Sexual Harassment and the Law: Justice or “Just Us”

Shirley Mays, Arizona Summit Law School
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SHIRLEY L. MAYS*

INTRODUCTION

The issue of sexual harassment in the workplace has captured and engaged the American public's attention. The topic has been endlessly discussed since the riveting Clarence Thomas Supreme Court confirmation hearings when Anita Hill accused him of conduct unbecoming any employer, particularly a Supreme Court justice. Ronald Dworkin has said that sexual harassment expresses a kind of power which men may seek to exercise over women. According to Dworkin, "[i]t is that kind of power that makes sexual harassment so vile: it forces women to choose between humiliation and self-injury."

In this commentary,¹ I will discuss justice in the context of women's claims for legal redress of legitimate complaints of sexual harassment in the workplace. The law of sexual harassment is rife with outdated notions of a woman's appropriate place in society based upon traditionally male-dominated norms. While Dworkin and others have broached the vileness of the offense, legal remedies have yet to be developed which accord a full measure of justice. My major thesis is that judicially-created remedies have proceeded from a flawed vision of justice that fails to recognize fully the perspective of the victim and instead incorporates the value judgment of power brokers, most of whom are men. This commentary discusses the formulation of the law of sexual harassment from a different perspective; one that recognizes that outcomes are affected by the viewpoints of the decisionmakers, especially when dealing in the domain of power and its association with gender-based relationships.

First, I will demonstrate my point with a few well-chosen examples. Next I will explain the development of the Court's doctrinal approach to sexual harassment claims. Finally, I will suggest what I view to be fundamental flaws in that approach.


². This article is an expansion of a response I gave to Dr. Karen Lebacqz's presentation in the Essays in Justice series at Capital University Law and Graduate Center. See Karen Lebacqz, Justice and Sexual Harassment, 22 CAP. U. L. REV. 605 (1993).
As we enter the twenty-first century, we must bring the law in line with reality or risk supporting institutions that continue to hamper a woman's ability to work in an environment free of gender-based biases. To delay this alignment and maintain these inhospitable institutions would be detrimental to all of us.

I. SEXUAL HARASSMENT—THE SCOPE OF THE PROBLEM

Rogers v. American Airlines\(^3\) provides a good example of the way in which the application of a "neutral" law achieves "just" but inequitable results. The plaintiff, Renee Rogers, was an African-American female who wore her hair in corn rows. Her employer, American Airlines, instituted a grooming policy that prohibited employees who worked in positions that put them in contact with the public from wearing an "all-braided hairstyle."\(^4\) Ms. Rogers, whose duties included "greeting passengers, issuing boarding passes, and checking luggage,"\(^5\) felt that the grooming policy violated her rights under Title VII of the Civil Rights Act.\(^6\)

Ms. Rogers argued that the policy discriminated against her as a black woman because it prevented her from wearing her hair in corn rows.\(^7\) American Airlines defended its policy on the grounds that it "was adopted in order to help American project a conservative and business-like image."\(^8\) The court recognized American Airline's desire to project a "conservative and business-like image" as an acceptable bona fide business purpose, and dismissed Ms. Rogers' complaint.

To the judges in the southern district of New York who decided Rogers, "justice" was an equitable concept achieved by applying the laws to Ms. Rogers' specific fact situation. The court never acknowledged the possibility that the application of those laws might not be neutral but

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4. Id. at 231.
5. Id.

It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin.

Id.
7. Rogers, 527 F. Supp. at 231.
8. Id. at 233.
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actually might be a cogitation of deeply held preconceptions. Therefore, without positive proof, it is possible to accept the "fact" that corn rows are neither business-like nor conservative.

By allowing American Airlines to justify its grooming policy on the grounds that it was merely a reflection of the company's need to project an image that was both conservative and business-like, the court sanctioned the underlying assumption that corn rows were neither "business-like" nor "conservative." The executives at American Airlines who instituted this grooming policy believed that corn rows did not reflect the business image that the company wanted to project. To these executives, the hairstyle was outside the "norm" set for the business world because the corn row style was sufficiently dissimilar from the way that white females wore (or should have worn) their hair. The court did not question this underlying assumption because the judge, too, shared the world perspective of the American executives. Therefore, the court found no need to state the obvious—that the wearing of a corn row hairstyle was not appropriate in the business community.

Male dominance prevails in American society. This domination reveals itself in the economic, social, and philosophical oppression of women. Due to these societal considerations, women generally have less power than men. Women who are dependent on their jobs to provide for their families find themselves at a disadvantage in terms of pay and opportunities for higher-paying positions. Male dominance fails to recognize women as individuals. It views them as objects to be used for the granting of sexual favors. It cajoles and demands, teases and compels, simply because it can.

One telling example of male domination and its attempt at self justification appeared in a New York Times editorial by Orlando

9. See Martha Chamallas, Feminists Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 TEX. J. WOMEN & LAW 95 (1992) (expanding the argument of male domination and explaining that it not only disadvantages women, but also adversely affects nonconforming men).

10. Some cases show that many women are fearful of male domination in the workplace, and react differently to what males perceive to be "innocent" remarks. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) ("A male supervisor might believe . . . that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive."); Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) ("Because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Men, who are rarely the victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive." (citation omitted)).
Patterson. Referencing the congressional hearings that showcased the allegations surrounding Justice Clarence Thomas' behavior toward Professor Anita Hill, Mr. Patterson maintains that even if we accept Professor Hill's recitation of the facts, no harm occurred to her. According to Mr. Patterson, Justice Thomas simply had engaged in "down home courting."2

We have failed to ask one fundamental question: how is non-erotic intimacy between men and women possible? Clarence Thomas emerged in the hearings as one of those rare men who... rigorously enforced the formal rules of gender relations, and... had an admirable set of intimate, non-erotic relations with his female associates.

And yet, tragically, there is his alleged failing with Professor Hill. How is this possible? While middle-class neo-Puritans ponder this question, the mass of the white working class and nearly all African-Americans except their intellectually exhausted leaders have already come up with the answer. He may well have said what he is alleged to have said, but he did so as a man not unreasonably attracted to an aloof women who is aesthetically and socially very similar to himself, who had made no secret of her own deep admiration for him.13

According to this passage, Professor Hill suffered no injustice; rather, it was Justice Thomas who actually endured the disadvantage because of the lack of cultural perspective regarding the intent of his words.

With his mainstream cultural guard down, Judge Thomas on several misjudged occasions may have done something completely out of the cultural frame of his white, upper-middle-class work world, but immediately recognizable to Professor Hill and most women of Southern working-class backgrounds, white or black, especially the latter.14

Mr. Patterson asks us to believe that we have viewed (and inherently judged) Justice Thomas' "style" of wooing Professor Hill from

12. Patterson, supra note 11, at 15.
13. Id.
14. Id.
the viewpoint of white society. He asks us further to accept that white society did not and could not recognize that both his words and manner were acceptable to black women.\(^{15}\)

Now to most American feminists, and to politicians manipulating the nation's lingering Puritan ideals, an obscenity is always an obscenity, an absolute offense against God and the moral order; to everyone else, including all professional social linguists and qualitative sociologists, an obscene expression, whether in Chaucerian Britain or the American South, has to be understood in context. I am convinced that Professor Hill perfectly understood the psycho-cultural context in which Judge Thomas allegedly regaled her with his Rabelaisian humor (possibly as a way of affirming their common origins), which is precisely why she never filed a complaint against him.

Raising the issue ten years later was unfair and disingenuous: unfair because, while she may well have been offended by his coarseness, there is no evidence that she suffered any emotional or career damage, and the punishment she belatedly sought was in no way commensurate with the offense; and disingenuous because she has lifted a verbal style that carries only minor sanction in one subcultural context and thrown it in the overheated cultural arena of mainstream, neo-Puritan America, where it incurs professional extinction.\(^{16}\)

Needless to say, I have several problems with Mr. Patterson's description of the nature of Justice Thomas' and Professor Hill's relationship.\(^{17}\) His commentary is insulting to all women, particularly those who are African-American. To assert that the class of working
women, and in particular the subset of Southern black working-class women, somehow expect, enjoy, or accept this behavior as preliminary to a romantic (or even a strictly sexual) relationship degrades, demeans, and humiliates all women. Further, the assertion feeds the stereotype that black women are hot, panting Jezebels to whom anything can be said, and from whom anything will be given in return. It fails to recognize the power differential in the workplace between Justice Thomas and Professor Hill (he was, after all, her supervisor) and seeks to justify disgusting behavior by resorting to culturally-based ethnocentric stereotypes.

II. SEXUAL HARASSMENT—THE DEFINITION

To date, the courts have recognized two kinds of sexual harassment as violative of Title VII prohibitions against discrimination: quid pro quo and hostile work environment.\textsuperscript{18} Quid pro quo harassment is fairly easy to discern. It occurs when sexual favors are requested or required in exchange for a job benefit. Failure to comply results in the loss of a job, or loss of a promotion.\textsuperscript{19} However, the determination as to when sexual harassment has risen to the level of a "hostile" work environment has proven to be much more problematic for the courts to define.

The Supreme Court's first opportunity to establish that hostile work environment could constitute a form of sexual harassment that violated Title VII came in the case of Meritor Savings Bank v. Vinson.\textsuperscript{20} Sidney Taylor, a vice-president of Meritor Savings Bank, hired Michelle Vinson as a teller trainee. Mr. Taylor initially treated Ms. Vinson in a fatherly manner, but soon after her probationary period ended, Mr. Taylor began making sexual advances toward her. Although she rebuffed him at first,

\textsuperscript{18} Courts initially were reluctant to acknowledge sexual harassment as a sex-based discrimination cause of action. Rather, the courts perceived sexual harassment as a personal cause of action, based on the employee's sex. In Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977), for example, the plaintiff claimed that her supervisor repeatedly made sexual comments to her, culminating in the creation of a working environment so intolerable that she was forced to resign. The court denied the plaintiff's cause of action, holding that the supervisor's behavior had been personal in nature, and unrelated to the plaintiff's gender. \textit{Id.} The courts first recognized a Title VII hostile work environment claim in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), \textit{cert. denied}, 406 U.S. 957 (1972). Courts finally recognized a Title VII violation of quid pro quo harassment based on sexual discrimination in Williams v. Saxbe, 413 F. Supp 654 (D.D.C. 1976), \textit{rev'd on other grounds sub nom.} Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

\textsuperscript{19} \textit{See, e.g.,} Williams v. Saxbe, 413 F. Supp. at 654.

\textsuperscript{20} 477 U.S. 57 (1986).
Ms. Vinson finally succumbed and had sexual intercourse with Mr. Taylor forty or fifty times over a four year period. Ms. Vinson said that she was afraid she would be dismissed from her position if she did not submit to Mr. Taylor. Additionally, Mr. Taylor also fondled Ms. Vinson's breasts and buttocks in front of other employees, followed her into the women's room, exposed himself to her, and raped her on several occasions. Due to her fear of reprisal, Ms. Vinson did not report any of these incidents.

The United States Supreme Court affirmed the court of appeals' holding that hostile work environment sexual harassment is a form of discrimination and is actionable as a violation of Title VII. The Court confirmed that a plaintiff may establish a violation of Title VII by proving that discrimination based upon sex has created a hostile or abusive work environment. The Court restricted the violation to such conduct that is "sufficiently severe or pervasive" as to affect a "term, condition, or privilege of employment." The majority noted that Title VII is designed to ensure an employee's "right to work in an environment free from discriminatory intimidation, ridicule, and insult," whether the harassment was based on race, religion, or national origin. Justice Rehnquist, writing for the majority, concluded that nothing in Title VII suggests that "a hostile environment based on discriminatory sexual harassment should not be likewise prohibited."

Furthermore, the Supreme Court rejected the bank's contention that Ms. Vinson participated in the sexual activity with Mr. Taylor voluntarily, concluding that the district court had improperly concentrated on Ms. Vinson's physical participation. The correct inquiry, according to the Court, should have focused on whether Ms. Vinson "by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary." The Court noted that evidence such as a "complainant's sexually provocative speech or dress . . . is obviously relevant" in determining whether sexual harassment occurred. Accordingly, Ms. Vinson's dress and speech was relevant because it indicated whether she had encouraged Mr. Taylor, and thus found his sexual advances welcome.

The Supreme Court recently revisited the issue of hostile work environment sexual harassment in the case of *Harris v. Forklift Systems*,

21. *Id.* at 60. Thus, although the court did not address it, it is easy to see that Ms. Vinson's claim also contained elements of quid pro quo sexual harassment.
23. *Id.* at 66.
24. *Id.* at 67.
25. *Id.* at 65.
26. *Id.* at 66.
27. *Id.* at 68.
28. *Id.* at 68-69.
In that case, plaintiff Teresa Harris worked as a manager for Forklift Systems, Inc., an equipment rental company owned by Charles Hardy. During the course of her two and one-half year tenure at Forklift Systems, Mr. Hardy made comments to Ms. Harris such as, "You're a woman, what do you know?" and, "We need a man as the rental manager." He also called her a "dumb ass woman." Mr. Hardy once suggested that he and Ms. Harris go to the Holiday Inn to negotiate her contract. This type of behavior continued over the course of her employment. Mr. Hardy asked Ms. Harris and other female employees to retrieve coins from his front pants pocket. He made sexual innuendoes about the clothing worn by Ms. Harris and other female employees.

Two years after she started working at Forklift Systems, Ms. Harris told Mr. Hardy that she found his comments offensive. Mr. Hardy said he meant no offense, and promised to stop the insulting behavior. He temporarily stopped but once again insulted Ms. Harris several weeks later when he asked her, in front of other employees, "What did you do, promise the guy . . . some [sex] Saturday night?" About one month later, Ms. Harris quit her job and sued Forklift Systems, claiming Mr. Hardy's conduct had created a hostile working environment.

In rendering its decision, the Supreme Court rejected the Sixth Circuit's contention that an employee must show psychological harm in order to prevail in a Title VII hostile environment sexual harassment case. Speaking for the Court, Justice O'Connor reaffirmed the standard set forth in Meritor: Title VII is violated when the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Justice O'Connor also made the following observations:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

30. Id. at 369.
31. Id.
32. Id.
33. Id.
34. Id. at 370 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).
35. Id.
The Court concluded that it could not set the precise boundaries to define what actions or conduct would constitute an abusive or hostile working environment; these assessments could only be determined by looking at the totality of the circumstances. Those "circumstances" could include "the frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with an employee's work performance."36

Thus, based upon the discussion in the above-mentioned cases, and with the aid of Equal Employment Opportunity Commission ("EEOC") guidelines,37 the courts have fashioned a definition of sexual harassment

36. Id. at 371. The Supreme Court did not find that sexual harassment had occurred, but remanded the case for the lower court to base its decision on the holding in Harris.

Both Justices Scalia and Ginsburg filed concurring opinions in this case. Although he acknowledged that the standard of an "abusive" or "hostile" work environment was a difficult one to define and apply, Justice Scalia felt that the court had done all that it could. Justice Scalia said, "I know of no alternative to the course the Court today has taken. . . . I know of no test more faithful to the inherently vague statutory language [of Title VII] than the one the Court today adopts." Id. at 372 (Scalia, J., concurring).

In her concurrence, Justice Ginsburg felt that the "critical issue" was "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id. at 372 (Ginsburg, J., concurring). If the conduct at issue has "unreasonably interfered with the plaintiff's work performance," a Title VII violation has occurred. Based upon the court's holding in the case of Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988), Justice Ginsburg felt that Title VII must treat all discriminatory employment practices, whether based upon race, gender, religion, or national origin, the same, i.e., "equally unlawful." Harris, 114 S. Ct. at 372-73 (Ginsburg, J., concurring).

37. The EEOC provides the following guidelines for defining sexual harassment:

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

29 C.F.R. § 1604.11(a) (1993).
and have further developed a method by which all sexual harassment claims must be proven. First, the fractious conduct in which the alleged harasser is engaged must be based upon the sex of the target. Thus, if the untoward behavior is the result of a personality conflict between two people, Title VII as a legal option provides no recourse to the complaining party. Even if the conduct is based on sex, it must be sufficiently harmful to alter the conditions of employment. Title VII is not designed to provide redress against those persons who are merely obnoxious or insensitive. Thus, if the offensive conduct is based on sex and negative job consequences flow from that gender-based conflict, sexual harassment may have occurred.

Second, in order to constitute sexual harassment, a plaintiff must prove that the sexual conduct complained of is unwelcome. The working environment itself is comprised of many kinds of personal relationships, including some that are sexual and others that are platonic in nature. According to the courts, to denounce all forms of sexual interaction between consenting adults at work would unnecessarily sterilize the workplace climate.

Third, the actions of which the plaintiff complains must be of sufficient number and duration to rise to the level of a hostile working environment. Rarely will an isolated incident justify a finding of hostile environment sexual harassment. As Justice O'Connor wrote in the case of Harris, "mere utterance of an . . . epithet which engenders offensive feelings in a [sic] employee, does not sufficiently affect the conditions of employment to implicate Title VII." Furthermore, "[t]he phrase 'terms,
conditions, or privileges of employment' [taken from the language of Title VII] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment."

In shaping a more responsive perspective of hostile working environment sexual harassment, I would prefer to embrace some facets of the definition which have been suggested by the courts and would reject others. The general belief that some forms of sexual interaction are at the least, inevitable and at best, permissible does not compel the conclusion reached by the courts and suggested by the EEOC that a plaintiff must "prove" that a particular form of sexual conduct is unwelcome. Both at work and in purely personal relationships, certain kinds of sexual behavior are tolerable, while other kinds of sexual behavior are objectionable. It is certainly possible to distinguish acceptable from unacceptable workplace sexual behavior. Therefore, rather than presuming that all sexual behavior has the potential to be desirable, why not presume, instead, that certain kinds of sexual conduct, namely those of a harassing nature, are always unwelcome?

Removing the requirement of proving the "unwelcomeness" of the harasser's behavior would remove the necessity of delving into the mind of the target. It would focus the gravamen of the inquiry on the harasser's conduct or behavior rather than on the target's response to that conduct. Further, dispensing with the unwelcomeness element would make irrelevant the way in which particular persons dress, or the sexually provocative speech in which an individual may engage.

I also would quibble with Justice O'Connor's assertion that the victim must "subjectively perceive the environment to be abusive" in order for a Title VII violation to occur. Under a hostile work environment analysis, it is the workplace itself that is poisoned. That workplace is capable of being contaminated despite the subjective views of the harasser's target. Once again, it is the harasser's actions that are at issue in a hostile environment claim, not the target's reaction to them. Under Justice O'Connor's analysis in the Meritor case, if Ms. Vinson had not been offended by Mr. Taylor's shenanigans, he would not have engaged in actionable conduct. Mr. Taylor would be free to act with impunity, as long as he employed uniquely stalwart individuals.

41. Id. (citations omitted).
42. In her essay, Ms. Lebacqz offers the following succinct definition of sexual harassment: "[W]ords, actions, or other symbols such as pictures that inappropriately sexualize an environment." Lebacqz, supra note 2, at 610. While I like some aspects of this definition, I feel that it, too, is inadequate in its attempt to encompass satisfactorily all the necessary aspects of sexual harassment.
43. Harris, 114 S. Ct. at 370.
Anyone, woman or man, who has experienced the devastating effects of either quid pro quo or hostile environment sexual harassment knows in his or her gut that it is wrong. Anyone who has firsthand knowledge of the ruinous results of sexual harassment knows intuitively that it is wrong. Anyone who has read the personal accounts of those who attest to the humiliating, degrading environmental consequences of sexual harassment instinctively knows that an injustice has occurred.

As we all know, however, gut feelings do not suffice to justify social and legal determinations. What we feel instinctively does, nevertheless, serve as the cornerstone for the enactment of many of society's laws. We feel it is wrong to take the life of another without just cause; hence our prohibition of murder. We feel that our children should be protected, therefore we enact child labor laws. We feel that all employees should be treated equally, so we proscribe discrimination.

The gut feelings that we have regarding what is right and what is wrong form the essence of our sense of morality. Although it sometimes seems that morals and morality are pushed to the farthest recesses of legal doctrine, our intuitive feelings about what is right and what is wrong do have a place in the formation of our laws regarding sexual discrimination and harassment.

Title VII itself reflects society's "gut feelings" that it is wrong to introduce extraneous factors into employment decisions concerning hiring, retention, promotion, and termination of workers. Most persons possess a deeply rooted belief that workplace determinations should be based upon merit, not upon the color of the person's eyes, or hair, or skin. These items have no impact upon a person's ability to perform his or her job duties. It offends our sense of justice to allow clearly immaterial considerations to influence work decisions.

The principle of justice implies the existence of an attainable state of affairs where just results are possible, even probable. Justice can be defined as "righteousness . . . conformity to truth, fact, or reason: correctness." Thus, the term implies that "Truth" with a capital "T" exists, and that we can both define it, as well as know it when we see it. Moreover, by realizing truth and therefore obtaining justice, we must be able to reach into our inner selves and bring forth that which is good, right, and honorable.

44. In a sense, "gut feelings" pertain to our sense of morals. Webster's Dictionary defines morals as "relating to principles of right and wrong in behavior . . . ." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 756 (10th Edition 1993).
45. Id. at 636.
The idea of incorporating morals into legal relationships is not unknown. The law of agency, for instance, illustrates an example of the incorporating of the philosophy of moral behavior when it sets forth the duties that an agent owes her principal. According to the law, an agent is one who acts on behalf of another (the principal), with the principal's consent and under the principal's control. Thus, in its simplest form, a person who is hired to do the work of another becomes the agent of that person.46

The agent, however, is not free to act with impunity in matters that touch and concern the principal-agent relationship. The agent owes a duty of care and loyalty to the principal: the agent may not take a business opportunity that rightfully belongs to the principal; neither may the agent bring disrepute to the name of the principal. The principal, in turn, must deal fairly with the agent and provide him or her with a reasonably safe working environment.47

Classifying this principal-agent relationship as one in which special duties are owed to one another can be justified by imposing morality into the equation. Because the agent represents the principal, and is hired to act on the principal's behalf, it would be wrong for the agent to use the information and contacts of the principal to benefit the agent. The law has, in order to aid in the conduct of workplace and business affairs, characterized this relationship as fiduciary in nature. Principals and agents must do the "right" thing by one another, because otherwise, an injustice would occur.

Following this reasoning, our sense of morality, then, permits us to prohibit sexual harassment because it is wrong and ought to be prohibited by law. Nonetheless, the question still remains, "Why must it be prohibited?"

Sexual harassment is wrong because it allows males in an unequal power circumstance to use their gender, and the privileges attendant thereto, to their advantage.48 Sexual harassment disadvantages women who are less powerful than their harassers; it introduces gender into the employment relationship as a criterion for employment decisions with no legitimate business reason.

As the court pointed out in Meritor, acquiescence to sexual conduct is not the equivalent of giving consent to a sexual relationship.49 An employee, particularly one who holds an unequal power position, may

47. Id.  
48. Although it is well settled that men may be subject to claims of sexual harassment and may receive redress through the court system, the number of women who are victims of sexual harassment far outnumber the number of men who are victimized. See, e.g., BARBARA GUTLEK, SEX AND THE WORKPLACE 46 (1985).  
feel pressure to concede to unwanted sexual demands. That employee may fear job loss or reprisal if she or he refuses to give the harasser what he or she wants. Under those circumstances, participation in sexual activities can hardly be considered voluntary.

Moreover, many persons may pretend to go along with sexual banter and joking that they find offensive so that they will not appear to be unduly sensitive. These employees put on this pretense to avoid becoming the brunt of harassing jokes in the workplace. Employers often emphasize the importance of "getting along" in work settings. Anything that sets one person apart from another may cause difficulties in this delicate balance.

An important perspective remains absent from the analysis of sexual harassment. Without it, we are forced to approach the issue of sexual harassment from a supposedly objective, rather than subjective standard. The objective standard, however, fails to acknowledge the role gender plays in the formulation and application of the laws.

The *Harris* Court missed its opportunity to incorporate gender perspective into its analysis of sexual harassment.50 A number of the lower courts, however, have recognized the role gender perspective plays in the definition of sexual harassment. For instance, *Ellison v. Brady*,51 a Ninth Circuit Court of Appeals decision, adopted the "reasonable woman" standard in evaluating whether sexual harassment occurred in the workplace. The plaintiff in that case, Kerry Ellison, and her harasser, Sterling Gray, both worked as revenue agents for the Internal Revenue Service ("IRS"). Shortly after he met her, Mr. Gray wrote Ms. Ellison several letters in which he professed his love for her and pined for a continuation of their non-existent relationship.52 In determining whether Mr. Gray's behavior was sufficiently severe or pervasive to alter the conditions of Ms. Ellison's working environment (a necessary prerequisite for a finding of hostile environment sexual harassment pursuant to the provisions of Title VII), the *Ellison* court made the following observations:

[We believe that in evaluating the severity and persuasiveness of sexual harassment, we should focus on the perspective of the victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of enforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory

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51. 924 F.2d 872 (9th Cir. 1991).
52. *Id.* at 874-75.
practice was common, and victims of harassment would have no remedy.

We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. This recognition led the Ninth Circuit to adopt a reasonable woman standard. Under this standard, the severity of harassing behavior is judged in accordance with whether "a reasonable woman would consider the alleged conduct sufficiently severe or pervasive to alter the conditions of employment."

In this case, the Ninth Circuit recognized the need for a system of justice that permits the perspective of the victim to define and alter our understanding of sexual harassment. To do otherwise would be to advance a faulty and illegitimate vision of justice. Justice can be served only by crafting judicial remedies that turn a blind eye to the traditional, male standard of defining sex-based misconduct.

CONCLUSION

The belief as to what constitutes "justice" is both shaped and colored by perspective. The acknowledgment that the law is neither objectively written nor inherently fair has far-reaching effects in the discussion of sexual harassment. The compendium of material that we label as "the law" is not simply an objective, neutral compilation of facts and information. Law is not developed in a vacuum, isolated from considerations of personality, perspective, or prejudice. Law reflects internalized and institutional biases and predilections. It is based upon the rules formulated by those who possess both the power and the position to impact jurisprudential decisionmaking. Those power brokers bring to this formulation all of their pre-conceptions about life and their perceptions of what is right or wrong. These generalized power brokers make value judgments about the relative importance of harms committed within society. They also set the parameters for the definition of those harms, based upon a value laden philosophy of the inherent good or evil of the injury. Finally, considering the nature of the act committed and the degree of inconvenience to society as a whole, they determine the punishments for commission of those harmful acts. Through the

53. *Id.* at 878 (citations omitted).
54. *Id.*
oftentimes uneven application of the various laws that condemn and thus prohibit pre-determined undesirable behavior, "justice" is achieved.

To many, the legal ideals possessed by the power brokers are not comprehensive enough to include the voice of others who exist outside the bounds of the powerful class of decisionmakers, particularly when it comes to the dispensation of justice. Comedian Richard Pryor used social satire to illustrate this concept of "justice." According to Mr. Pryor, "justice" meant exactly what the word implied, i.e. "just us." As he explained, "I went to the courtroom looking for justice, and that's exactly what I found: Just us! I went to the jails, and who's serving time? Just us! So who gets justice in this country? Right again! Just us!"\(^{55}\)

Both Richard's Pryor's understanding of justice and the understanding of justice exemplified by the court in the Rogers case were shaped by life experiences. To Mr. Pryor and others who share his world view, fairness is not embodied in the concept of justice; rather, the application of the laws—those same laws that are developed from a particularized perspective—were applied to punish unfairly and demean an already oppressed people.

According to this perspective, a vast schism exists in this country between the rich and the poor; the black and the white; the "haves" and the "have-nots." Those who are rich are most often white—the "haves"—and are able to manipulate the judicial system and use the very system that was designed to assure impartiality in order to oppress the "have-nots" who most frequently are African-Americans, the poor, and vast numbers of women. The power broker's notion of justice fails to recognize the inequalities that pervade the American legal system. But this much should be obvious: the stain of racism and sexism is indelibly stamped across the fabric of this country and racism has had an undeniable impact on every part of all of our lives.\(^{56}\) Those who possess the power to shape the laws and enforce "justice," however, either suppress or ignore that "fact." Therefore, the idea of embracing "justice" as an equitable concept is fatally and permanently flawed.

Failure to allow the victim's perspective to shape the definition of sexual harassment results in injustice. Moving toward a system of justice that allows for a standard that incorporates a non-male, non-traditional way of framing the issues and searching for solutions will ensure that justice is served. Our legal system is flexible enough to accommodate an ethical basis for wrong-doing, and is strong enough to "just say no" to


\(^{56}\) See, e.g., Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); see also Derrick Bell, The Racism is Permanent Thesis: Courageous Revelations or Unconscious Denial of Racial Genocide, 22 Cap. U. L. Rev. 571 (1993).
sexual harassment. In this way, we can be secure in the knowledge that the system is interested in justice, rather than "just us."