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Rational Women: A Test for Sex-Based Harassment

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The issue of what constitutes acceptable sexual conduct in the workplace has sparked contentious social debate. In addition, courts have disagreed about how to define actionable sex-based harassment under Title VII of the Civil Rights Act. Under the current doctrine, courts render case-by-case judgments about whether particular acts of harassment are harmful or offensive enough to constitute discrimination. This inquiry is laden with subjective value judgments, and it transforms the individual harassment case into a microcosm for the larger social debate about what behavior is acceptable in the workplace. This Article presents an alternative test for evaluating sexual harassment claims under Title VII that avoids normative speculation. The Article starts from the premise that Title VII's objective is to ensure that women's employment decisions are not burdened by factors that do not enter into men's employment decisions. The author demonstrates that sex-based harassment plays a significant role in women's economic status, directly effecting women's job retention rates and contributing to horizontal and vertical occupational segregation. Employing economic analysis, the author suggests that behavior should be considered discriminatory whenever it would lead a hypothetical rational woman to alter her employment decisions if she could do so at little or no cost.

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INTRODUCTION

In recent years, the issue of sexual harassment[1] has been a lightning rod for sharply divergent views about the place of women and sex in the workplace. In what at times appears to be a tug-of-war over sexual mores, sexual harassment has sparked an unusually fervent public debate about what is and is not acceptable behavior on the job. The terms of the debate are multiple: is sexual harassment an expression of normal, biologically-based sexuality, a tool deliberately used by men to discourage women from moving beyond their traditional roles in the workplace, or a predictable consequence of organizational structures in which power and peer groups are skewed along sex lines?[2] Are those who complain of sexual harassment

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1. I use the term "sexual harassment" because it has such common currency, but a better term is "sex-based harassment" because the class of conduct which is of concern to Title VII need not be "sexual" except in the sense that the conduct is "sex-based": that is, directed at one sex or having a disparate impact on one sex.

2. The social-scientific bases for these differing theories of sexual harassment have been investigated to some degree. *See, e.g.*, David E. Terpstra & Douglas D. Baker, *Sexual Harassment at Work: The Psychosocial Issues, in* VULNERABLE WORKERS: PSYCHOSOCIAL AND LEGAL ISSUES 179 (Marilyn J. Davidson & Jill Earnshaw eds., 1991). Terpstra and Baker identify four theories of sexual harassment. The "most simplistic" explanation, with the least empirical support, is that which accounts for harassment as a result of biological forces or physical attraction. *Id.* at 181. A second focuses on learning or conditioning (socialization), which can be treated as a variation of the biological view since it still describes harassers as being "programmed" to harass. *Id.* A third approach views harassment as intentional behavior aimed at preserving male dominance at work and in society, rather than as unconscious or subconscious in motivation. *Id.* Finally, the fourth explanation emphasizes organizational structures, arguing that hierarchy, power differentials, and sex-role expectations are more likely to be carried into the workplace when women are a minority in a given locale, a view that is supported by findings that firms where the workforce is at least 75% male have the highest rates of sexual harassment complaints. *Id.* at 181-82. Terpstra and Baker conclude that each approach, except perhaps the biological, has some validity. *Id.* at 182.

Barbara Gutek also provides a useful analysis of sexual harassment theories. *See* BARBARA A. GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS 12-18 (1985) [hereinafter GUTEK, WORKPLACE]. Gutek describes three models: the "natural-biological" model, which posits that sexual harassment results from natural physical attraction; the "organizational" model, which treats harassment as a function of hierarchy and differential sex distributions within that hierarchy; and the "sociocultural" model, which attributes workplace sexual harassment to the larger society's differential distribution of status and power. *Id.* at 13-15. Gutek reports that according to one study, the natural-biological model has little empirical support, while the other two models are partially valid but cannot explain completely why harassment occurs. *Id.* (citing Sandra S. Tangri et al., *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES No. 4, at 33 (1982)).

As an alternative, Gutek proposes the "sex role spillover" model, which combines characteristics of the other three models. The sex role spillover model explains harassment as an outgrowth of the carryover of inappropriate gender-based expectations from other social settings into the workplace. *Id.* at 15-18, 129-52 (developing and explaining the sex role spillover model). Gutek argues that the spillover model is the best explanatory model, based on her own research. *Id.* at 153-69; *see id.* at 66-68 (explaining how common types of sexual harassment fit the spillover model); *id.* at 118-19 (providing evidence that sexual harassment is sometimes a form of retaliation by men against women in traditionally male jobs; underrepresentation of women also increases sex-role spillover); *see also* CHERYL GOMEZ-PRESTON, WHEN NO MEANS NO: A GUIDE TO SEXUAL HARASSMENT 34-35 (1993) (adopting "power" perspective on sexual harassment); JERRY A. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS 151-55 (1989) (summarizing studies of different male-dominated

spurned lovers, overly sensitive prudes, and curmudgeonly feminists, or are they ordinary working women who simply want to be left alone to do their jobs?[3] When is a hand on the shoulder or a comment on a person's clothing

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occupations and theories of the causes of sexual harassment, and noting that there is evidence that some harassment in those occupations results from male workers' desire to preserve the "male-based camaraderie of the workplace," the sense that they are employed doing "men's work," and/or their job security and privileged pay rates, all of which may be threatened or appear to be threatened by the presence of women); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (viewing sexual harassment as a result and expression of sex-based power and dominance); NANCY D. MCCANN & THOMAS A. MCGINN, HARASSED: 100 WOMEN DEFINE INAPPROPRIATE BEHAVIOR IN THE WORKPLACE 76-79 (1992) (endorsing the view that sexual harassment is about power and preserving the masculine status quo); MARY C. MEYER ET AL., SEXUAL HARASSMENT 49-69 (1981) (discussing "biosexual" and, primarily, "psychosocial" theories of sexual harassment); Barbara A. Gutek, *A Psychological Examination of Sexual Harassment, in* SEX ROLE STEREOTYPING AND AFFIRMATIVE ACTION POLICY 131, 136-37, 144 (Barbara A. Gutek ed., 1982) [hereinafter Gutek, *Psychological Examination*] (explaining sexual harassment in terms of the "spillover" model and surveying theories of other feminists); Ronni Sandroff, *Sexual Harassment: The Inside Story,* WORKING WOMAN, June 1992, at 47, 49 (reporting that 50% of 9,000 survey respondents stated that sexual harassment results not from "flirtatiousness, hormones or sexual desire" but rather from the "desire to bully and intimidate women").

Despite the paucity of evidence supporting the biological model, it appeared in a few early briefs and judicial opinions. *See, e.g.,* Barnes v. Costle, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring) (noting that sexual advances may not be "intrinsically offensive" in that they involve, in many instances, "normal and expectable" social behavior); Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (stating that employers should not be liable for sexual harassment because sexual attraction is a "natural . . . phenomenon"), *rev'd,* 600 F.2d 211 (9th Cir. 1979); *see also* Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 13, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979) (arguing that "[s]exual attraction is a fact of life" even in the workplace, and therefore plaintiff had no actionable claim for relief) (on file with author).

3. *See, e.g.,* GOMEZ-PRESTON, *supra* note 2, at 32-34 (noting that victims come from all sectors of the population, but that some groups appear to be victimized by sexual harassment more than others—for example, more women than men, more people of color than whites); GUTEK, WORKPLACE, *supra* note 2, at 54-58 (reporting that women are more likely to be harassed than men, and that sex is a far more accurate predictive variable of the likelihood of experiencing harassment than is age, marital status, parental status, educational background, occupation, family income, or race/ethnicity; finding that among women, marital status was the only one of these demographic characteristics that was strongly related to experiencing harassment); MACKINNON, *supra* note 2, at 28-31 (victimization of women crosses lines of age, marital status, physical appearance, race, class, occupation, pay range, and other characteristics and circumstances, although "[f]requency and type of incident may vary with specific vulnerabilities of the woman, or qualities of the job, employer, situation, or workplace"); RESEARCH & SPECIAL STUDIES BRANCH, CANADIAN HUMAN RIGHTS COMM'N, UNWANTED SEXUAL ATTENTION AND SEXUAL HARASSMENT: RESULTS OF A SURVEY OF CANADIANS 6-7 (1983) [hereinafter SURVEY OF CANADIANS] (finding that women in all groups experienced unwanted sexual attention, but women aged 18 to 29, single women, low-income women, and women with at least some college education were more likely to label it "harassment"); Gutek, *Psychological Examination, supra* note 2, at 153-55 (summarizing results of earlier studies, as well as her own research, which show that victims of sexual harassment come from all occupational categories, ages, marital statuses, racial and ethnic backgrounds, etc., although rates of victimization vary slightly according to age, marital status, and race); Terpstra & Baker, *supra* note 2, at 184 (reporting that victims tend to be women; under age 35; single, divorced, or separated; and possess at least a college degree, although such findings may reflect, in part, how different women perceive behavior and/or differences in willingness to report harassment); Sandroff, *supra* note 2, at 48 (reporting that a survey of 9000 *Working Women* readers concerning their experiences with sexual harassment found that, in general, "[t]he old prey on the young, and the powerful on the less powerful," and noting the prevalence of harassment of women in male-dominated fields or in formerly all-male domains such as upper management); Connie White et al., Sexual

sexual or harassing? What is the harm in telling a sexual joke in the workplace or asking someone out on a date? Is it harassment to treat everybody in a workplace, women included, in an abusive or ribald fashion?[4]

Emotions on this topic run high. Many women are angry: Why is it that men still don't get it, that they don't understand that I don't want to be pursued as a sexual object while I'm trying to do my job?[5] Many men are nervous: Am I going to get sued now for telling a co-worker she looks nice

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Harassment in the Coal Industry: A Survey of Women Miners 9 (1981) (unpublished manuscript, in collection of University of California, Berkeley Library) (studying women miners in ten states and finding that women miners are sexually harassed without regard to age or marital status).

Compare these findings to one court's view of a plaintiff who alleged, among other things, that a male co-worker had shone a flashlight up her skirt: "In sum, the attitude displayed [in the plaintiff's journal] is of a deeply troubled woman pre-disposed to interpret her experiences at [work] as sex discrimination or sexual harassment and thereby, tragically, destined to fail." Vermett v. Hough, 627 F. Supp. 587, 600 (W.D. Mich. 1986) (holding against plaintiff on allegations of sex discrimination, sexual harassment, retaliation, and constructive discharge).

4. On the effects of sexual teasing and joking, see BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 105-06 (1986) (arguing that "less severe" harassment such as sexual teasing and joking helps maintain occupational segregation and can have negative effects on women's careers); MACKINNON, *supra* note 2, at 52 (observing that trivialization of sexual harassment, often accomplished through humor, is one reason harassment was "invisible" for so long); BETH MILWID, WORKING WITH MEN: PROFESSIONAL WOMEN TALK ABOUT POWER, SEXUALITY, AND ETHICS 97 (1990) (reporting that women interviewed argue that crude jokes, lewd comments, etc., by senior managers set the stage for and communicate tolerance of sexual harassment within the ranks).

On perceptions of sexual joking and comments as harassment, see GUTEK, WORKPLACE, *supra* note 2, at 43-53, 82-85, 119-21, 166-69 (reporting responses of women and men to various workplace behaviors, including sexual joking and sexual comments); Terpstra & Baker, *supra* note 2, at 185-87 (showing that 72% of female federal employees rated uninvited sexual teasing, jokes, remarks, or questions as harassment; in a different survey of women workers, 85% felt "sexual propositions stated as a game or joke" were harassing, 39% felt off-color sexual jokes not directed at the individual were harassing, 25% felt obscene, sexually oriented graffiti not directed at the individual were harassing, and 13% felt obscene, sexually oriented gestures not directed at the individual were harassing); Ronni Sandroff, *Sexual Harassment in the Fortune 500,* WORKING WOMAN, Dec. 1988, at 69, 71-73 (reporting that 97% to 100% of personnel managers at Fortune 500 companies responding to a survey said that hypothetical scenarios posed to them involving sexual joking, offensive sexual language, etc., would constitute sexual harassment).

Compare the views above to the court's characterization of the incidents at issue in Spencer v. General Elec. Co., 697 F. Supp. 204, 213-15 (E.D. Va. 1988), *aff'd,* 894 F.2d 651 (4th Cir. 1990), in which a male supervisor licked a woman subordinate's glasses several times and made reference to the sexual use of his tongue, sat on the laps of women employees and put his hands on their knees and between their legs, and told sexual stories and made sexually-explicit comments. The court characterizes this behavior as "sexual horseplay" and notes that office employees, except for two, found the "horseplay" to be "funny and inoffensive." *Id.* at 213-14. The court did ultimately find that a hostile environment existed, although the plaintiff was awarded only nominal damages. *Id.* at 219-20.

5. *See, e.g.,* Anita F. Hill, *Sexual Harassment: The Nature of the Beast,* 65 S. CAL. L. REV. 1445, 1447-48 (1992) (reporting that many women are angered by the persistence of sexual harassment and arguing that sexually harassing behavior is often downplayed by workers and courts and defined more narrowly by men than women); Abby J. Leibman, *Doubting Thomas: Sexual Harassment Truth or Consequences,* 65 S. CAL. L. REV. 1441, 1442 (1992) ("Why must we, as women, accept workplace behavior that *actually* harms us, simply because it isn't *perceived* as harmful by men?"); Barbara Ehrenreich, *Women Would Have Known,* TIME, Oct. 21, 1991, at 104 (discussing the all-male Senate Judiciary Committee's failure to understand sexual harassment in the Anita Hill/Clarence Thomas hearings); Anna Quindlen, *Listen to Us,* N.Y. TIMES, Oct. 9, 1991, at A25 (same).

today?;[6] and fed-up: I'm not changing my language or taking down my posters just because some "crybaby" woman feels offended; If you can't take the heat, get out of the kitchen.[7] When the questions are framed as: Is it acceptable for a man to ask out a co-worker repeatedly, to send her love letters, to tell dirty jokes, to compliment, the debate over sexual harassment appears to be a turf skirmish in the battle of the sexes.

In light of the way the issue has been framed and the emotions it packs, it is not surprising that the legal determination of what constitutes sex-based harassment for purposes of proving a violation of Title VII of the Civil Rights Act[8] has been difficult for the courts. Early on in the short

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6. *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 391-92 (1992) (analogizing sexual harassment to date rape, which he argues is often the result of misunderstanding and miscommunication between men and women with different sexual mores); Bruce Fein, *Inviting Sexual Harassment Overkill?*, WASH. TIMES, Nov. 15, 1993, at A16 (arguing that Title VII should be amended to require a concrete injury as an element of sexual harassment claims in order to avoid "friendly banter between the sexes" from being unnecessarily eliminated in the workplace); John Leo, *Harassment's Murky Edges*, U.S. NEWS & WORLD REP., Oct. 21, 1991, at 26 (arguing that a subjective standard for sexual harassment makes it difficult for men to know what behavior is unacceptable).

Judge Kozinski of the Ninth Circuit Court of Appeals explains such fears this way:

> The fear of a sexual harassment charge—with the humiliating personal implication and the potentially devastating professional consequences—may well discourage many employees from taking the first hesitating step toward an office romance. This may make the workplace a less collegial and inviting place, as men and women socialize less with their co-workers and turn their energies toward meeting people elsewhere.

Alex Kozinski, *Foreword* to BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW v, vii (1992); *see also id.* at x-xi (expressing concern that fear of sexual harassment charges will lead male supervisors to distance themselves from female employees, for example, by choosing male employees for business trips and after-hours projects, rather than more competent female employees: "as sexual harassment litigation becomes more common, male managers may end up presupposing that every time they appoint a woman to a position that brings her into close personal contact, they hand her a loaded gun with which she can blow away their careers").

7. Alan Dershowitz, *Putting a Gender Bias on Free Speech*, BUFFALO NEWS, Jul. 27, 1993, at B3 (arguing that sexually offensive campaign tactics in a union election should be protected by the First Amendment and suggesting that the "crybaby" woman who complained of such tactics "get out of the kitchen."). Professor Dershowitz chooses an odd metaphor, since it is women who traditionally cope with crybabies and overheated kitchens and it is back to the kitchen he is in fact suggesting they go. The point I will make in this paper can nonetheless be expressed in terms of the same metaphor: unless it is necessary to scorch in order to cook, women don't have to leave the kitchen—they are entitled to have the heat turned down. *See also* John Leo, *An Empty Ruling on Harassment*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 20 (arguing that trends in sexual harassment law will promote "corporate McCarthyism," "hair-trigger puritanism," and "anticipatory censorship by employers," and complaining that in the aftermath of one court case, "a male employee can't have a photo of his wife in a swimsuit on his desk. Even a newspaper with a bra advertisement would violate the judge's ruling . . . ."); William Safire, *Against the Grain*, N.Y. TIMES, Mar. 1, 1993, at A15 (referring to Senator Robert Packwood's treatment of women staffers as "hassling," not "real sexual harassment"); William Safire, *Sleazy Senate Inquiry*, N.Y. TIMES, Oct. 25, 1993, at A19 (same); *cf.* Kozinski, *supra* note 6, at viii (arguing that "locker-room jargon" and "pictures of scantily clad women" may be "workplace indiscretions" that infringe on women's rights to work in abuse-free environments, but that prohibiting such speech and decorations may be "constitutionally suspect" under the First Amendment).

8. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. V 1993). The first case establishing a cause of action for sexual harassment under the sex discrimination provisions of Title VII was Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on procedural grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). *Williams* was a "quid pro quo" case, holding that a male supervisor's retaliatory actions taken because a female employee declined his sexual advances

history of sexual harassment doctrine it was precisely the perceived difficulty of demarcating the scope of sex-based harassment that led courts to reject, even ridicule, the idea that sexual harassment could violate federal employment law:

> It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act . . . . [A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.[9]
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> [I]f an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination . . . we would need 4,000 federal trial judges instead of some 400.[10]

While it is now settled law that sex-based harassment does indeed violate Title VII, the question of what constitutes actionable sex-based harassment continues to be nettlesome. The reason for the ongoing difficulty, I argue, is that courts have taken up the question as if the legal determination of when workplace conduct violates Title VII depends on whether social norms of acceptable workplace conduct have been violated. While the two issues are obviously not unrelated, injecting the latter, with all of its indeterminacy, into the former has significantly clouded what might otherwise be a relatively sharply focused legal inquiry. There is no need, or wisdom, in setting up sexual harassment claims as Rorschach tests in sexual mores.

Nor does Title VII dictate such a result. The virtue of Title VII liability for sex-based harassment is that the normative decision about what is and is not acceptable, from a purely legal vantage point, has already been made by Congress: the line is crossed when sex-based harassment imposes a discriminatory burden on women's employment decisions. In this Article, I argue that if the courts can keep their eyes trained on that statutory line,

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constituted sex discrimination. *Id.* at 657-61. The first case establishing a cause of action for "hostile environment" sexual harassment was Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), holding that sexually offensive conditions of employment can constitute sexual harassment. The first sexual harassment case to reach the Supreme Court was Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), which validated the use of Title VII to bring sexual harassment claims, of either the "quid pro quo" or "hostile work environment" variety, although it did not impose strict liability on employers. *Id.* at 65-66, 72-73.

9. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975) (holding that no cause of action existed against employer where female employees terminated their employment due to verbal and physical sexual advances by their supervisor where there was no employer policy served, no benefit to the employer from the conduct, and the conduct had no relationship to the nature of the employment), *vacated without opinion,* 562 F.2d 55 (9th Cir. 1977).

10. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 557 (D.N.J. 1976) (holding that sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII), *rev'd,* 568 F.2d 1044 (3d Cir. 1977).

then even while the buzz of public debate about sexual harassment continues around them, they can deftly navigate the contours of Title VII's protection against discrimination in the workplace.

I present a test for evaluating sexual harassment claims under Title VII that avoids the pitfalls of the current psychologically focused, case-by-case, tort-like treatment of sex-based harassment claims. Instead, my test focuses directly on the discriminatory impact of sex-based harassment on employment choices. Under my test, sex-based harassment is defined as sex-based, non-job-related workplace conduct that would lead a rational woman to alter her workplace behavior—such as by refusing overtime, projects, or travel that will put her in contact with a harasser, requesting a transfer, or quitting—if she could do so at little or no cost to her. The test stems from an economic conceptualization[11] of the problem of workplace harassment and its role in determining the employment status of women.

More importantly, the test directs a court (and those who would avoid Title VII liability for harassment) to consider the response of the economic construct of a "rational decision-maker" to allegedly harassing workplace events, under the hypothetical circumstances in which the impact of harassment on decision-making on the margin can be identified: a choice between two identical environments that differ only in terms of harassment. The test is deliberately abstract in this dimension, in order to avoid importing into the test constraints on decision-making, often gender-based, that face real individuals, and to reject any requirement that individuals take judicially specified actions, such as quitting or requesting a transfer, in response to the discrimination they suffer in the conditions of work. But the test is also concretely grounded in the reality of women's experiences in the workplace[12] in the following sense: the "rational decision-maker" to whom attention is directed is explicitly to be conceived of as a "rational woman," that is, someone who assesses the costs or benefits of the conditions of a workplace as a woman would.

The Article is organized as follows: Part I reviews the status of sex-based harassment law on the question of what constitutes actionable harassment under Title VII. Part II critiques the tests developed by the federal circuit courts and most recently the Supreme Court, identifying the inadequacies in the current conception of why sex-based harassment is sex discrimination. Part III then develops an economic construction of sex-based harassment, examining the impact of harassment on employment decisions.

11. A note of caution: there is a well-entrenched tradition in law and economics scholarship of using the term "economic analysis" to mean an efficiency-based inquiry into the design of legal rules. The analysis I employ here is not efficiency-oriented; the test I derive is not motivated by efficiency considerations. The analysis is "economic" in a more general sense, in that I use economic concepts, other than efficiency, to structure my inquiry. *See infra* text accompanying notes 101-103.

12. Although men also report significant rates of sexual harassment in the workplace, women are clearly the typical plaintiffs and so I formulate the test in terms of women's experience. The test is easily adapted for male plaintiffs.

This Part also offers an analysis of the economic consequences of sex-based harassment and supporting data. Part IV develops the "rational woman" test and explores its application.

I
THE CURRENT LAW OF SEX-BASED HARASSMENT

The term "sexual harassment" does not appear in Title VII and yet there appears to be a clear consensus that two types of workplace behavior raise the possibility of a sex-based harassment claim. "Sexual harassment" is workplace behavior that is either sexual or harassing (in the dictionary sense of "to vex, trouble, or annoy continually or chronically"),[13] but it need not be both.

The greatest emphasis has been on specifically sexual conduct at work: sexual propositions, sexual touching, sexual jokes, sexual displays, and the like. The Equal Employment Opportunity Commission (EEOC) has defined "sexual harassment" as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[14] Several prominent sexual harassment cases involve such behavior. In *Henson v. City of Dundee,*[15] Barbara Henson complained that her superior, John Sellgren, chief of police of Dundee, Florida, harangued her (and her one female co-worker) with demeaning sexual inquiries and vulgar statements, solicited sexual relations with her on several occasions, and retaliated against her refusals by suspending her on a pretextual basis and by preventing her from attending the police academy.[16] As described in *Meritor Savings Bank v. Vinson,*[17] Mechelle Vinson's boss, Sidney Taylor, invited her to dinner, and, during the meal, suggested that they go to a motel to have sex. After this first incident, he repeatedly demanded sexual favors from her, fondled her in front of other employees, followed her into the restroom, exposed himself to her, and even forcibly raped her.[18] In *Robinson v. Jacksonville Shipyards, Inc.,*[19] Lois Robinson complained that at the shipyards where she worked, she was subjected to pervasive displays of pornographic photographs, cartoons, drawings, and graffiti, including a photo of a woman's pubic area with a meat spatula pressed against it, a dart board containing a drawing of a woman's breast with the nipple as the bull's-eye, and several photos of nude women—many of whom resembled Robinson in physical appearance—engaged in sexual activity or posed in sexually submissive positions.[20] Robinson's male co-workers also repeat-

13. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1986).
14. 29 C.F.R. § 1604.11(a) (1994).
15. 682 F.2d 897 (11th Cir. 1982).
16. *Id.* at 899-900.
17. 477 U.S. 57 (1986).
18. *Id.* at 60.
19. 760 F. Supp. 1486 (M.D. Fla. 1991).
20. *Id.* at 1495-98.

edly made sexually explicit comments to her, wrote demeaning sexually explicit graffiti in her work area, and sexually harassed other women workers both verbally and physically.[21]

Despite the legal and popular preoccupation with specifically sexual conduct, the EEOC has recognized that "sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex."[22] By the same token, courts have considered under the rubric "sexual harassment" workplace conduct that does not involve sexual activity per se. For example, in *Morris v. American National Can Corp.*,[23] Jacquelyn Morris claimed she was harassed both sexually and non-sexually by her co-workers and supervisors at American National Can. The non-sexual harassment included abusive verbal harassment and graffiti, as well as sabotage and theft of her equipment: her radio, fan, and cabinet were intentionally damaged; foul substances were put in her welding helmet, tool box, work bench, and air line; her tools and her tool box were stolen; and she was physically assaulted by employees throwing cylindrical cartridges of rolled sandpaper at her.[24]

In like manner, Priscilla Kelsey Andrews (and co-plaintiff Debra Ann Conn) complained in *Andrews v. City of Philadelphia*[25] of both overtly sexual harassment and non-sexual harassment at the Philadelphia Police Department. The non-sexual harassment included being given more difficult work assignments than comparable male co-workers; being refused help by male officers, even though the men helped one another; and having files and notes stolen, vandalized, and/or destroyed, covers torn off personal notebooks and manuals, and soda put in a typewriter.[26] In addition, Andrews' car tires were slashed and her windshield wipers stolen; the exterior paint was scratched on Andrews' and Conn's cars; both women received anonymous threatening or obscene phone calls at their unlisted home telephone numbers; Conn's clothing was damaged; and Andrews suffered severe burns on her back after putting on a shirt which had been tainted with a "lime substance" later found on other clothing in her locker and on her locker door.[27]

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21. *Id.* at 1498-1501.

22. Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050, 8 FAIR EMPL. PRAC. MAN. (BNA) 405:6692 (Mar. 19, 1990) (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987)).

23. 730 F. Supp. 1489 (E.D. Mo. 1989), *aff'd in part and rev'd in part*, 941 F.2d 710 (8th Cir. 1991).

24. *Id.* at 1490-92.

25. 895 F.2d 1469 (3d Cir. 1990).

26. *Id.* at 1472-75.

27. *Id.*

The plaintiffs in *Hall v. Gus Construction Co.*[28] had a similar story to tell: in addition to suffering blatant sexual harassment, a male co-worker urinated in plaintiff Darla Hall's water bottle; male co-workers urinated in the gas tank of plaintiff Ticknor's car, causing it to malfunction; the company mechanic ignored the women's complaints that leaking carbon monoxide fumes from the company truck made them drowsy when they drove it but repaired the truck immediately after a male worker drove it; and male co-workers refused to allow the women to use a truck to go into town for bathroom breaks.[29] The *Hall* court expressly affirmed that "offensive conduct" need not "have explicit sexual overtones" to constitute sexual harassment, and that sexual harassment includes all harassment that would not have occurred but for the victim's sex.[30]

What unites these cases doctrinally is first that the person who is the object of the harassment is singled out because of her sex: the activity is sex-based. Hence a more appropriate term for what the courts call "sexual" harassment is "sex-based" (or "gender-based") harassment.[31] Second, the activity in question is fundamentally extraneous to the work of the workplace. This element of sexual harassment has been obscured by the focus on specifically sexual conduct, yet it is precisely the extraneous nature of sex-based harassment that has led courts to worry about whether employers

28. 842 F.2d 1010 (8th Cir. 1988).

29. *Id.* at 1012; *cf.* Waltman v. International Paper Co., 875 F.2d 468, 471 (5th Cir. 1989) (describing how co-worker grabbed plaintiff's arms while she was carrying a vial of hot liquid through powerhouse of paper mill and another co-worker then stuck his tongue in plaintiff's ear); Llewellyn v. Celanese Corp., 693 F. Supp. 369, 371-73 (W.D.N.C. 1988) (describing sexual harassment of plaintiff truck driver who, in addition to receiving sexual advances and comments, was subjected to acts of sabotage and violence: the pin linking plaintiff's tractor to her trailer was removed; a snake was put in her truck's cab; she was threatened with violence verbally and in writing, sometimes anonymously; and a fellow driver attempted to abduct her); Egger v. Local 276, Plumbers & Pipefitters Union, 644 F. Supp. 795, 797 (D. Mass. 1986) (describing co-worker's sexual harassment of plaintiff, which included pulling ladder out from under her and shoving a steel pipe into her ribs).

30. *Hall*, 842 F.2d at 1014 (citing McKinney v. Dole, 765 F.2d 1129, 1139 (D.C. Cir. 1985) (upholding plaintiff's sexual harassment charge based on both overt sexual advances and non-sexual physical assault)); *see also* Laughinghouse v. Risser, 754 F. Supp. 836 (D. Kan. 1990). In *Laughinghouse*, the defendant's management style toward plantiff became extremely abusive after plaintiff rejected his sexual advances. *Id.* at 838. The court noted that although defendant was generally "abrasive" in his supervisory capacity, he was "more abusive" to women than men, and held that such behavior is sexual harassment since it would not have occurred "but for" plaintiff's sex. *Id.* at 840.

In addition to the cases discussed in this paragraph, note also that most of the quid pro quo cases involve both sexual and non-sexual harassment. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 899-900 (11th Cir. 1982) (describing how supervisor prevented plaintiff from attending police academy in retaliation for her refusal to grant him sexual favors); Barnes v. Costle, 561 F.2d 983, 985 (D.C. Cir. 1977) (recounting how supervisor repeatedly promised plaintiff a promotion if she granted him sexual favors and, after being repeatedly rejected, harassed and belittled her). The pattern in *Barnes* and *Henson*, both quid pro quo cases, appears to be typical: the initial harassment is sexual in form ("unwelcome advances" and the like), and the subsequent harassment—retaliation for refusals to provide sexual favors—takes non-sexual form (unwarranted disciplinary measures, demotion, refusals to provide training, etc.).

31. *See supra* note 1.

are in fact liable for harassment by supervisors or co-workers on the job.[32] Unless one is talking about sex-related employment, sexual behavior on the job rather obviously takes place in the interstices of the business of doing business: people engaged in sexual conduct at work usually aren't doing their jobs (although they may be relying on the power of their jobs) at the time. Similarly, harassment of a non-sexual nature—stealing notes[33] or erasing computer disks, rigging up hazards,[34] scrawling epithets[35]—involves supervisors or co-workers diverting their energy from their work and often deliberately interfering with someone else's work. Thus sex-based harassment cases do not, at least not overtly, ask whether there is a "legitimate, non-discriminatory reason"[36] for the harassment or whether harassment is "job-related . . . and consistent with business necessity."[37] Instead, the focus of sex-based harassment doctrine is whether workplace harassment rises to the level of discrimination for purposes of Title VII.

In answer to this question, the current governing standards for sex-based harassment claims were originally laid down in *Meritor Savings Bank*

32. On employer liability for harassment by supervisors, see Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986) (rejecting automatic employer liability for sexual harassment by a supervisor and suggesting that courts look to agency principles for guidance in this area) (hostile environment); *Henson*, 682 F.2d at 905 (holding that an employer is liable only if it knew or should have known of harassment and failed to take prompt remedial action) (quid pro quo); *Barnes*, 561 F.2d at 993 (stating that, although generally employers are liable for their supervisors' discriminatory actions, an employer may be relieved of liability if an employee's harassing conduct violated policy and occurred without employer knowledge, and employer rectified situation upon discovering it) (quid pro quo); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977) (holding employer liable if it had "actual or constructive knowledge" of harassment by a supervisor and failed to take prompt remedial action) (quid pro quo).

On employer liability for harassment by co-workers, see Faris v. Henry Vogt Mach. Co., 813 F.2d 786, 787 (6th Cir. 1987) (finding no employer liability where plaintiff failed to establish that employer knew or should have known about co-worker harassment and that the company took no remedial action); Silverstein v. Metroplex Communications, Inc., 678 F. Supp. 863, 870 (S.D. Fla. 1988) (finding no liability where employer had no actual or constructive knowledge of harassment); Wimberly v. Shoney's Inc., 39 Fair Empl. Prac. Cas. (BNA) 444, 453 (S.D. Ga. 1985) (same); Collins v. Pfizer Inc., 39 Fair Empl. Prac. Cas. (BNA) 1316, 1331 (D. Conn. 1985) (refusing to find employer liable where plaintiff did not report the alleged harassment to management); Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315, 1322 (D.N.J. 1983) (finding no liability where employer had no actual or constructive knowledge of harassment).

33. *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1473, 1475 (3d Cir. 1990).

34. *See, e.g., Hall*, 842 F.2d at 1012; Llewellyn v. Celanese Corp., 693 F. Supp. 369, 371 (W.D.N.C. 1988).

35. *See, e.g., Hall*, 842 F.2d at 1012; Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1499 (M.D. Fla. 1991); Morris v. American Nat'l Can Corp., 730 F. Supp. 1489, 1491 (E.D. Mo. 1989).

36. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (holding that under Title VII, once a plaintiff establishes a prima facie case of race discrimination, the burden shifts to the employer to show a legitimate, non-discriminatory reason for its actions); *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (applying rule in *McDonnell Douglas* to a gender discrimination case).

37. Title VII of the Civil Rights Act of 1964, § 703, *as amended by* the Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. V 1993) (allocating burden of proof in disparate impact cases).

v. Vinson,[38] the first case in which the United States Supreme Court faced the question of what constitutes sex-based harassment. Although this was the Court's first consideration of sex-based harassment, the case involved not the (now) relatively straightforward claim of quid pro quo sexual harassment,[39] in which sexual activity is explicitly required from an employee if she is to keep her job or obtain benefits such as a promotion, but rather the enduringly more troublesome claim of what has come to be known as "hostile environment" sexual harassment.[40] Although plaintiff Mechelle Vinson could not prove that her submission to fondling and sexual demands were required in order for her to keep her job or obtain promotions, the Court found that she had stated a cause of action for discrimination under Title VII. Finding the behavior to which Vinson was exposed to be sex-based for purposes of the Act,[41] the Court sustained the hostile environment

38. 477 U.S. 57 (1986).

39. Prior to *Barnes* (and even subsequently, in some circuits), courts routinely rejected "quid pro quo" sexual harassment claims. *See, e.g.,* Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979); Garber v. Saxon Indus., Inc., 14 Empl. Prac. Dec. (CCH) ¶ 7586 (E.D. Va. 1976), *rev'd sub nom.* Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd,* 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd,* 568 F.2d 1044 (3d Cir. 1977); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated without opinion,* 562 F.2d 55 (9th Cir. 1977). The district court's decision in *Barnes,* of course, also rejected plaintiff's claim for relief for quid pro quo harassment. Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

40. MacKinnon originally termed this "condition of work" harassment. *See* MACKINNON, *supra* note 2, at 40-47. My analysis suggests that her term hews more closely to the discriminatory focus of Title VII than the now judicially sanctioned, tort-like term, "hostile environment."

41. *Meritor,* 477 U.S. at 66-67. Courts originally stumbled over the question of whether sexual harassment constitutes sex discrimination, worried about the fact-pattern of a bisexual employer who made sexual demands of both male and female employees. *See, e.g.,* Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing) (arguing that Congress must not have intended individual harassment to constitute Title VII sex discrimination because it does not make sense to protect a woman from a lesbian harasser or a male heterosexual harasser, but not from a bisexual harasser), *aff'd on other grounds sub. nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (stating that harassment of both men and women by a bisexual would not be discrimination); *Tomkins,* 422 F. Supp. at 556 (holding that a male supervisor's sexual harassment and assault of a female employee did not constitute sex discrimination because "gender lines might as easily have been reversed, or even not crossed at all"); *Corne,* 390 F. Supp. at 163 (holding that sexual advances are not contemplated by Title VII because such conduct, directed equally toward males, would not be a basis for suit).

The Supreme Court had little difficulty in finding that sexual harassment is sex discrimination: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." *Meritor,* 477 U.S. at 64. It is interesting to note that it was the demonstration that sexual harassment was sex-based discrimination that preoccupied the legal argument presented by Catharine MacKinnon in her insightful book, *Sexual Harassment of Working Women. See* MACKINNON, *supra* note 2, at 143-213. Courts have found sexual harassment to be sex discrimination on the basis of a simple differences approach to discrimination law and not the more subtle inequality approach that MacKinnon advocates. *See also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 357-59 (1992) (using bisexual harasser concept to argue for an "autonomy" norm rather than an "antidiscrimination" norm in his critique of Title VII).

claim and agreed that the protections of Title VII go "beyond the economic aspects of employment."[42]

The Court drew on two sources as models for the standard for a hostile environment sexual harassment claim. First, the Court took guidance from the EEOC interpretation that sexual harassment violates Title VII when it has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[43] Second, the Court endorsed the analogy between racial and sexual harassment drawn earlier by the Eleventh Circuit in *Henson v. City of Dundee.*[44] The Court noted that a Title VII hostile environment claim for racial harassment had long been recoguized by the courts on the theory that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[45] It then drew the following analogy:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[46]

The Court cautioned, however, that not all "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" in the workplace[47] constitute a violation of Title VII. It stated the following test: "For sexual harassment to be actionable, it must be suffi-

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Note, however, that although courts have recognized heterosexual (and, to some extent, homosexual) harassment as sex discrimination, many continue to consider sexual harassment by a bisexual person to be excluded from Title VII coverage on the grounds that if persons of either sex would, theoretically, be equally subject to such harassment, it could not be sex-based (even if the harassment were sexual in content). *See, e.g., Barnes,* 561 F.2d at 990 n.55 (distinguishing heterosexual and homosexual harassment from harassment by a bisexual individual, reasoning that the former would not occur but for the sex of the victim, while the latter could be inflicted on employees of either gender and thus would not constitute *sex* discrimination); *see also* Jones v. Flagship Int'l, 793 F.2d 714, 720 n.5 (5th Cir. 1986) ("Except in the exccedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex."), *cert. denied,* 479 U.S. 1065 (1987); Henson v. City of Dundee, 682 F.2d 897, 904, 905 n.11 (11th Cir. 1982) (same); Harrison v. Chance, 797 P.2d 200, 204 (Mont. 1990) (citing *Henson* and *Barnes* on the bisexuality exception but refusing to consider the bisexuality issue for procedural reasons); *cf.* Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336-38 (D. Wyo. 1993) (distinguishing a bisexual harasser from an "equal opportunity" harasser whose remarks are gender-driven and holding the latter liable under Title VII).

42. 477 U.S. at 66.

43. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1994)).

44. *Id.* at 66-67 (citing *Henson,* 682 F.2d at 902).

45. *Id.* at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972)).

46. *Id.* at 67 (quoting *Henson,* 682 F.2d at 902).

47. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)).

ciently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.' "[48]

In the years following the *Meritor* decision, two divergent interpretations emerged to explain when harassment is "sufficiently severe or pervasive." In the first, as formulated by the Sixth Circuit in *Rabidue v. Osceola Refining Co.*,[49] harassment is "sufficiently severe or pervasive" to violate Title VII when it has "the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well being of the plaintiff."[50] The seeds for this interpretation are found in *Henson*:

> For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances.[51]

The basis for the *Henson* court's invocation of psychological effects is traceable to *Rogers v. Equal Employment Opportunity Commission*,[52] cited by the *Henson* court for the proposition that "the state of psychological well being is a term, condition, or privilege of employment within the meaning of Title VII,"[53] and by the Supreme Court for the proposition that racial harassment violates Title VII because of its effect on "emotional and psychological stability."[54] The Fifth Circuit elaborated in *Rogers*: "As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse."[55] Building on these views, the *Rabidue* interpretation is that sexual harassment violates Title VII because it discriminates in the provision of a "fringe benefit," namely the state of "psychological well being" engendered by workplace atmosphere.[56]

The second interpretation of the *Meritor* test relies more heavily on the EEOC formulation cited by the Supreme Court in *Meritor*. In *Ellison v.*

48. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904) (alteration in original).

49. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

50. *Id.* at 619.

51. *Henson*, 682 F.2d at 904.

52. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

53. *Henson*, 682 F.2d at 904.

54. *Meritor*, 477 U.S. at 66 (quoting *Rogers*, 454 F.2d at 238).

55. *Rogers*, 454 F.2d at 238.

56. This psychological effects formulation is also adopted by the Third and Seventh Circuits. *See* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482-83 (3d Cir. 1990) (referring to effect of harassment on employee's psychological stability); Brooms v. Regal Tube Co., 881 F.2d 412, 418-19 (7th Cir. 1989) (referring to employee's psychological well-being).

Brady,[57] the Ninth Circuit explicitly rejected the *Rabidue* psychological harm requirement: "Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."[58] Applying the EEOC guidelines, the Ninth Circuit elaborated on the *Meritor* test, concluding that "[c]onduct which unreasonably interferes with work performance can alter a condition of employment and create an abusive working environment."[59]

In its 1993 term, the Supreme Court decided *Harris v. Forklift Systems,*[60] appearing to resolve this split in interpretation of the *Meritor* test in favor of the second approach. Although the *Harris* court's formulation diverges somewhat from the Ninth Circuit's "unreasonable interference" standard for determining abusive environments,[61] *Ellison* and *Harris* are in substantial agreement. Writing for the Court, Justice O'Connor clarified the *Meritor* test: in order for a plaintiff charging her employer with sexual harassment to demonstrate that her working conditions were "actually altered" in violation of Title VII, she must show that the conduct complained of was "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive"[62] and that she "subjectively perceive[d] the environment to be abusive."[63] Under *Harris*, the presence of psychological impairment is relevant to proving an abusive environment, but it is not a required element of proof for a Title VII sex-based harassment claim.[64] In their rejection of the *Rabidue* psychological injury requirement and their focus on abusive environments, the *Harris* and *Ellison* decisions are largely in accord.

Although the *Harris* test rejects the explicit formulation of the psychological effects requirement in *Rabidue,* a sexual harassment plaintiff may still be required to show some degree of psychological harm in order to prevail. The test is still formulated on psychological terrain, turning on an analysis of an individual's experience of "hostility" or "abuse." In the absence of concrete external evidence that harassment caused an employee's job performance to suffer, discouraged her from staying in her job, or prevented the advancement of her career,[65] there is little to confirm the plaintiff's experience of hostility or abuse. Courts implementing the *Harris* "subjective" requirement have no alternative but to demand that the

57. 924 F.2d 872 (9th Cir. 1991).

58. *Id.* at 878.

59. *Id.* at 877.

60. 114 S. Ct. 367 (1993).

61. *See id.* at 370-71; *cf. id.* at 372 (Ginsburg, J., concurring) (endorsing the EEOC's "unreasonable interference" test).

62. *Id.* at 370.

63. *Id.*

64. *Id.* at 370-71.

65. *See id.* at 371.

plaintiff show psychological impairment in order to prove that she subjectively perceived her workplace to be abusive or hostile. Even with external evidence of an impact on workplace performance, the causation requirement in the test is likely to beg evidence of psychological impairment.

II

CRITIQUE OF EXISTING TESTS: WHAT WENT WRONG

Both the *Harris* test and the now-discredited *Rabidue* test are flawed because of their origin in an inadequate analysis of why hostile environment sex-based harassment constitutes sex discrimination in employment. In *Meritor,* the Supreme Court characterized its recognition of a hostile environment claim under Title VII as a rejection of the view that, in enacting Title VII, "Congress was concerned [only] with . . . 'tangible loss' of 'an economic character,' not 'purely psychological aspects of the workplace environment.' "[66] In so doing, and in adopting the alternative view that "harassment leading to noneconomic injury can violate Title VII,"[67] the Court set up a dichotomy between economic and purely psychological effects. In this view, harassment leads to economic effects when employment, promotion, or compensation is conditioned explicitly on submission to sexual demands, and to "purely psychological" effects when those conditions are absent.

It is not surprising, then, that the tests that have emerged to implement the *Meritor* "sufficiently severe and pervasive" standard have focused on the psychological impact of harassment, either on a woman's well-being or on her work performance. Even cases that have recognized the economic effects of harassment, such as *Harris,* continue to inquire into whether conduct is sufficiently severe or pervasive to produce both objective and subjective determinations that the environment is "hostile" or "abusive." To the extent that it does so, the *Harris* test, like its predecessors, is rooted in the view that the discrimination created by sex-based harassment may inhere per se in the different subjective environments in which men and women work when women alone are harassed. Women are discriminated against, in this view, because they must suffer the intangible "purely psychological," "non-economic" harms of harassment, namely the denial of a "state of psychological well-being," while men do not. Consequently, the central preoccupation of these tests is a tort-like inquiry into the extent of the psychological harm and a judicial determination of whether the harm is significant enough to warrant a remedy.

This inquiry invites, even requires, a *normative* judgment in each case of whether harassment is offensive enough to constitute discrimination.[68]

66. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (quoting Brief for Petitioner at 30-31, 34).

67. *Id.* at 65.

68. Justice Scalia expressed concern about this inquiry in *Harris*:

In answering this question, it is nearly impossible to avoid incorporating some judgment about what women should put up with at work,[69] what is considered normatively acceptable in a particular workplace[70] or the wider culture,[71] or, at least implicitly, what is a fair allocation between the type of workplace men prefer and the type of workplace women prefer (assuming such generalizations could be made). Is peering down a women's blouse bad enough to be called "abusive"? Is insinuating that a woman closed a deal by relying on sex offensive enough to require redress?[72] These case-by-case normative judgments, required by each of the tests developed to

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"Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person's" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. 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.* One might say that what constitutes "negligence" (a traditional jury question) is not much more clear and certain than what constitutes "abusiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under [Title VII] "abusiveness" is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.

Be that as it may, I know of no alternative to the course the Court today has taken.

114 S. Ct. at 372 (Scalia, J., concurring) (emphasis added).

69. *See, e.g.*, GUTEK, WORKPLACE, *supra* note 2, at 10, 73, 81 (summarizing results of survey of business managers in Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment: Some See It . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 76, in which majority of respondents subscribed to the view that women employees should be able to handle whatever behavior confronts them, including sexual advances); SURVEY OF CANADIANS, *supra* note 3, at 22-23 (reporting that 50% of survey respondents agreed at least somewhat with statement that women should expect sexual advances at work and learn to handle them).

Cases adopting an "assumption of the risk" approach to sexual harassment include, for example, Rabidue v. Osceola Refining Co., 805 F.2d 611, 620-21 (6th Cir. 1986) (stating that a factor in finding sexual harassment is "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment"), *cert. denied*, 481 U.S. 1041 (1987); *see* MACKINNON, *supra* note 2, at 80-81 & nn.104-05 (citing Decision of the Referee, In re Nancy J. Fillhouer, Case No. SJ-5963, William J. Costello, Referee (San Jose Referee Office, April 28, 1975), which denied plaintiff's harassment claim and noted repeatedly that plaintiff "resumed work with full knowledge of the conditions of employment" despite the fact that plaintiff returned to work only on her employer's promise to treat her respectfully).

70. *See, e.g.*, Halpert v. Wertheim & Co., 27 Fair Empl. Prac. Cas. (BNA) 21, 23-24 (S.D.N.Y. 1980) (ruling that vulgar language, common among stock traders, did not constitute harassment when directed at plaintiff stock trader); *see also* Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 535 (N.D. Ill. 1988) (finding supervisor's sexual overtures toward plaintiff "essentially unoffensive and not even clearly unwelcome"), *aff'd*, 913 F.2d 456 (7th Cir. 1990); Vermett v. Hough, 627 F. Supp. 587, 607 (W.D. Mich. 1986) (finding the shining of flashlight up skirt "childish" but not sexually harassing; dismissing other allegations of harassment as not credible); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986) (ruling that alleged instances of sexual suggestions and propositions directed at plaintiff mechanic were "too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim").

71. *See Rabidue*, 805 F.2d at 622 (ruling that sexually oriented posters had a de minimis effect on the plaintiff's work environment "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica").

72. *See Harris*, 114 S. Ct. at 369.

evaluate harassment claims (including the *Harris* test), make sex-based harassment cases difficult to judge and evoke such strong reactions, often divided roughly along gender lines, to decisions in sexual harassment cases. For under such an approach the court is called on to treat each sexual harassment case as a microcosm of the contentious public debate about acceptable sexual conduct in the workplace.

These difficulties in sexual harassment doctrine—the psychological harm requirement and the injection of case-by-case tort judgments about harm and offensiveness—can be traced back to the Supreme Court's endorsement in *Meritor* of the essentially false dichotomy between tangible "economic" effects of harassment in the quid pro quo case and "non-economic" psychological effects of harassment in the hostile environment case. The dichotomy is false because even if the *harasser* does not threaten to inflict direct economic injury, the *victim's response* to a harassing environment may have an economic effect. This may be true even if the harassment has no negative psychological impact on the victim; indeed, it may be true even if the harassment is not "offensive" to the recipient.[73] Even women who are equipped with nerves and countenances of steel may nonetheless take action to their detriment in response to harassment.

By analyzing the hostile environment case as one of discrimination in the intangible psychological benefits of employment, courts have missed the essential violation of Title VII that harassment perpetuates—the introduction of a discriminatory factor into women's economic choices.[74] Sex-

73. *See infra* Part IV.

74. Congress's concern about the economic effects of discrimination can be seen in the legislative history of the Equal Employment Opportunities Enforcement Act of 1971, Pub. L. No. 92-261, § 4, 86 Stat. 104 (1972), 42 U.S.C. § 2000e-5, which amended Title VII. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 4-5 (1971) (characterizing the situation of "working women" as involving "profound economic discrimination" and "*economic deprivation as a class,*" and noting wage disparities between men and women) (emphasis added); *id.* at 14 (arguing that the EEOC should have authority to handle "pattern or practice" cases in order to address systemic discrimination comprehensively); *id.* at 24 (advocating that the EEOC be empowered to enforce equal employment obligations in federal employment because the Civil Service Commission failed to recognize that purportedly neutral policies have discriminatory effects that subject "classes of persons who are culturally or educationally disadvantaged . . . to a heavier burden in seeking employment"); *see also* Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977) (noting that Title VII "invalidates all 'artificial, arbitrary and unnecessary barriers' " to women's employment, and that in adopting the 1972 amendments Congress intended to combat sex discrimination vigorously and "elevate the status of women in employment").

Similar concerns were expressed during congressional debates over the Civil Rights and Women's Equity in Employment Act of 1991, which also amended Title VII. *See* H.R. REP. No. 40, pt. I, 102d Cong., 1st Sess. 20-21 (1991) (discussing pay equity/wage gap in relation to discrimination); 137 CONG. REC. S15,480, S15,486, S15,488, S15,491, S15,494 (daily ed. Oct. 30, 1991), *reprinted in* DAVID A. CATHCART ET AL., THE CIVIL RIGHTS ACT OF 1991, at 264-78 (1993); 137 CONG. REC. H9533, H9537-39, H9552, H9555 (daily ed. Nov. 7, 1991), *reprinted in* CATHCART, *supra* at 345-67.

On Title VII and the economic effects of discrimination, *see generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-67 (1986) (holding Title VII prohibitions not limited to "tangible, economic barriers"); EEOC v. Shell Oil Co., 466 U.S. 54, 69 (1984) ("By 1972, Congress was aware that employment discrimination was a 'complex and pervasive' problem that could be extirpated only with thoroughgoing remedies . . . ."); General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) ("When the

based harassment is a cost of employment that women alone bear, and this cost can be expected to lead women, conceived of as rational actors, to make employment decisions that differ from those made by men in otherwise similar circumstances. The flaw in the current analysis of sex-based harassment is that it finds discrimination simply in the differential cost imposed upon men and women.[75] Closer analysis goes a step further to see that the discrimination worked by sex-based harassment stems from the rational response of female employees to harassment.

Once the focus is shifted to the impact of harassment on women's employment decisions, it is plain that sex-based harassment, even if not of the quid pro quo variety, is economic discrimination. Women's employment decisions, and consequently their economic status, are distorted by the practice of harassment in ways that men's employment decisions and economic status are not. Since harassment is discrimination that goes to the core of Title VII's concern with equal employment opportunity, there is no basis for a legal standard that requires a case-by-case normative assessment of whether harassment is "hostile" or "abusive" enough to constitute an injury. Title VII decrees the injury: discrimination. The only inquiry that harassment law should make is whether alleged harassment introduces a distortion into the employment choices women make. In the next Parts, I turn to an economic analysis of the impact of sex-based harassment and develop a test for when harassment violates Title VII.

III

THE ECONOMIC IMPACT OF SEX-BASED HARASSMENT

Sex-based harassment affects many aspects of women's lives. It can cause psychological harm.[76] It can interfere with a woman's job, by diminishing her professional credibility, by depriving her of equipment or cooperation, or by inflicting psychological injury.[77] It can perpetuate sexual

EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination."); Donovan v. University of Tex., 643 F.2d 1201, 1205 & n.8 (5th Cir. 1981) (reviewing legislative history of 1972 amendments and noting that Congress intended "to deal comprehensively with systematic discrimination").

75. See, for example, Justice Ginsburg's concurrence in *Harris*: "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." *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring).

76. *See, e.g.*, GUTEK, WORKPLACE, *supra* note 2, at 70-71, 113-15; MACKINNON, supra note 2, at 47-52; SURVEY OF CANADIANS, *supra* note 3, at 14-16; Terpstra & Baker, *supra* note 2, at 191-92; Sandroff, *supra* note 2, at 50.

77. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 985 (D.C. Cir. 1977) (supervisor retaliated against employee's rejection of his advances by stripping her of her job duties and then abolishing her job); Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 555 (D.N.J. 1976) (supervisor retaliated against plaintiff who complained of sexual harassment with disciplinary layoffs and threats of demotion and salary cuts), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654, 655-56

stereotypes of women, such as "women are primarily sex objects and not workers" and "women use sex to gain advancement in the workplace."[78] It can contribute to women's diminished self-esteem and to their conception of themselves as capable only of "women's work."[79] It can reinforce male dominance in the workplace.[80]

(D.D.C. 1976) (supervisor retaliated against plaintiff who rejected his advances by issuing repeated and unwarranted reprimands about job performance, refusing to provide routine supervision and task direction, refusing to consider her proposals and recommendations, and refusing to recognize her as a competent professional), *rev'd on procedural grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); Monge v. Beebe Rubber Co., 316 A.2d 549, 551-52 (N.H. 1974) (foreman retaliated against plaintiff by cutting her hours, putting her on a lower-paying machine, and interfering with her work so she was unable to maintain production); MACKINNON, *supra* note 2, at 195 n.147 (citing [1973] EEOC Decisions (CCH) ¶ 6290 (1971) (employer demoted female supervisor because male inferiors harassed her and refused to assist her in tasks requiring teamwork)); Jill L. Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go,* 10 CAP. U. L. REV. 445, 465-66 (1981) (citing In re Arbitration between Douglass Aircraft Co. v. United Auto., Aerospace & Agric. Workers (UAW), Local 148 (June 30, 1980) (sexual harassment led to decrease in productivity and denial of training)); *see also* GUTEK, WORKPLACE, *supra* note 2, at 70-71, 113-15 (surveying the reactions of women to harassment and reporting that job satisfaction among women is reduced by all forms of sex at work and even by complimentary sexual comments); MILWID, *supra* note 4, at 107 (citing a woman's story of worrying that her reputation may be damaged if she sued for harassment); SURVEY OF CANADIANS, *supra* note 3, at 14-16 (reporting effects of harassment on respondents' work); Terpstra & Baker, *supra* note 2, at 195; Sandroff, *supra* note 4, at 71 (noting that harassed women who decide to stay in their jobs "take more sick leave and suffer an eclipse of confidence in their company that saps their enthusaism and productivity").

78. *See* GUTEK, WORKPLACE, *supra* note 2, at 165-69; BERGMANN, *supra* note 4, at 104-05 ("Sometimes the sexual harassment of a woman in a typically female job is done to show her and her coworkers that she is always a sex object and so cannot be a serious competitor of men."); MACKINNON, *supra* note 2, at 36-39, 49, 177, 180, 197; *see also* MILWID, *supra* note 4, at 111-13 (recounting story of a woman who, after being the target of sexual advances, gained a reputation for using sex to get promotions); *cf. id.* at 39-41, 80, 87, 102-04, 115 (recounting stories of women worried about being perceived as sex objects rather than workers and as having slept their way to the top).

Such sexual stereotypes of women are prevalent in the workplace. *See* GUTEK, WORKPLACE, *supra* note 2, at 50-52, 126-27, 132-37; Sandroff, *supra* note 4, at 73 ("Many men are accustomed to treating women in rather limited ways, as sex objects or as relatives . . . but have little experience in dealing with women as colleagues, peers, workers or supervisors."); *see also* CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court, in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 103, 112 (1987) (discussing defenses of two men accused of harassment: the first reasoned that since plaintiff tolerated it for so long she must have liked it, and the second heard that plaintiff had sex with the first and assumed she was "open" to sex with him as well (note that plaintiff claimed the second man raped her)); SURVEY OF CANADIANS, *supra* note 3, at 423-24 (reporting that 33% of all respondents and 35% of male respondents agreed that women who are bothered by male co-workers usually ask for it); Catherine Breslin & Michele Morris, *"Please Leave Me Alone,"* WORKING WOMAN, Dec. 1988, at 74, 77 (stating that plaintiffs in a $2.5 million sexual harassment lawsuit were accused by their employer of engaging in "negligent, reckless, and wanton conduct which combined and concurred with any alleged similar conduct of defendants").

79. *See, e.g.,* MACKINNON, *supra* note 2, at 22-23, 47-52, 178, 216; Sandroff, *supra* note 2, at 50 (describing effects of harassment on women's self-esteem); *cf.* MILWID, *supra* note 4, at 50 (describing perfectionism as attempt to overcome skepticism about woman's ability to perform job).

80. *See* GUTEK, WORKPLACE, *supra* note 2, at 14-15; MACKINNON, *supra* note 2, at 1-2, 191-92, 235-36; MCCANN & MCGINN, *supra* note 2, at 76; Goodman, *supra* note 77, at 468; Tangri et al., *supra* note 2, at 40; *cf.* Sandroff, *supra* note 4, at 69, 72 (reporting that companies with lowest percentages of female workers report highest rates of sexual harassment complaints).

Although all of these statements about sex-based harassment are to some degree true, none provides a strong analytical base for sex-based harassment cases under Title VII as it is currently interpreted.[81] The economic analysis of sex-based harassment that I offer in this Part provides a stronger foundation for the development of a test for sex-based harassment. It does not do so at the expense of the other claims about the impact of sex-based harassment enumerated above. Nor does it reject sex-based harassment claims that would succeed under an alternative view of the harm of sex-based harassment. The economics-derived test for sex-based harassment that I present in Part IV is generally more expansive, but also more determinate,[82] than tests rooted in psychological harm.

The starting point for analyzing the economic impact of sex-based harassment is at the macroeconomic level,[83] where the impact of sex-based harassment on women's economic status is widely recognized. For example, sex-based harassment is a factor in the perpetuation of occupational segregation.[84] Particularly for women attempting to enter traditionally male-dominated or exclusively male fields, sex-based harassment erects a significant barrier. Studies document that over forty percent of women in

81. MacKinnon's emphasis on the role of sexual harassment in the perpetuation of cultural limitations on women in the workforce is one that I agree is important theoretically. As she implicitly recognizes, however, Title VII will only be an effective tool in interrupting this role if courts conceive of "discrimination" according to what she calls the "inequality" approach: finding a practice discriminatory when it contributes to women's disadvantaged status. *See* MACKINNON, *supra* note 2, at 174. The "differences" approach to discrimination—finding a practice discriminatory when it treats women differently than it treats similarly situated men—is poorly suited to addressing the cultural harm of sexual harassment that MacKinnon analyzes because it does not address how sexual harassment contributes to the different positions, notably with respect to power, in which actual men and women find themselves. The differences approach, however, as MacKinnon recognizes, is the approach followed in current United States doctrine. My project in this Article is to develop a test for sexual harassment that reaches as deeply as it can into the harm of sexual harassment within the established differences framework, although I agree that the inequality approach is a superior understanding of discrimination.

82. The test turns on a positive inquiry into the likely impact of harassment on the employment decisions of a hypothetical rational decision-maker, rather than on a normative judgment about when harassment is sufficiently offensive to a reasonable woman to cause psychological harm or impaired workplace performance; the "reasonable" woman is easily defined to be one who is able to handle what a court believes are ordinary and acceptable working conditions. *See* text accompanying notes 104-105.

As a more determinate analysis than existing tests for sexual harassment, my economic test would seem to answer Justice Scalia's concerns, expressed in his concurring opinion in *Harris*, about the vagueness and potential abuse of the existing standard. *See supra* note 68. My analysis makes clear that "abusive" harassment has tangible economic effects on women in the workforce, and the test I propose focuses explicitly on those economic harms. If Justice Scalia is concerned that plaintiffs who charge employers with "abusive harassment" may have suffered no "independent" harm, unlike plaintiffs alleging the tort of negligence, this analysis should relieve him of that misconception. The test I recommend should also satisfy Justice Scalia that an alternative to the *Harris* test does exist—an alternative that arguably eliminates the problems he postulates.

83. I want to emphasize again that my analysis is not efficiency-oriented. *See supra* note 11. I am concerned with women's economic status and economic disadvantage for normative reasons not affiliated with efficiency. Efficiency may be—probably is—at stake here also, but my normative framework takes the undesirability of women's diminished economic status as a premise.

84. *See* BERGMANN, *supra* note 4, at 104-06.

male-dominated jobs, as compared to thirty percent of women in all jobs, have suffered one or more negative consequences of harassment; twenty percent as compared to nine percent have quit a job at some point because of harassment; and an additional nine percent of women in male-dominated fields have lost a job at some point because of harassment.[85] In many blue-collar jobs in particular, sex-based harassment is an overtly hostile effort to get female intruders to quit.[86]

Moreover, half of the women in white-collar female-dominated occupations who consider moving into blue-collar male-dominated positions anticipate harassment.[87] "Thus, the fear of harassment may constitute as large a barrier as harassment itself in constraining choices women make regarding their careers."[88] As a result, one study has documented that although women move into male-dominated occupations at significant, if low, rates, this flow has not had any substantial impact on the degree of occupational segregation (which remains widespread thirty years after the passage of the Civil Rights Act)[89] because women leave these occupations at almost the same rate.[90] In fact, a "large proportion of women in men's occupations leave male-dominated fields entirely when they change occupations."[91] That women hired into these jobs have the skills necessary for entry into the occupation defeats to some extent a "human capital" explanation for the attrition rate. That the women leaving male-dominated occupations do not leave the workforce entirely defeats to some extent the theory that the lack of child care accounts for the attrition rate.[92] Thus, sex-based harassment may be an important factor in the perpetuation of horizontal occupational segregation.

Sex-based harassment may also contribute to vertical occupational segregation by reducing women's workplace flexibility, productivity, and ambition and by distorting the evaluation of women on the job. Flexibility is directly impeded by harassment because the dominant response of women who have been harassed and those who anticipate harassment is,

85. Barbara A. Gutek & Bruce Morasch, *Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. Soc. Issues No. 4, at 55, 68 (1982); *see also* Jacobs, *supra* note 2, at 151-53 (citing Gutek & Morasch, *supra*).

86. Jacobs, *supra* note 2, at 151-55; White et al., *supra* note 3, at 8-10 (describing harassment stemming from male co-workers' resentment of women miners).

87. Jacobs, *supra* note 2, at 152.

88. *Id.*

A former chief of police for a large California city has told me of severe sexual harassment of women police officers, to the extent that male officers would fail to provide backup assistance on the street. The potential impact of such harassment on a woman's decision to enter the police force is plain. For other examples of harassment directed against women police offieers, see Andrews v. City of Philadelphia, 895 F.2d 1469, 1473 (3d Cir. 1990).

89. Victor R. Fuchs, Women's Quest for Economic Equality 1-2, 33-35 (1988).

90. *See* Jacobs, *supra* note 2, at 144, 164-68.

91. *Id.* at 168; *see generally id.* at 134-68.

92. *See id.* at 47, 165-67.

rather obviously, to avoid the harassment.[93] Women who are concerned about being harassed while travelling with their co-workers or supervisors, for example, may refuse or limit their business-related travel, thus hampering their promotion potential; they may also refuse promotions that require travel. Promotion prospects are also damaged when women avoid overtime or night shifts because of the greater likelihood of harassment at these times, and when they refuse transfers to projects or units where they will come in closer contact with known harassers. Evaluations for promotions may be clouded by the sexual preoccupation or sexist perceptions of a harassing supervisor. Such evaluations also suffer because of the difficulty that a woman has in performing up to her potential when harassment takes up her time, upsets and distracts her, inhibits her on-the-job training, or deprives her of the cooperation she needs from fellow employees.[94] In addition, progress up the job ladder is impeded when sex-based harassment inhibits a woman from developing mentors to help her develop job skills and organizational insight.

Related to the contribution of sex-based harassment to occupational segregation is its impact on wages. Horizontal occupational segregation is responsible for at least thirty percent of the wage gap between men and women,[95] as traditionally male occupations generally are much more highly paid than traditionally female occupations. Vertical occupational segregation also has obvious implications for the wage differential between men and women. Promotion to better-paying male-dominated positions is impeded when sex-based harassment interferes with a woman's performance evaluations. Diminished ambition[96] or diminished credibility with clients resulting from sex-based harassment also translates into lower

93. *See, e.g.*, SURVEY OF CANADIANS, *supra* note 3, at 10-11 (avoidance was the response of 30% of women receiving unwanted sexual attention, 41% of women who labelled this behavior harassment, 23% of women who did not label this behavior harassment, and 15% of men who received unwanted sexual attention); Terpstra & Baker, *supra* note 2, at 188 (in study of federal employees, 43% of harassed women said their response was avoidance); *see also* MACKINNON, *supra* note 2, at 52; MILWID, *supra* note 4, at 96.

94. *See* BERGMANN, *supra* note 4, at 103-04; Goodman, *supra* note 77, at 454; *see also* Macey v. World Airways, Inc., 14 Fair Empl. Prac. Cas. (BNA) 1426, 1428 (N.D. Cal. 1977) (first female mechanic at company denied informal help and training); Williams v. Saxbe, 413 F. Supp. 654, 655-56 (D.D.C. 1976) (male superior retaliated by withholding information and support after his sexual advance was refused), *rev'd on procedural grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); Goodman, *supra* note 77, at 465-66 (female mechanic terminated from training program after harassment affected her work performance); *cf.* BERGMANN, *supra* note 4, at 80, 113, 117 (explaining that a common rationalization among employers who deny training opportunities to women is that women have a higher turnover rate).

95. WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 33 (Donald J. Treiman & Heidi I. Hartmann eds., 1981); *see also* White et al., *supra* note 3, at 3-4 (women miners surveyed averaged $17,302 gross annual income in 1980, in contrast to an average gross annual income of $7,789 if they had kept their pre-mining jobs; the women's most common occupations prior to mining were factory work and waitressing).

96. *See, e.g.*, GUTEK, WORKPLACE, *supra* note 2, at 124.

incomes. So do refusals of overtime for hourly workers and refusals of travel or clients for commission employees.

Sex-based harassment is also a factor in women's overall economic status as a consequence of its impact on women's job and occupation turnover rates and their documented lower "attachment" to the workforce.[97] Women who quit or lose a job because of harassment[98] diminish their long-term earning capacity by interrupting their accumulation of experience and skills, and by sending poor signals to the labor market about their abilities, commitment, and reliability.[99] Even if a woman remains in her job, her long-term earning capacity nevertheless suffers when her accumulation of on-the-job training is encumbered by the interference of sex-based harassment or by her refusals of specific projects, transfers, shifts, or travel in order to limit her exposure to harassment. And long-term earning capacity is reduced when harassment, by diminishing a woman's job satisfaction, reduces her labor-force attachment and thus increases both the likelihood that she will exit the labor force and the length of time she chooses to stay out of the labor force. Sex-based harassment may, through this mechanism, affect women's decisions about how long to stay at home doing housework and child care (a substantial determinant of women's diminished economic status)[100] or how long to remain on unemployment or welfare.

The most important point to recognize about the contribution of sex-based harassment to women's economic status is that many of these effects are a result of *women's employment choices,* made in response to the experience or anticipation of harassment. That is, from an economic point of view in which women employees are conceived of as rational actors, the

97. Women quit their jobs more often then men and spend more time outside the workforce. *See* Mary Corcoran & Greg J. Duncan, *Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes,* 14 J. HUM. RESOURCES 3, 7-8 (1979) (finding that women are more likely than men to miss work due to their own illness and that of others, to have imposed limitations on job location and work, and to plan to quit work in the near future); Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation,* 82 GEO. L.J. 31, 42 (1993) (finding a large but narrowing difference between the time men and women spend out of the labor force after completing school).

98. *See, e.g.,* SURVEY OF CANADIANS, *supra* note 3, at 15 (23% of all women receiving unwanted sexual attention, and 35% of women labelling this behavior "harassment," quit or were fired from their jobs); Terpstra & Baker, *supra* note 2, at 195 (1985 study of EEO complainants reported that 16% had quit their jobs in response to sexual harassment and 66% had been fired; 1982 study of different group of harassed women found 25% had been fired or laid off, and 42% had quit; the three "most representative" studies of sexual harassment victims, in the view of the authors, indicate that 2% to 7% of such workers are fired, and 7% to 15% quit their jobs); Sandroff, *supra* note 2, at 50 (25% of survey respondents who had been victimized by sexual harassment had been fired or forced to quit).

99. On the other hand, a woman may rationally fear that continuing to work in an environment in which sexual harassment is rampant will send a distorted signal to the outside labor market that she participates in harassment and has earned her position, salary, etc., at least in part by sexual means, thereby decreasing the labor market's estimate of her abilities. *See, e.g.,* GUTEK, WORKPLACE, *supra* note 2, at 167-69; MACKINNON, *supra* note 2, at 49; MILWID, *supra* note 4, at 103-04, 111-13; *cf.* BERGMANN, *supra* note 4, at 104-05.

100. *See* Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap,* 82 GEO. L.J. 89, 89 (1993).

macroeconomic implications of sex-based harassment for women's economic status can be traced to the microeconomic employment choices made by individual women. Therefore, if we understand the legislative intent of Title VII to be the elimination of discrimination in the "terms, conditions, and privileges" of work in order, in part, to eliminate discrimination as a factor in women's macroeconomic status—and not simply to provide tort-like protection for the invasion of individual rights—then it is necessary to craft a legal test for sex-based harassment under Title VII that interrupts the microeconomic impact of harassment on women's employment choices. I turn now to the construction of such a test.

IV
THE RATIONAL WOMAN: AN ECONOMIC TEST FOR SEX-BASED HARASSMENT

A. Developing the Test

The test I present uses economic analysis, which provides a model of women in the workplace as rational actors, to identify the circumstances in which women's employment choices are distorted to their detriment by factors that do not equally distort men's choices and cannot be justified on the grounds of "job-relatedness" and "business necessity." In order to understand the test, it is important to grasp the positive and normative dimensions of the economic analysis I employ. Understanding the former will require only a short recapitulation of conventional economic methodology. The latter, however, involves an approach oddly unconventional in the law and economics literature. Let me begin with the unconventional.

The normative framework I rely on takes Title VII as its starting point. That is, I do not seek to justify my test for discrimination on the grounds that it is an efficient rule.[101] Rather, I assume as a basic principle that harm occurs when women's economic status is distorted by discriminatory factors, and that it is one of the purposes of Title VII to redress this harm. Thus the economic analysis I employ differs from the standard fare of traditional law and economics writings in that I take anti-discrimination, and not efficiency, to be the normative principle of the test I construct. The fact that Title VII harassment law seeks to regulate conduct that is quintessentially non-job-related[102] makes the decision to ignore efficiency considerations

101. For efficiency analysis of Title VII, see John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (arguing that Title VII may be efficiency-enhancing); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) (expressing skepticism regarding Donahue's arguments); John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987) (responding to Posner, and still arguing for the efficiency of Title VII while conceding that further empirical research is desirable).

102. *See supra* text accompanying notes 32-37.

relatively straightforward, even for those who do wish to retain efficiency as a guiding principle.[103]

The positive dimension of the analysis I employ is "economic" because it is grounded in the economic analysis of employment choices made by an abstract entity known as a "rational person." Economists suppose that the rational person assesses the options before her in terms of the various costs and benefits associated with each option. Rational employment decisions, for example, involve an assessment of the cost or "disutility" associated with a particular job,[104] such as the loss of time available to engage in leisure activities or in non-market work such as housekeeping and child care, weighed against the benefits of the job, notably the wage paid, the training received, the inherent pleasure of the work, and so on. These costs and benefits can reflect the full range of job characteristics, from tangibles such as wages, benefits, and hours, to intangibles such as working conditions, stress, enjoyment, satisfaction of personal goals, and offense to moral standards. They can also reflect dynamic, not merely static, considerations. For example, training in a current job may be valuable not only because it increases current wages and satisfies an immediate intellectual or emotional need to be challenged or stimulated, but also because it increases long-run earning capacity, job satisfaction, and labor force attachment. Failure to establish a mentor relationship with a superior may be costly not only because it reduces current wages or job satisfaction, but also, and probably more importantly, because it diminishes long-run prospects for earnings, promotion, and attainment of personal goals in a firm, occupation, or industry.

These costs and benefits are, importantly, idiosyncratic and subjective; they may, and indeed are assumed to, vary from person to person. Working a night shift, for example, may provide some people the benefit of being able to juggle child care with a spouse or other relative who works days. Transferring to another city may, for some, impose the costs of uprooting a family or losing attachment to local cultural or political organizations. Some individuals may find business-related travel more exhausting and disruptive than others. Developing job-related skills and experience may be more valuable to those who anticipate that their costs of living are due to

103. There are second-order efficiency considerations that could be invoked in the design of a test for sex-based harassment, in particular, the costs of administering the test and the costs of changes in employer practices intended to ward off Title VII claims. For an argument against Title VII in all forms based on such efficiency concerns, see EPSTEIN, *supra* note 41, at 159-437. I treat Title VII as a congressional determination of the trade-off between the costs of administering discrimination law and the social benefit of eliminating or redueing discrimination in the workplace.

104. Throughout, I use the term "job" to include all the different attributes of a person's employment, including the shift she works, the amount she travels, the co-workers or supervisors she works with, and the projects she works on. Thus a job change may mean simply a change in the attributes of the job, such as the elimination of travel or a change in supervisors.

rise as a consequence of illness, childbirth, or divorce in the family than to those who expect to exit the labor force in the near future.

Because people differ in their assessment of the net benefits of a job, it is not possible to predict the response of any *particular* individual to, for example, a decrease in wages. The wage reduction will reduce each person's net benefits, but for some and perhaps for many, the reduction will not be sufficient to cause a change in employment choices such as a refusal to engage in business travel or a move to the day shift. Economists formalize this idea with the concept of the "margin." An employee who is on the margin in any particular job is indifferent between the job she is doing and switching to her next best alternative. The observation that most people would not change their employment choices in response to a small drop in wages, even if there was a similar job available at the higher original wage, is the same as saying that most people are not on the margin: they perceive the costs of change to outweigh the benefits. These costs may include the loss of idiosyncratic benefits from the current job, such as the benefits of friendships at work and proximity to home, child care, or recreation; transition costs, such as the cost of changing routines, establishing new relationships, and doing paper work; and human capital costs, arising from the abandonment of what economists call "specific human capital," or knowledge of a particular task, workplace, or co-workers that increases a worker's productivity, but only in that particular task or workplace or with those particular co-workers.[105]

For most workers at any given point in time, the costs of switching to a new or modified job are significant: frequently, there is no alternative that offers the same level of benefits as the current job, and even more frequently, the transition and human capital costs are substantial. Intuitively, it takes a substantial drop in wages to induce most employees to change or modify their jobs. Note that this does not mean that the worker who does not switch in response to a drop in wages has not in fact been harmed by the drop. The switching behavior of all but the employee on the margin is an unreliable indicator of the existence or magnitude of a cut in wages.

Harassment will have an immediate and observable impact on the employment decisions of an employee on the margin for whom the costs of switching to the next best alternative without harassment are negligible. Other employees, for whom switching costs are not negligible, will be induced to modify their employment only if the cost of harassment is high enough to them. In particular, for many women at a given point in time, the next best alternative without harassment will be far from an identical position. It may not be possible or it may be very costly, in either the short or

105. It is not the loss per se of investments in human capital that enters into the employee's decision but rather the loss of the return to those investments when they are no longer valuable. In practical terms, the loss can be thought of as a reduced probability of promotions or raises, or as lower commissions, when the employee switches to a job in which she has less experience.

the long run, to eliminate harassment by eliminating shift work, changing supervisors, refusing projects or travel, or transferring to a different office or unit. These women will continue in their current positions even if it means enduring substantial levels of harassment. And for women in many occupations, the alternative without a significant risk of harassment simply may not exist: a cocktail waitress, a factory worker in a male-dominated industry, or a young investment banker may believe, quite accurately, that there is no point in switching jobs because "it's the same everywhere."

These women may not be prompted to switch even though they are subjected to high levels of harassment. The impact of harassment on their employment decisions may make itself known only at some point in the (perhaps distant) future when they decide to change occupations entirely or exhibit higher rates of job turnover or longer periods out of the labor force as a consequence of lowered job satisfaction and labor-force attachment. Whether they respond by changing their employment behavior immediately, in the future, or not at all, all of these women nonetheless bear the cost of harassment. Harassment has a potential effect on the employment decisions of any woman subjected to it, a potential that over time is likely to be realized in one way or another by the great majority of women.

In addition, women actually in a job who are subjected to harassment represent only a subset, perhaps a small subset, of the women whose employment decisions might be affected by the harassment.[106] Many women may choose not to enter a job, occupation, or the labor force partly because they expect harassment, expectations that may be based on general knowledge about the risk of harassment in particular occupations or on particular knowledge about individuals who have engaged previously in harassment.[107] Especially when the risks of harassment in a given position are generally known, the women who take those jobs—and who therefore might be in a position to complain of sex-based harassment—represent a biased sample of all women. They are women for whom the next best alternative is substantially inferior and who therefore are less likely to switch in response to harassment once it begins. The failure of these women to

106. It seems reasonable to think that the women who enter traditionally male blue-collar jobs, for example, where harassment can be particularly hostile, are a small fraction of the number of women who might be interested in such jobs but for the harassment.

107. *See, e.g.*, GUTEK, WORKPLACE, *supra* note 2, at 63, 66, 68 (finding that "[t]he most common kind of sexual encounter at work involves a female recipient and a male initiator who behaves the same way toward other women," and that men who frequently comment on a woman's appearance do so to many women); SURVEY OF CANADIANS, *supra* note 3, at 10 (65% of harassed women and 53% of harassed men said harasser also victimized others); Sandroff, *supra* note 2, at 49-50 (nearly half of survey respondents who had been harassed had known "chronic harassers"); *see also* Breslin & Morris, *supra* note 78, at 75 (defendant in this case study allegedly harassed many women at the same company); Horn v. Duke Homes, 755 F.2d 599, 602 (7th Cir. 1985) (plaintiff demonstrated that supervisor had a pattern of harassing female employees in order to show that employer's claimed reason for dismissal of plaintiff was pretextual); Priest v. Rotary, 634 F. Supp. 571, 574-76 (N.D. Cal. 1986) (defendant subjected a number of employees to sexual harassment).

switch in actual fact, however, does not imply that they are not bearing a cost that would and has caused a significant number of other women to alter their employment behavior.

Consequently, it is wrong to think that focusing on the decision-making of the rare, indeed potentially fictional, marginal employee implies that harassment has negligible effects on women's employment decisions in the aggregate. It is also wrong to suppose that because a particular woman, notably the employee complaining of sex-based harassment, has not made demonstrable changes in her employment decisions, the harassment is not a significant influence on women's employment decisions at the macroeconomic level. At any given time, a woman is unlikely to be on the margin, particularly given the skewing effect that anticipation of harassment has on the allocation of women across jobs and the widespread nature of harassment. Even if she chooses, in the end, to bear the cost of harassment rather than the cost of switching, there may be many other women who have chosen and will choose differently.

Nor does the failure to switch imply that a woman has not experienced discrimination. The discriminatory factor has indeed been introduced into her employment calculus even if she is unable to make the changes that she, like the hypothetical marginal employee, would make if non-harassing alternatives were available to her at little to no cost. Similarly, it would be a mistake to assume that a woman who has chosen an occupation with a high incidence of harassment demonstrates that the risk of harassment was not a factor in her decision-making. A large percentage of women contemplating such jobs report that harassment is a factor in their thinking;[108] that some are undeterred demonstrates only that they perceive the benefits of the job to outweigh the cost of harassment. Hence, focusing on the individual behavior of the marginal employee is a way of identifying a *significant* factor in women's employment decisions on both a macroeconomic and an individual level.

From this analysis of harassment as a cost that can induce an employee on the margin to alter her employment behavior, it is a short step to a test for identifying when allegedly harassing behavior violates Title VII as sex discrimination. Consider first a case in which the complained-of non-job-related behavior is facially sex-based, in the sense that it is directed at women and not men. Examples of such behavior include sexual propositions and demands, sexual touching, sexual jokes about or directed at a female employee, sexual looks, and compliments on clothing. Since the behavior is a sex-based classification on its face, the question that remains is whether the classification amounts to discrimination for purposes of Title VII. As the D.C. Circuit recognized in *Barnes v. Costle,*

108. *See supra* notes 88-93 and accompanying text.

> [N]ot every dissimilarity in employment conditions respectively set for the sexes impinges on Title VII. . . . Title VII was not intended to encompass minor sexual classifications which "do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex."[109]

Thus the question is, does this sex-based workplace practice impinge on the career opportunities facing women employees?

The economic analysis provided above implies the following test for determining the answer to this question. In its purest form, the test is this: *Non-job-related sex-based conduct constitutes sex discrimination in violation of Title VII if a rational woman would alter her workplace behavior to her detriment in order to eliminate the risk of such conduct if she could do so costlessly.* Posed in this way, the test engages a thought experiment about the response to alleged harassment of female employees who are on the margin, that is, who need not incur any cost in order to eliminate the complained-of conduct from their working environment. In this pure form, the test uncovers the merest hint of discrimination in women's employment decision-making by identifying conduct that introduces a factor into women's employment decisions that is absent from men's employment decisions. When this test is met, women on the margin will alter their employment choices, such as by refusing certain shifts, travel, projects, or overtime, and seeking transfers as a consequence of the complained-of conduct.

Because we live in a world imbued with transaction costs, the premise of the test—zero switching costs—can appear too far removed from the real world of employment distortions with which Title VII concerns itself. For this reason, it can help to introduce a variation on the thought-exercise proposed by the test. Suppose a woman is choosing between two jobs and one of the differences between them is that in one there is a risk of certain sex-based conduct that is not present in the other. Would a woman's job choice be influenced by this difference? Would it if the jobs were substantially identical, in her evaluation if not in form, but for the risk of harassment? If the conduct she expects from workplace superiors and co-workers plays a role in her choice between these jobs, then that conduct, if sex-based in application, is a discriminatory factor in her employment calculus. It violates Title VII. We can therefore pose this alternative form of the test: *Non-job-related sex-based conduct constitutes sex discrimination in violation of Title VII if a rational woman's choice between two jobs offering her*

109. 561 F.2d 983, 990-91 n.57 (D.C. Cir. 1977) (citations omitted).

substantially equivalent benefits would be influenced by the fact that such conduct is present in one job but not the other.

From an economic perspective, these two forms of the test turn on the same issue: whether the complained-of conduct is a factor in women's employment decision-making. Looking at a woman's choices from an *ex ante* perspective, before she has become settled into a particular job and therefore before job choices become clouded by inertia and specific investments, underscores the point that even small differences can influence job choices. Women are rarely in the position of having alternative jobs that they value roughly the same as the job they are in, but they can more easily be imagined to face a close call when initially choosing between jobs that on balance appear to offer them equivalent levels of monetary and personal benefits.

The test can also be reformulated for those cases, which have presented the courts with greater difficulty, in which the complained-of behavior is not specifically directed at female employees, such as the presence of pornography or generalized sexual joking.[110] Since such behavior is facially neutral, the test for whether it constitutes sex-based discrimination is essentially a test for disparate impact: *Non-job-related conduct, facially sex-neutral in form, constitutes sex discrimination in violation of Title VII when significantly more women than men would be induced to alter their workplace behavior to their detriment in order to eliminate the risk of such conduct if they could do so costlessly.* Alternatively, in the *ex ante* form, the test is this: *Non-job-related conduct, facially sex-neutral in form, constitutes sex discrimination in violation of Title VII when significantly more women than men, in choosing between two jobs offering substantially equivalent benefits, would be influenced by the fact that such conduct is present in one job but not the other.* This test is met when the complained-of workplace practice introduces into women's employment decisions a factor that is absent from men's decisions or exerts an opposite effect on men's decisions (that is, male employees would be willing to incur a small cost in order to introduce rather than eliminate the conduct in question). Note that the test in this case does not privilege women's evaluation of workplace practices over men's; the practice is found to violate Title VII under the above test not because it is costly to women per se, but rather because it has a disparate impact on men's and women's employment behavior. Under this test, Title VII requires that workplace environments be neutral in their effects on men's and women's employment decisions, not that environments be non-abusive in the abstract.[111]

110. *See, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

111. That is not to say that there should be no right to freedom from abuse in the workplace, only that the core of Title VII is *discrimination* in the workplace, and so the illegality under Title VII rests in the fact that the environment is abusive for one sex and not the other. The tendency to understand the

Nor does this test privilege one particular group of women's preferences about workplace practices over others'. One difficulty in designing the disparate impact version of the test is that some women may attach positive value to workplace practices, such as on-the-job dating, to which other women object. Again, because Title VII targets sex discrimination in work conditions and not their absolute level, the issue is whether a workplace practice has systematically negative consequences for women vis-a-vis men. Even if significant numbers of women enjoy an atmosphere in which sexual jokes abound, if systematically more women than men find this costly, then the practice is discriminatory, distorting women's decisions as a group. An analogy to more conventional discriminatory practices is provided by the case in which a small number of women benefit from a sex quota in hiring, perhaps because they prefer a male-dominated workplace or because they enjoy the status and attention that scarcity confers. Despite these women's preferences, however, the practice is discriminatory under Title VII.

B. Comparing the Test to Existing Doctrine

By focusing on the effect of harassment on women's employment decisions, the rational-woman test I propose avoids the misguided inquiry into a plaintiff's subjective psychological reactions that occurs under the current sex-based harassment doctrine. As discussed above,[112] harassment has disadvantageous employment effects for women and results in serious economic harm. The pschologically-based tests currently employed by the courts overlook several of these harms: Even a woman who is not subjectively offended by sexual harassment may nonetheless rationally choose to avoid an environment with harassment in order to protect her employment outcomes from infection by sexual preoccupation or sexism. The rational-woman test, on the other hand, has no subjective component; no psychological inquiries, including evaluations of "offensiveness" and the plaintiff's psychological well-being, are necessary to the test in any of its formulations. The experience of psychological effects and offense will still support a Title VII claim, of course, where a rational woman can be expected to alter her employment behavior to avoid such injury if she has the opportunity to do so at little to no cost.

Nor does the rational-woman test inquire into the *actual* employment response of a given plaintiff, the *actual* costs to her of making a change in her workplace in order to eliminate the conduct of which she complains, or the *actual* choice she made in the face of her *ex ante* options among jobs. As I have emphasized, few women at any point in time actually find them-

hostile environment claim as a tort claim of a right to be free of abuse has, in my view, been partially responsible for the focus on the psychological effects of harassment and the requirement of an individualized, subjective showing of harm.

112. *See supra* Part III (discussing the economic impact of harassment).

selves in a position to alter their employment behavior at low cost. The rational-woman test is posed as a hypothetical, supposing a woman who could eliminate the harassment at little to no cost precisely to ensure that the real-world costs of employment changes do not deprive a woman of Title VII protection. Title VII should be understood to say that these are costs that no woman, no matter what the result of her employment calculus, should have to weigh.[113]

Eliminating a subjective test for "abusiveness" and consideration of the plaintiff's actual employment-related responses to harassment moves sex-harassment doctrine away from the tort-like quagmire of normative judgments in which the courts currently struggle—when is behavior "abusive" or "hostile" enough?—and towards an empirical (what economists call positive) inquiry into employment behavior. The test still contains a normative element, of course. But by and large the normative work is done by Title VII itself: discrimination that distorts employment opportunities is a wrong.

To see why eliminating a subjective test of "hostility" or "abusiveness" comports with Title VII and why the tort-like inquiry into the subjective, psychological effects of harassment on plaintiffs is a distortion away from Title VII's concern with employment practices, consider the following scenario. Suppose a firm seeks to limit the employment of women and so reduces women's scores on an employment test by twenty percent. Some superbly qualified women may still win jobs under this test. But clearly what is important for purposes of Title VII is that the test is blatant sex discrimination. And the class of women with standing to object to the practice would include women who would nonetheless be hired under the test. Such women may not be entitled to damages, but they would be empowered to seek an injunction against the practice.[114] By the same token, it will

113. The only role for a subjective inquiry under the rational-woman test is in those cases in which the defendant attempts to demonstrate that a particular plaintiff actively initiated the behavior of which she now complains.

114. Courts have held that the provisions of Title VII governing standing to sue are to be construed as broadly as permissible under Article III of the United States Constitution. Senter v. General Motors Corp., 532 F.2d 511, 517 (6th Cir. 1976), *cert. denied,* 429 U.S. 870 (1976); Local 194, Retail, Wholesale & Dept. Store Union v. Standard Brands, Inc., 540 F.2d 864, 866 (7th Cir. 1976); Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 357-62 (1977); Bouman v. Block, 940 F.2d 1211, 1221-22 (9th Cir.), *cert. denied,* 505 U.S. 1005 (1991); Holsey v. Armour & Co., 743 F.2d 199, 208-09, 216-17 (4th Cir. 1984); Thompson v. Sawyer, 678 F.2d 257, 284 (D.C. Cir. 1982); EEOC v. Korn Indus., Inc., 662 F.2d 256, 260 (4th Cir. 1981); Bing v. Roadway Express, Inc., 485 F.2d 441, 448-49, 451 (5th Cir. 1973); United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36, 416 F.2d 123, 132 (8th Cir. 1969); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 652-53 (4th Cir. 1967) (the first "futility doctrine" case); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (holding that statistical showing of disproportionate impact need not be based on analysis of characteristics of actual job applicants); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1016-17 (2d Cir. 1980) (holding victim of discrimination need not show his or her application was rejected in order to recover), *cert. denied,* 452 U.S. 940 (1981); Acha v. Beame, 531 F.2d 648, 656 (2d Cir. 1976) (holding individual plaintiffs have burden of satisfying court that their lack of seniority resulted from discrimination); Hairston v. McLean

often be precisely those women who are less sensitive to harassment, such as women who contemplate blue-collar employment and are undeterred by the prospect of harassment, who are the only ones in a position to identify and challenge harassment under Title VII.

In addition, Title VII contemplates complaints against discriminatory practices being prosecuted by the EEOC in what has been styled a "pattern or practice" case.[115] Although failing to identify women who have in fact been harmed by the pattern or practice has at times undermined the proof of such a case,[116] there is no statutory requirement that victims be identified. The pattern or practice case captures the fact that Title VII is, ultimately, concerned with rooting out discriminatory employment practices and not merely compensating individual harms. Thus, requiring a showing of subjective harm limits the reach of Title VII short of what Congress apparently intended through its authorization of the EEOC as, essentially, a regulatory body overseeing employment practices. The rational-woman test, by eliminating the subjective component reiterated by the Supreme Court in *Harris,* thus brings sex-based harassment doctrine more closely into line with Title VII's focus on discriminatory employment practices rather than individual and individually harmful employment events.

The rational-woman test for sex-based harassment also eliminates other elements of current sex-based harassment cases that, like the subjective harm requirement, have been responsible for diverting the analyses in these cases away from the central concerns of Title VII. To begin with, the test transcends the debate, joined in particular in the Ninth Circuit,[117] over whether the proper standard is achieved with a "reasonable person" or a "reasonable woman" test. This issue is contentious under current doctrine precisely because the "reasonableness" requirement is the vehicle for the normative assessment of what is acceptable workplace behavior—the debate is over whether the standard should be that of an (ostensibly) gender-free "person" or a woman. The rational-woman test avoids this norma-

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Trucking Co., 520 F.2d 226, 231-34 (4th Cir. 1975); Carter v. Gallagher, 452 F.2d 315, 330-31 (8th Cir. 1971) (suit under 42 U.S.C. §§ 1981 and 1983, not Title VII), *cert. denied,* 406 U.S. 950 (1972).

On remedies, *see Teamsters,* 431 U.S. at 362-67; Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); *Carter,* 452 F.2d at 330 ("[T]he presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination.") (citing *Sheet Metal Workers,* 416 F.2d at 132, and Title VII, 42 U.S.C. § 2000e-5(g)).

115. 42 U.S.C. § 2000e-5.

116. *See, e.g.,* EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1276, 1315 (N.D. Ill. 1986) (holding that the existence of written discriminatory policy does not create presumption that the policy was enforced and affected individuals, and that assumption of equal interest of men and women in commission sales positions was unfounded), *aff'd,* 839 F.2d 302 (7th Cir. 1988); EEOC v. Mead Foods, Inc., 466 F. Supp. 1, 3-4 (W.D. Okla. 1977) (holding showing of statistical underrepresentation of women in defendant's workforce, lower pay rates for women, and job classifications without women insufficient to show pattern of discrimination in light of "clearly established and common practical knowledge . . . that certain work in a bakery operation is not attractive to females").

117. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

tive struggle. The reason the test is formulated with reference to women's perceptions and responses is not because of the normative claim of gender, but because, fundamentally, the contours of the test are fashioned by asking the empirical question, will a particular practice distort *women's* employment behavior? The test is focused on women because it is women's responses to a practice that only they must endure that defines the practice as discriminatory.

The rational-woman test also eliminates the burden on the plaintiff to establish that the behavior was "unwelcome." The test is an objective measure of "unwelcomeness": those behaviors that rational women would be willing to pay to avoid are by definition unwelcome. This is not to say that there should be no opportunity for a defendant to demonstrate that although the hypothetical rational woman, reflecting the judgment of a significant number of actual women, would find the behavior unwelcome and so seek to avoid it, the particular plaintiff in a case sought out the behavior she now complains about. It does, however, eliminate the misplaced inquiry into whether or not the woman's response was sufficiently negative to alert the perpetrator that the behavior was unwelcome. As numerous empirical studies have confirmed, women often do not respond in an overtly negative way to sexual overtures in the workplace, largely because in their judgment and experience, a negative response that in turn offends the perpetrator only makes the situation worse.[118] It is quite normal for women to attempt to defuse sexual harassment with a joke or the appearance of indifference. Such reactions do not mean that the behavior is welcome, or that women would not avoid it if they could even at a cost.

Relatedly, the notion that there is "no harm in asking"[119] fails under the rational woman test. The "no harm in asking" argument is flawed on two counts. First, much of the conduct at issue goes well beyond "asking." There is no reason why a man should be entitled to pressure a woman with sexual demands, touch her in a sexual way, or ridicule her in sexual jokes, as a way of finding out whether the behavior is welcome or not: the harm is already done in that many women would, if given the opportunity, choose to alter their employment choices so as to avoid being subject to such behavior in the first place. Second, even in those cases where the behavior does involve simply "asking," harm may still be done in that women may

118. *See, e.g.*, GUTEK, WORKPLACE, *supra* note 2, at 71-72; MEYER ET AL., *supra* note 2, at 193-98; SURVEY OF CANADIANS, *supra* note 3, at 13 (50% of harassed women said they expected negative consequences if they did not agree to go along with the unwanted attention, as did 31% of women receiving unwanted sexual attention who did not view this behavior as "harassment"); *see also* Sandroff, *supra* note 4, at 71 (95% of women and men who report sexual harassment fear retaliation and loss of privacy); sources cited *supra* note 77.

119. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 818 & n.16 (1991) (discussing how tort law rarely provides relief for solicitation of sexual favors because such behavior falls under the "no harm in asking" rule). *But see* MACKINNON, *supra* note 2, at 32-33 (arguing that in many situations the "no harm in asking" rule is inapplicable because rebuffing sexual solicitations often results in adverse consequences).

quite rationally infer from the asking that the future holds further harassment[120] and hence be induced to alter their employment choices.

Finally, the test I propose places an onus on men, employers, and organizations to become educated about what behavior on their or their subordinates' part would prompt employment changes by a rational female employee. The test rejects the notion that men are entitled to the protection of their misimpressions about how such behavior is interpreted by women. Affording men such protection, it seems clear, is inconsistent with the recognition that Title VII is not directed solely at intentional discrimination but also draws within its ambit practices that introduce discrimination into the employment setting through their disparate impact.[121] It also presents a significant problem of moral hazard in the sense that it gives men in the workplace, and particularly those in management, an incentive to *refrain* from learning how women are concretely affected by behavior developed in a workplace in which men have been traditionally dominant. But most importantly, from a legal perspective, such protection vitiates the protection to which women are entitled under Title VII and undermines the goal of employment equity precisely because it is the rational *woman's* subjective assessment of workplace behavior that causes her employment decisions to be distorted and so effects discrimination in the employment status of women in the aggregate. Defendants are entitled to prove, nonetheless, that their impressions are not mistaken, that significant numbers of women would not be prompted to make costly changes in their employment decisions in order to avoid the behavior in which they engaged, or that the plaintiff initiated the workplace behavior she now challenges.[122]

C. *Applying the Test*

Although I have characterized the test as an "empirical" test, I conceive of it as one that can be applied without benefit of statistical demonstrations. What the test demands is a thought exercise, much as tort law negligence standard asks the court to imagine the behavior of a "reasonable person." Consider the facts of the *Harris* case, for example. As summarized by Justice O'Connor:

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120. Many women who do not report harassment find that the harassment escalates. *See* MACKINNON, *supra* note 2, at 48 (reporting that according to one study, 76% of ignored sexual advances intensify); Sandroff, *supra* note 4, at 71 (quoting a sexual harassment expert's opinion that "[h]arassment tends to escalate if it's not stopped promptly"). Similarly, many women who do report harassment also find themselves subject to more extreme harassment. *See* Breslin & Morris, *supra* note 78, at 75-77 (recounting how plaintiff in case study experienced escalation of harassment after filing complaint); Goodman, *supra* note 77, at 458 (reporting that some women who complain of harassment are subject to increased harassment).

121. *See* Griggs v. Duke Power, 401 U.S. 424, 431-32 (1971).

122. This is not to say that the burden should continue to be placed, as it now is, on the plaintiff to show that she adequately informed the defendant that his behavior was unwelcome. *See supra* text accompanying note 118.

> Teresa Harris worked as a manager at Forklift Systems, Inc., an equipment rental company, from April 1985 until October 1987. Charles Hardy was Forklift's president.
>
> The Magistrate found that, throughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendoes. Hardy told Harris on several occasions in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendoes about Harris' and other women's clothing.[123]

Under the standards set out by the Supreme Court in this case, the court on retrial was asked to consider whether Hardy's conduct could "reasonably be perceived, and [was] perceived [by Harris], as hostile or abusive."[124] It is inevitable, of course, that the terms "hostile" and "abusive" will become laden with normative content about whether Hardy behaved egregiously enough, and whether he violated norms of workplace conduct sufficiently, to warrant Title VII's sanction. The first trial judge in this case thought that Hardy's behavior could not "be characterized as much more than annoying and insensitive. . . . [i]nane and adolescent . . . . Although Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff."[125] Essentially, the trial judge told Teresa Harris that she *shouldn't* feel intimidated or abused; that she too should evaluate the conduct as merely "annoying" and "inane." For that is what the "reasonable" woman would conclude.

The inquiry under the test I propose is radically different. The question a trial court should be asking in the *Harris* case is whether a female employee such as Harris would prefer to eliminate from her job the type of behavior exhibited by Hardy. How often would a woman have to be asked to retrieve coins from her employer's pants' pocket before she would be willing to incur some cost to change jobs? Can we imagine a woman in a job search, choosing between this job and a similar one, being influenced by the knowledge that her potential employer might behave like this on the job? Answering these questions requires us to put ourselves in the plaintiff's shoes (imagining ourselves as women if we are not) and ask whether

123. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993).

124. *Id.* at 371.

125. Harris v. Forklift Sys., Inc., 60 Empl. Prac. Dec. (CCH) ¶ 42, 070, at 74,250 (M.D. Tenn. 1990), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd*, 114 S. Ct. 367 (1993).

the fact of the harassment would play a part in our employment decisions. The rational-woman test does not ask, from the external, normative perspective, how women *should* evaluate such behavior. It asks how women *do* evaluate such behavior.

I do not believe that statistics are needed to answer these questions in the *Harris* case. I have no trouble imagining women steering clear of Charles Hardy's workplace to avoid having to put their hands in his front pockets at his command. Nor do I have trouble believing that some women would choose to work for Hardy nonetheless because their next best alternative pays them significantly less, requires them to make a move their families cannot make, or poses the same risk of harassment as the job at Forklift. Nevertheless, statistics can be brought to bear on this inquiry. As already noted, we have evidence that women considering jobs in male-dominated fields are influenced by the risk of harassment. Plaintiffs can devise surveys to generate numerical data on the particular types of workplace conduct of which they complain. Expert testimony could also bolster the court's understanding or prediction of how women might be expected to respond to various types of workplace conduct if they were in a position to do so.

CONCLUSION

The trouble presented by sex-based harassment claims is, apparently, the basic unease that many people, and judges in particular, feel in classifying as sex-based harassment workplace behavior which appears in many ways traditional and unremarkable. It is the very ordinariness of harassment that has given rise to the inadequate conception of why sex-based harassment constitutes sex discrimination. This inadequate conception considers sex-based harassment to be discrimination only when it exceeds the bounds of acceptable behavior and becomes "abusive," with the implications that abuse has for a woman's psychological state or her ability to do her job.

I have argued in this Article that the better way to understand why sex-based harassment is sex discrimination is to focus on the impact of sex-based harassment on women's employment choices. This focus goes to the core of Title VII's objective of ensuring that women's employment decisions are not burdened by factors that do not enter into men's employment decisions. When analyzed from this perspective, it becomes plain that sex-based harassment is discriminatory whenever it would lead a hypothetical rational woman (meaning someone who weighs costs and benefits in making decisions) to alter her employment choices were she given the opportunity to do so at little to no cost. If such a woman would be induced to switch, then it must be the case that even women who do not in fact switch are being forced to consider a discriminatory factor in making their employment decisions. Title VII prohibits employers from introducing such a fac-

tor into women's employment calculus as part of its effort to eliminate discrimination as a factor in women's economic status on the macroeconomic level.

By adopting the rational-woman test for sex-based harassment, courts could avoid some of the issues that have tended to turn sex-based harassment claims into tort claims for emotional harm and pull sex-based harassment doctrine away from the central concerns of Title VII. In particular, inquiries into the psychological effects of harassment, even when formulated as inquiries into the impact of harassment on a woman's ability to perform her job, would be replaced by inquiries into the numerous mechanisms by which sex-based harassment can influence the employment choices women make. The test also eliminates from the formulation of the test normative judgments about what constitutes acceptable workplace behavior or reasonable emotional responses, such as that reflected in the Sixth Circuit's opinion in *Rabidue v. Osceola Refining Co.*:

> [I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. . . . Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.[126]

The analysis in this Article demonstrates that it is not for the purpose of changing social mores per se that Title VII prohibits working environments in which "sexual jokes, sexual conversations and girlie magazines abound." It is because a significant number of women would, if given the opportunity, change their employment choices in order to avoid such environments. Where the work environments introduce discriminatory factors into women's employment choices, even widespread workplace practices can violate Title VII.

126. 805 F.2d 611, 620-21 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).