysis: the harassers were motivated in part by the sex of the victims because they would not have harassed women in any of the situations.

Similarly, Professor Franke complains that the but-for test is problematic because it focuses attention on the motivation of the harasser, rather than on the consequences of harassment for the victims.¹³¹ For example, Professor Franke says, male supervisors may not know that a female subordinate may regard comments like "you have a great figure" or "nice legs" as offensive.¹³² The motivating factor analysis eases this concern. Professor Franke assumes that, because the supervisor did not know that the comments would be offensive, they could not meet the but-for test of discrimination. But that is not the case with the motivating factor analysis, properly applied. The question to ask is: would the supervisor have made these comments to a male subordinate? If not, and it seems highly unlikely, the motivating factor test is satisfied—discrimination has been proven.¹³³ This example emphasizes that the motivating factor test, properly applied, is a very generous test for proving discrimination. The issue is not *why* the supervisor made the statements (for example, was it because of sexual desire?), but rather whether the conduct was motivated at least in part by the sex of the recipient. Professor Franke's concern that the test focuses attention on the motivation of the harasser, rather than the consequences on victims, is still present, of course. But that concern is ameliorated when one considers the entire discrimination-centered model, instead of only the discrimination element. The discrimination element, it is true, focuses on the motivation of the harasser. The "affects" element, on the other hand, focuses on the victim; it asks very directly whether the conduct affected a term or condition of the victim's employment. The discrimination-centered model pays attention to both the motivation of the harasser (through the discrimination element) and the effect of the conduct on the victim (through the "affects" element).

Professor Franke's analysis also provides a useful lens through which to view the discrimination-centered model because it emphasizes the broad range of conduct which would be captured by the model—a much broader range than Professor Franke's own model. Consider the three same-sex situations to which she applies her model. The first situation of same-sex harassment based on sexual desire, which is *not* harassment under her model, most likely would be under a discrimination-

¹³¹ See *id.* at 745-46.

¹³² See *id.*

¹³³ This is not to say that a successful case of sexual harassment has been established. In addition to proving discrimination, the plaintiff would have to prove that the conduct affected a term or condition of employment. These kinds of statements, without more, most likely would not be sufficiently severe or pervasive to meet the second basic element of a hostile environment case.

centered model. Certainly, the discrimination element would be satisfied because a gay harasser would not engage in the same objectionable conduct toward someone of the opposite sex.¹³⁴ Similarly, Professor Franke's second situation (same-sex, but sexually-oriented rough-housing and horsing around) is quite problematic under her analysis, but easy under a discrimination-centered model. If, to use Professor Franke's examples, the perpetrators are teasing men with plastic penises and using language like "suck my dick,"¹³⁵ but would not do so with women,¹³⁶ the discrimination element is satisfied under a discrimination-centered model. Finally, Professor Franke's third situation (targeting a man because he is not sufficiently masculine) would be discrimination even more easily under a motivating factor analysis than under Professor Franke's analysis. Instead of having to prove that there are hetero-patriarchal norms in this workplace and that this conduct was undertaken to enforce them, one simply need prove that women in the workplace are not targeted for being insufficiently masculine. In sum, the discrimination-centered model prohibits a broader range of objectionable conduct than Professor Franke's suggested analysis, and does so in a way that is in line with discrimination law as applied outside of harassment law, that is more intuitively identifiable as discrimination, and that is more accessible to the courts and juries who will be applying it.¹³⁷

¹³⁴ Although this example clearly would meet the discrimination element in the discrimination-centered model, it is not clearly sexual harassment under the model because it also must meet the "affects" requirement. It is possible that the conduct in this example would neither affect a tangible aspect of employment nor be sufficiently severe or pervasive to alter the working environment. Elsewhere in her article, Professor Franke appears to accept limiting prohibited conduct to that which rises to a particular level of offensiveness. See Franke, *What's Wrong*, *supra* note 103, at 770.

¹³⁵ See *id.* at 768.

¹³⁶ It is important to note that no women need be present in the workplace to make this showing. The relevant question to ask is: would the conduct have occurred if the victim were a woman? See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). In a sense, this question *always* is hypothetical because the actual victim is never, at the same time, both his own sex and the opposite sex. Thus, that the question is hypothetical in the case in which no person of the opposite sex is in the workplace does not make the case any different, theoretically, from any other case. Proving the discrimination may be more difficult because one cannot point to persons of the opposite sex who have been treated differently, but even that evidence only goes to prove the central underlying issue which necessarily is hypothetical: would the conduct have been different if this particular person was of the opposite sex? Thus, those who criticize the motivating factor analysis because it does not apply to one-sex workplaces are off base.

¹³⁷ Viewed in this way, Professor Franke's primary method of analysis is ironic. Her general mode of analysis is to examine cases at the margin to determine what light they shed on cases at the center. See Franke, *supra* note 116, at 7; Franke, *What's Wrong*, *supra* note 103, at 759. The irony is that that mode of analysis tends to cut against the antistatutory approach to harassment. The antistatutory approach applies quite well at the center. Most of the cases do involve heavily gendered workplaces in which men act to maintain and

The discrimination-centered model also is broader than Professor Franke's in another way. The discrimination-centered model relies on a generic conception of discrimination which has been applied across the full range of types of discrimination, such as race, age, and disability discrimination. Professor Franke's model, in contrast, applies to these other types of discrimination, if at all, only uncertainly and in quite modified versions.¹³⁸ The concept of discrimination as the maintenance and enforcement of hetero-patriarchal gender norms in the workplace simply does not apply to harassment because of one's race, age, or disability. Professor Franke may be able to make analogous arguments with respect to these other types of harassment, but she has not done so yet and, even if she did, the analysis necessarily would differ in significant respects from her analysis of sexual harassment. The discrimination-centered model provides one conceptualization of the legal violation which is both broad enough to encompass all types of harassment and which is firmly tethered to the body of antidiscrimination law. Sexual harassment law is not exceptional, but rather it is merely one type of prohibited discrimination.

Finally, Professor Franke's approach tends to highlight the extent to which the discrimination-centered approach is tied to Title VII, the statutory base of sexual harassment law. In contrast to the many connections between both the language of Title VII and the language of the Supreme Court cases discussing sexual harassment,¹³⁹ Professor Franke's approach has only a very tenuous connection with either. Nothing in Title VII says anything about "hetero-patriarchal gender norms," nor is there any direct supportive language in the Supreme Court cases.¹⁴⁰ This, obviously, does not mean that the dominance-based theories are wrong. It is common, after all, for academics to provide better explanations and deeper theories for decisions than the courts have been able to do on their own.¹⁴¹ That, indeed, is

enforce that culture. But, as Professor Franke acknowledges, the approach applies only very uneasily to cases at the margin, such as the first two situations discussed in the text.

¹³⁸ The plural is used here advisedly. Professor Franke's rationale is likely to require separate theories for each of these other types of harassment.

¹³⁹ See *supra* text accompanying notes 71-100.

¹⁴⁰ In contrast to Supreme Court jurisprudence in which there is very little support for antisubordination theory, occasional support can be found in some lower court opinions. See *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 861 n.15 (3d Cir. 1990) ("[H]ostile environment cases depend on the underlying theory that '[w]omen's sexuality largely defines women as women in this society, so violations of it are abuses of women as women.'" (quoting MACKINNON, *supra* note 1, at 174)). But see Gillian K. Hadfield, *Sexual Harassment*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 455-57 (Peter Newman ed., 1998) (arguing that the Supreme Court treats harassment as personal tort-like abuse, rather than as systemic, society-wide harm as contemplated by antisubordination theory).

¹⁴¹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (articulating a process theory of judicial review); Guido Calabresi & A.

one of the functions of academics. Having said that, however, the extent to which an approach aligns with statutory language and case law is generally viewed as quite important, especially by legislatures and courts (if not always academics). And this alignment is a factor cutting in favor of the discrimination-centered approach and against Professor Franke's approach.

2. The Respect Approach

Professor Anita Bernstein articulates another approach to sexual harassment. In an influential article, she argues that the current approach which emphasizes reasonableness should be replaced with an approach based on respect.¹⁴² The primary question to be asked in harassment cases is: "Did [the employer] behave as a respectful person toward [the plaintiff]?"¹⁴³ As others have noted, Professor Bernstein supports her thesis impressively:

She seeks not only to resolve a protracted controversy about the proper standpoint from which to assess sexual harassment but also to reconceptualize the wrong and to address a range of ancillary problems in the doctrine. She seeks to situate sexual harassment on a continuum between employment discrimination and intentional tort and to use a rich backdrop of philosophical literature to inform some practical legal questions. Her account offers many features that enrich the existing literature on sexual harassment: a meticulous and nuanced history of the complications entailed by the reasonableness standard; an attentive, sympathetic account of some subjective injuries imposed by harassing conduct; a provocative argument for enhanced employer liability; and a commonsense, comprehensible instruction for juries about what to look for in a sexual harassment case.¹⁴⁴

Professor Bernstein underplays the relationship between her theory and Title VII. At first glance, the two appear to be completely unconnected. Title VII says nothing directly about respect, nor does the concept of respect as articulated by Professor Bernstein say anything directly about discrimination. In a single paragraph, however,

Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (articulating a common framework for analyzing property and tort issues); Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962) (articulating a theory of secondary boycotts).

¹⁴² See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446 (1997).

¹⁴³ *Id.* at 522.

¹⁴⁴ Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1175 (1998) (citations omitted).

Professor Bernstein explains how the concept of respect fits into a Title VII cause of action:

[E]ven when the defendant did not behave as a respectful person, a Title VII claim might fail under the respectful person standard because of its poor fit with the antidiscrimination purposes of the statute. Disrespectful conduct not based on sex would remain outside the remedial boundaries of Title VII, consistent with the view now prevailing in the courts. When disrespectful conduct is too trivial, isolated, or ambiguous to be deemed "pervasive," summary judgment would be proper under the respectful person standard.¹⁴⁵

Although helpful, this language is not clear about two possible fits between the respectful person standard and Title VII. First, Professor Bernstein may mean that the respectful person standard is separate and independent from the other Title VII requirements. To establish a Title VII claim one must prove that the employer did not act as a respectful person, *and* that the employer discriminated, *and* that the conduct was pervasive. The jury instructions suggested by Professor Bernstein support this interpretation, although they place the respectful person standard at the center and the others at the periphery.¹⁴⁶ Alternatively, the respectful person standard may be the viewpoint from which one decides whether the employer's conduct was "pervasive."¹⁴⁷ Under this view, the respectful person standard merely would be a replacement for the reasonable person/woman standard, which long has been

¹⁴⁵ Bernstein, *supra* note 142, at 505 (citations omitted).

¹⁴⁶ The jury instructions proposed by Professor Bernstein begin with one paragraph which provides a standard statement of the elements of a cause of action for hostile environment sexual harassment, including discrimination and severe or pervasive conduct. The remaining six paragraphs, however, focus on what it means to behave as a respectful person. See Bernstein, *supra* note 142, at 521-24.

¹⁴⁷ Following Professor Bernstein's lead, I am using "pervasive" here as shorthand to refer to the requirement that the conduct be "sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." Bernstein, *supra* note 142, at 505, 522.

controversial.¹⁴⁸ A later article by Professor Bernstein supports this interpretation, although it also is less than transparent.¹⁴⁹

Once again, Professor Bernstein's approach is a useful lens through which to view the discrimination-centered model. Under the first interpretation, Professor Bernstein's approach to sexual harassment is necessarily narrower than the discrimination-centered approach. The discrimination-centered approach requires only that the employer discriminate and, in a hostile environment case, that the conduct be pervasive. Professor Bernstein's approach requires proof of an additional element: lack of respect. The relevant class of cases, then, would be those in which the employer discriminated through pervasive conduct, but nevertheless acted as a respectful person. The discrimination-centered model would call for liability in this class of cases; Professor Bernstein's approach would not. What kind of conduct might fall into this class? Employers who regularly protected women from hard or physical work would be one example,¹⁵⁰ the stereotype would be the old-fashioned southern gentlemen as employer.¹⁵¹ Professor Bernstein responds to this, in her

¹⁴⁸ Compare *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (applying the reasonable woman standard), with *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995) (applying the reasonable person standard). See generally Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992) (discussing use of the "reasonable woman" standard in sexual harassment law, battered woman self-defense law, and rape law); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (offering an "explanation for how the reasonable person test retains its legitimacy in the face of numerous analytical weaknesses." *Id.* at 1177-78); Robert Unikel, Comment, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326 (1992) (arguing that a "modified" reasonable person standard is more appropriate than the reasonable woman standard because the latter is impracticable in light of male judges' and jurors' inability to discern the qualities of a reasonable woman without resorting to gender stereotypes).

¹⁴⁹ In a later article, Professor Bernstein says that her Harvard article is a "narrow work" which merely "proposes to replace the 'reasonable person' (and reasonable woman, man, target, victim, and so forth) of hostile environment sexual harassment doctrine with the 'respectful person.'" Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231, 1232 (1998) (citation omitted). On the same page, however, Professor Bernstein also says that her article asks much broader questions: "What is [hostile environment] sexual harassment? . . . What does it mean to say—for purposes of dispute resolution and the implicit function of private law as a source of communication between citizens and the state about justice—that a defendant ought to face liability for hostile environment sexual harassment?" *Id.*

¹⁵⁰ Cf. SULLIVAN ET AL., *supra* note 19, § 8.8 (discussing the effect of Title VII on state laws intended to protect female workers).

¹⁵¹ Professor Abrams has made this point much better than I by pointing out that the concept of respect can be heavily gendered. See Abrams, *supra* note 144, at 1179-84.

typically straightforward and pithy manner, by claiming that “the pseudo-respectful Confederate soldier and the pedestals he erects in the path of progress” are likely to be very small in number and quite unsympathetic to juries.¹⁵² I do not know if she is correct on those two empirical points but, even assuming that she is, the argument does not undermine the basic point of this comparison with the discrimination-centered model: Professor Bernstein’s approach necessarily is narrower because it adds an extra element to the cause of action.

The second interpretation of Professor Bernstein’s respect approach is that it merely indicates the perspective from which one should analyze the pervasiveness requirement: one should analyze it from the perspective of a respectful person, rather than that of a reasonable person. Viewed in this way, Professor Bernstein highlights one of several issues that the discrimination-centered approach put forward in this Article does not address. The discrimination-centered approach requires that the conduct be pervasive, but does not address the more attenuated issue of perspective. That is an important issue, as is the issue of employer liability for harassing conduct. But both are outside the scope of this Article, which focuses instead on identifying the basic elements required to establish the existence of sexual harassment under Title VII.

Finally, Professor Bernstein’s approach emphasizes once again how closely tethered the discrimination-centered approach is to the statute and cases. In contrast to Professor Franke’s approach, which merely did not find much support in Title VII and the cases,¹⁵³ Professor Bernstein’s approach flirts with direct conflict. Professor Bernstein accepts “incivility” as an alternative articulation of “respect,”¹⁵⁴ which approaches direct conflict with the Supreme Court’s reluctance to create a “general civility code for the American workplace.”¹⁵⁵ Similarly, when respect is viewed as an alternative to reasonableness, Professor Bernstein’s view contrasts sharply with the Court’s endorsement, albeit in dicta, of the “reasonable person” standard.¹⁵⁶ By contrast, as discussed earlier, the discrimination-centered model is tethered closely to both the statute and the case law and, as a result, treats harassment as an unexceptional type of discrimination.¹⁵⁷

¹⁵² Bernstein, *supra* note 142, at 1237.

¹⁵³ See *supra* text accompanying notes 103-41.

¹⁵⁴ Bernstein, *supra* note 142, at 450.

¹⁵⁵ *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998).

¹⁵⁶ See *Oncale*, 118 S. Ct. at 1003 (1998) (emphasizing that the severity of harassment “should be judged from the perspective of a reasonable person in the plaintiff’s position”); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (holding that a “reasonable person” must find the environment to be hostile or abusive).

¹⁵⁷ See *supra* text accompanying notes 44-100.

3. The Competence-Centered Approach

Professor Vicki Schultz has forwarded another approach to sexual harassment which emphasizes that it often functions to “denigrat[e] women’s competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers.”¹⁵⁸ In pursuing this insight, she argues that hostile environment cases should not be treated as distinct from other kinds of discrimination cases and should not have special elements; that the courts should de-emphasize the sexual content of harassing conduct and focus instead merely on whether the conduct was based on gender; that the concept of unwelcomeness should be abandoned; and that a presumption of illegal harassment should exist when the harassment is directed at women who work in traditionally segregated job categories.¹⁵⁹

Professor Schultz’s approach is consistent with a discrimination-centered approach in important respects. Both approaches, for example, argue that harassment cases should not be treated as significantly different from other discrimination cases; that the courts have erred by focusing on the sexual content of harassing conduct; and that unwelcomeness should be de-emphasized.¹⁶⁰ This overlap is especially interesting because the positions were reached through quite different methodologies. Professor Schultz reached her positions based on an ambitious and impressive, policy-oriented analysis of case law and theory. The analysis here supporting the discrimination-centered model is much more modest and doctrinal, based primarily on a close reading of the statutory language of Title VII and Supreme Court case law. Nevertheless, even though the analyses begin at quite different locations and take different routes to their conclusions, they converge on these important points.

Professor Schultz’s approach to causation is similar to the discrimination-centered approach in some respects, but distinct from it in others. Professor Schultz,

¹⁵⁸ Schultz, *supra* note 20, at 1755.

¹⁵⁹ See *id.* at 1797-802.

¹⁶⁰ Professor Schultz would reject unwelcomeness entirely. See Schultz, *supra* note 20, at 1802. In contrast, the discrimination-centered model would reduce it from an element of every cause of action to a factor that is relevant in hostile environment cases only. See *supra* notes 63-69 and accompanying text. Professor Schultz’s approach to unwelcomeness highlights the extent to which she envisions a unitary theory of sexual harassment. See *infra* notes 170-71 and accompanying text. If the law prohibits only harassment undermining work competence, then rejecting welcomeness entirely makes perfect sense. As Professor Schultz puts it, “few employees invite conduct that attacks their work performance in the name of gender conformity.” Schultz, *supra* note 20, at 1802. On the other hand, unwelcomeness may retain a role to the extent harassment arises out of other types of discrimination, such as sheer animosity to women, horseplay, or misguided romance. One can try to squeeze all of these types of harassment into the work competence category and, hence, contend that unwelcomeness is not relevant to any of them. Or one can, as the discrimination-centered model does, recognize that unwelcomeness may be relevant to the “affects” issue in some contexts.

like proponents of the discrimination-centered approach, views motivating factor analysis as the "touchstone" to causation.¹⁶¹ And both envision a wide-ranging inquiry into factors relevant to the issue of whether discrimination played a motivating role in producing the objectionable conduct.¹⁶² The analyses diverge, however, on the significance of job segregation. Professor Schultz argues that a presumption that conduct is gender based should be applied when the conduct is directed at women who work in traditionally segregated job categories.¹⁶³ The discrimination-centered model does not incorporate such a presumption.

Professor Schultz's position on this presumption is ironic. A major part of Professor Schultz's criticism of the current state of harassment law focuses on the two-tiered structure of causation in which conduct with sexual content is treated as presumptively discriminatory, but not conduct without sexual content. Her principal concern with this dichotomy is that it tends to make "nonsexual forms of harassment fade from view."¹⁶⁴ But then she creates another presumption, this time for segregated job categories, yet fails to appreciate how it may have the same effect. Her presumption would tend to diminish the importance of harassing conduct that occurs in nonsegregated job categories.

The discrimination-centered model, however, does not recognize the presumption for other reasons. First, the presumption is not based either in Title VII or the Supreme Court's harassment cases. Neither mentions or provides any support for such a presumption. Second, the Court in discrimination cases has been wary of special presumptions or other rules that tend to treat discrimination cases differently than other civil cases.¹⁶⁵ Third, the presumption is much broader than the evidence upon which it is based. Professor Schultz bases the presumption on the "proven link between hostile work environment harassment and job segregation by sex."¹⁶⁶ The only evidence she cites, however, is that women in male-dominated settings are more

¹⁶¹ See Schultz, *supra* note 20, at 1800.

¹⁶² See *id.* at 1800-01.

¹⁶³ Professor Schultz says the presumption should apply when directed at women who work in sex-segregated job categories. See *id.* at 1801. This implies that the presumption would not be available if the claim were brought by a male working in a sex-segregated job, and that implication is supported by Professor Schultz's underlying theory that harassment is a mechanism used to denigrate the work competence of women. Professor Schultz, however, uses an example which implies that the presumption should apply when males in a female-dominated job category are held to preconceived notions of masculine behavior. See *id.* at 1800 n.580.

¹⁶⁴ *Id.* at 1801.

¹⁶⁵ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (holding that presumptions in Title VII cases operate like presumptions in all other cases); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (noting that the "[c]onventional rules of civil litigation generally apply in Title VII cases," while holding that burden of persuasion rules in Title VII cases operate the same as in other cases).

¹⁶⁶ Schultz, *supra* note 20, at 1801.

likely to suffer harassment.¹⁶⁷ The presumption she forwards is not limited to that “proven link,” but instead is much broader, applying also to women in female-dominated job categories and, maybe, to men in either male- or female-dominated job categories.¹⁶⁸ Fourth, Professor Schultz is very unclear about the conduct to which the presumption would apply. She says clearly that the presumption is to apply to “nonsexual conduct,”¹⁶⁹ so the sexual content of the conduct cannot trigger the presumption. Does that mean that *all* conduct in segregated workplaces, even the most innocuous, is presumptively discriminatory? If not, and excluding sexual content as a possibility, what distinguishes the conduct giving rise to the presumption from other conduct which would not? Professor Schultz provides no guidance to these crucial questions and, even if answers are found, they imply that application of the presumption would be quite difficult in practice. Finally, and most importantly, the presumption increases the risk that one unitary theory of sexual harassment, focusing on sexualized behavior, will be replaced with another, focusing on sex segregation.¹⁷⁰ A principal value of the discrimination-centered model is that it is very broad, flexible and generous in finding discrimination, based on the motivating factor analysis. Creating a presumption for one type of evidence of discrimination inevitably will tend to diminish the strength and importance of other avenues of proof.

Rejection of Professor Schultz’s presumption, however, does not imply that evidence of job segregation is irrelevant. Evidence does exist, after all, that women working in male-dominated jobs are at higher risk of harassment, so the existence of job segregation in that circumstance may well be relevant to causation. Similarly, as in *Oncale*, evidence that the workplace is all male may contribute to the plaintiff’s showing that he was treated differently because of his sex—the claim could be that this type of conduct would not have occurred if women were present to demasculinize the workplace. But recognizing that job segregation may be *relevant* to the causation issue is quite different from a *presumption* that discrimination is present everywhere there is job segregation.

Professor Schultz also suggests a shift in perspective on what she calls the “harm” issue and what this Article calls the “affects” element. Instead of focusing on whether the conduct was severe or pervasive, Professor Schultz suggests that the focus be directly on whether the conduct “makes it more difficult for the harasses to do the job because of their gender.”¹⁷¹ This approach has the advantage of shifting attention away from the sexual content of the conduct to the effect of the conduct on

¹⁶⁷ See *id.* at 1759.

¹⁶⁸ See *supra* note 163.

¹⁶⁹ Schultz, *supra* note 20, at 1801.

¹⁷⁰ For this point made in a different way, see Abrams, *supra* note 144, at 1215. See also *supra* note 160 (discussing Professor Schultz’s view on this issue).

¹⁷¹ Schultz, *supra* note 20, at 1802.

job performance.¹⁷² In addition, it has the advantage of being tied even more directly to the statutory language of Title VII than the severe or pervasive standard.¹⁷³ Yet, it imposes a lesser standard than in quid pro quo cases, permitting the element to be satisfied whenever the conduct affects job performance, and so maintains the distinction between the two basic types of harassment claims. Nothing in the discrimination-centered model would prohibit movement to this interpretation of the “affects” element. The model as articulated here does not adopt the interpretation primarily because the severe or pervasive articulation of the standard is ensconced firmly in the case law, including the cases in the Supreme Court.¹⁷⁴ In addition, unlike the severe or pervasive articulation, this interpretation may have the unfortunate side effect of requiring victims to prove that their job performance was not stellar to make out a harassment case.¹⁷⁵

In sum, Professor Schultz’s competence-centered account is consistent with the discrimination-centered model in many respects. Most basically, both call for a streamlined cause of action which emphasizes that harassment is quite similar to other kinds of discrimination claims. The major difference between the two models is the emphasis Professor Schultz places on job segregation.

B. *Harassment and the First Amendment*

Several scholars have attacked the standard model of sexual harassment on First Amendment grounds.¹⁷⁶ Because the standard model largely eliminates

¹⁷² See *id.*

¹⁷³ The relevant statutory language is that the discrimination must affect “compensation, terms, conditions, or privileges of employment” Title VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1994).

¹⁷⁴ See *supra* text accompanying notes 71-100. See also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24-25 (1993) (Scalia, J., concurring) (rejecting interference with an employee’s work performance as a replacement for the “severe or pervasive” standard).

¹⁷⁵ This disadvantage must be balanced against the benefit mentioned by Professor Schultz: the interpretation would make employers more hesitant to claim that harasses are not competent workers because such a claim would make it easier for plaintiffs to meet the “affects” element. See Schultz, *supra* note 20, at 1802.

¹⁷⁶ See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993). See also Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENTARY 71 (1996) (arguing that restrictions on hate speech more generally are inconsistent with the First Amendment). Other scholars have recognized tension between parts of harassment law and the First Amendment, but have been more willing to accommodate. See KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* (1995); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEXAS

discrimination as an element,¹⁷⁷ these scholars argue that the model renders impermissible any type of unwelcome sexually-oriented speech that is "severe or pervasive."¹⁷⁸ This is a strong argument. The model potentially prohibits a wide-range of speech and other expressive conduct that normally would be protected and that fails to fit within any of the well-recognized exceptions to First Amendment protection (such as fighting words and obscenity).¹⁷⁹

For two different reasons, a discrimination-centered model of sexual harassment would avoid this type of First Amendment problem. First, within the discrimination-centered model, speech is not implicated directly. Instead, any speech merely is evidence of one of the two elements of a Title VII cause of action: discrimination or effect on a term or condition of employment. To illustrate, consider a situation in which an employer discharges an employee and the only evidence of discrimination is the employer's statement, "I discharged her because she's a woman." Although the First Amendment would prohibit a direct penalty for making the statement, use of the statement as evidence of illegal discrimination would clearly be permissible. As the Supreme Court said in *Wisconsin v. Mitchell*,¹⁸⁰ "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."¹⁸¹ In exactly the same way, a discrimination-centered model of sexual harassment makes clear that speech is not being regulated directly, but rather is merely evidence of the elements of a harassment cause of action: discrimination and an effect on a term or condition of employment. Under a

L. REV. 687 (1997); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701 (1995); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995). Still other scholars defend harassment law as entirely consistent with the First Amendment. See CATHARINE A. MACKINNON, *ONLY WORDS* (1993); Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996).

¹⁷⁷ See *supra* text accompanying notes 18-43.

¹⁷⁸ See Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Restrict?*, 85 GEO. L.J. 627, 628-35 (1997). See also Browne, *supra* note 176, at 491-501 (discussing the First Amendment implications of certain Title VII sexual and racial harassment claims); Gerard, *supra* note 176, at 1004-07 (arguing that free-speech problems in hostile environment cases stem not from the statutory language of Title VII, but from the EEOC's guidelines which have largely been treated as authoritative by the Supreme Court).

¹⁷⁹ Professor Volokh has been particularly active in identifying situations in which harassment claims have been based on speech. See Volokh, *supra* note 176; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Eugene Volokh, *Freedom of Speech vs. Workplace Harassment Law—A Growing Conflict* (visited Dec. 1, 1998) <<http://www.law.ucla.edu/faculty/volokh/harass>>.

¹⁸⁰ 508 U.S. 476 (1993).

¹⁸¹ *Id.* at 489.

discrimination-centered model, speech is merely evidence of illegal discrimination and, as such, falls within *Mitchell*'s protective umbrella.

Second, a discrimination-centered model would avoid the First Amendment problem because many of the speech restrictions cited with concern by scholars would not violate Title VII. If speech does not provide evidence of one of the two elements of a Title VII cause of action, it is completely unaffected. Thus, "Men Working" signs¹⁸² or a picture of Goya's "Naked Maja" painting,¹⁸³ to cite two real-life examples, would be completely unaffected by Title VII unless they were "discrimination" that "affected" a term or condition of employment. Similarly, a discrimination-centered model of sexual harassment would not restrict a workplace that contained lots of pinups of near-naked women and nothing else objectionable,¹⁸⁴ unless the pinups provided evidence of discrimination that affected a term or condition of employment—and it is unlikely that these examples would constitute evidence of discrimination. If the picture, sign, or pinups were posted for everyone to see, there simply would be no cognizable discrimination.¹⁸⁵ On the other hand, if the pinups only began to appear when women entered the workplace, or if the Goya painting was directed particularly at women because of its placement, or if the "Men Working" sign was accompanied by taunting directed at women that implied that they did not work hard (or hard enough), the speech may be evidence of discrimination. But then, once again, it would fit within the *Mitchell* exception: the First Amendment is not violated when speech is used as evidence of illegal motivation.¹⁸⁶

¹⁸² See Volokh, *supra* note 176, at 631-32.

¹⁸³ See *id.* at 642.

¹⁸⁴ Because almost all sexual harassment cases involve some touching or even outright sexual assault, the First Amendment critics have been able to point to only one case fitting this example, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). See Estlund, *supra* note 176, at 691 n.13. Professor Browne claims that the case imposes liability "based entirely on the pervasive presence of sexually oriented magazines, pin-up pictures . . . and 'sexually demeaning remarks and jokes' by male coworkers; the plaintiff complained of neither physical assaults nor sexual propositions." Browne, *supra* note 176, at 495. This description of the case, however, is true only if read very literally. While it is true that the *plaintiff* did not complain of physical assaults or sexual propositions, it is not true that the case imposes liability based entirely on highly objectionable speech. The case also was based on testimony by other women in the workplace of sexual propositions and assaults. See *Robinson*, 760 F. Supp. at 1499-501.

¹⁸⁵ By cognizable discrimination, I mean discrimination which would meet *Price Waterhouse*'s mixed-motives model, as described earlier. See *supra* text accompanying notes 46-56. As noted earlier, the disparate impact model generally is unavailable to prove discrimination in these circumstances. See *supra* note 45.

¹⁸⁶ Note that this is *not* Professor Volokh's accommodation between sexual harassment law and the First Amendment. Professor Volokh argues that personally-directed harassing speech may be restricted. See Volokh, *Freedom of Speech and Workplace Harassment*, *supra*

A workplace containing a large number of pinups is likely to be quite offensive to the women working there. Without additional evidence of discrimination, however, the discrimination-centered model does not make that type of conduct illegal. This result would be a major concern if cases existed in which the only conduct at issue was pinups and there was no additional evidence of discrimination. I know of no such cases. Certainly, the most well-known case involving pinups, *Robinson v. Jacksonville Shipyards*, involved a large amount of other conduct that easily met the discrimination element, and the existence of pinups simply was additional evidence of that discrimination.¹⁸⁷ In this sense, however, the discrimination-centered model is narrower than the theories discussed in the preceding section. Subordination approaches and the respect approach would almost certainly prohibit the pinups and the competence-centered approach would be likely to do so. Given the absence of a situation in which this actually would make a difference, however, this hypothetical narrowness is outweighed by the interest in ensuring that sexual harassment law does not conflict with the First Amendment, the ability of the discrimination-centered model to undercut First Amendment attacks which threaten to limit sexual harassment law more broadly, and the actual situations, mentioned in the preceding section, in which the discrimination-centered approach is broader than the alternatives.

A discrimination-centered model of harassment, then, avoids the First Amendment issue which otherwise threatens to weaken harassment law. The model clarifies that the central issue is discrimination and, hence, shifts attention away from the First Amendment and toward the issue to which Title VII is directed. Once the force of the First Amendment issue is softened, the model should strengthen harassment law by making courts more willing to rely on obnoxious speech to find a violation of Title VII. That is, once the fear of infringing the First Amendment is removed from these cases, courts may be more willing to rely on obnoxious

note 179, at 1843-71. For a similar, but more expansive proposal, see Estlund, *supra* note 176, at 741-59. Under the theory advanced in this Article, speech may be restricted regardless of whether it is personally-directed or whether it is directed at women generally. The crucial issue is not whether it is personally directed, but whether it is discriminatory. Clearly, obnoxious speech that is directed only at a woman because she is a woman would be discriminatory and, hence, could be restricted. But obnoxious speech directed at a large number of female employees because they are women also would be discriminatory and subject to restriction. For example, if the pinups were posted only when the company began to hire women and as an effort to discourage and harass the female workers, then the pinups would be subject to restriction under a discrimination-centered model of harassment, and the restriction would be permissible under the First Amendment because of *Mitchell's* protective umbrella.

¹⁸⁷ See *Robinson*, 760 F. Supp at 1499-501; *supra* note 184.

statements to find either discrimination itself or that the conduct was sufficiently severe or pervasive to affect a term or condition of employment.¹⁸⁸

V. CONCLUSION

The discrimination-centered model of sexual harassment is based on a formal version of equality: discrimination exists when women are treated differently because of their sex.¹⁸⁹ Professor MacKinnon calls this the "differences" approach.¹⁹⁰ The model eschews what has become the predominant academic perspective on harassment, the antisubordination approach. The model does not do this because formal equality provides a better theoretical explanation of the problem. It may well be that, for the bulk of cases, the antisubordination approach describes the nature of the wrong and the need for remedy better. Instead, the discrimination-centered model relies on the formal version of equality for two principal reasons. First, the formal equality approach is broader than the antisubordination approach. It is broad enough to encompass easily all those marginal cases that Professor Franke discusses,¹⁹¹ without jeopardizing the core cases which fall within the antisubordination theory. This breadth is important because the marginal cases cover some of the most vulnerable and abused; they cannot be left behind. Second, the formal equality model counters sexual harassment exceptionalism and brings harassment law back into the familiar territory occupied by the rest of discrimination law. This is important because it permits harassment law to borrow broadly from concepts well developed elsewhere, because the familiarity may encourage judges (especially) and juries to interpret harassment law generously, and because it weakens attempts by opponents to minimize and marginalize harassment law. Opponents cannot claim that harassment law merely is a power move by feminists or that the First

¹⁸⁸ The ability of the discrimination-centered model to accommodate First Amendment concerns is important because, even if the courts do not strike down the law under the First Amendment, they may weaken sexual harassment doctrine by interpreting Title VII narrowly to avoid having to face the First Amendment issues. See *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995) (holding that conduct was not sufficiently severe or pervasive to constitute sexual harassment, in part because of First Amendment concerns). See generally *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979) (stating that courts should construe statutes so as to avoid serious constitutional problems unless such construction is clearly contrary to the intent of Congress).

¹⁸⁹ For an insightful presentation and analysis of formal equality, see Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). For a critique and historical overview, see Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998).

¹⁹⁰ See MACKINNON, *supra* note 1, at 192-208.

¹⁹¹ See *supra* text accompanying notes 125-29, 134-37.

Amendment applies only to harassment law but not to the rest of discrimination law. The formal model of equality ties the fate of harassment law to the fate of discrimination law generally. Although we may despair about both at times, the antidiscrimination banner has led this country through its most important domestic battles from the Civil War, to *Brown v. Board of Education*,¹⁹² to Title VII. It is battle worn, battle tested, strong, and, most importantly, right. The antiharassment effort will be strengthened by following closely behind.

¹⁹² 347 U.S. 483 (1954).