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Introduction: Current Issues in Sexual Harassment Law

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SPECIAL PROJECT

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INTRODUCTION

In the two decades since the first federal court[1] recognized sexual harassment as a form of sex discrimination under Title

1. *Williams v. Saxbe*, 413 F. Supp. 654 (D. D.C. 1976). *Williams* involved the termination of a female employee because she refused to accede to her supervisor's sexual advances. The defendant argued that the plaintiff was fired "not because she was a woman, but rather because she decided not to furnish the sexual consideration . . . demanded." Id. at 657. The court rejected this argument and stated that "the conduct of the plaintiff's supervisor created an artificial barrier te employment which was placed before one gender and not the other." Id. Rather than read Title VII narrowly to prohibit only sex-based stereotypes, the *Williams* court recognized that Title VII prohibited all discrimination on the basis of sex, including sexual harassment.

Other courts held that sexual harassment did not amount to discrimination based on sex. See, for example, *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975); *Ludington v. Sambo's Restaurants*, 474 F. Supp. 480 (E.D. Wis. 1979). These courts reasoned that the sexual harassment at issue was not actionahle under Title VII because it did not involve a policy of the

VII,[2] sexual harassment has become an oft-discussed and increasingly litigated issue. The cause of action for sexual harassment arose as a result of the feminist revolution that brought women[3] into the workforce in unprecedented numbers. Women began to hold positions previously occupied by men and to demand equal treatment, respect, and dignity.[4] Some believe that women have already achieved equality in the workplace.[5] The issue of sexual harassment, however, continues to spawn much debate as the role of women in society and, consequently, workplace norms continue to evolve.[6] This Special Project addresses four current issues in sexual harassment law.

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employer. Rather, the conduct was "nothing more than a personal proclivity, peculiarity[,] . . . mannerism[, or] . . . personal urge." *Corne*, 390 F. Supp. at 163. These courts feared that recognition of a cause of action for sexual harassment would lead to "a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another." Id.

2. 42 U.S.C. § 2000e et seq. (1988 and Supp. 1993). Title VII prohibits employer discrimination against an individual with regard to the individual's "compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." Id. at § 2000e-2(a)(1). Although Title VII does not expressly prohibit sexual harassment, the United States Supreme Court has held that such conduct is discrimination on the basis of sex with respect to the terms, conditions, and privileges of an individual's employment and thus violates Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

3. Admittedly, men can and have been victims of sexual harassment. See Alba Conte, 1 *Sexual Harassment in the Workplace* § 1.1 at 1 (John Wiley & Sons, 2d ed. 1994) (citing a survey finding 15% of male employees surveyed reported sexual harassment). However, the development of the law surrounding sexual harassment is inextricably tied to the women's movement and the efforts of women to achieve equal rights. See Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 Harv. Women's L. J. 35, 40-42 (1990) (discussing women's collective consciousness raising in the 1960s and 1970s and the emergence of sexual harassment litigation). See also, Conte, 1 *Sexual Harassment in the Workplace* at iii (dedicating the treatise to "all the women who decided that enough was enough").

4. See Thomas I. Emerson, *Foreword*, in Catherine MacKinnon, *Sexual Harassment of Working Women* vii, vii (Yale U., 1979). Professor Emerson noted in 1979: "As women's liberation makes progress, the facts [about sexual harassment] are beginning to come into the open and the profound implications for our society are beginning to be understood." Id.

That the cause of action for sexual harassment did not arise until the mid-1970s is not to say that workplaces were free from sexual harassment prior to then. Indeed, sexually harassing conduct, though largely undocumented, has been around as long as women have been in the workforce. However, the sexual revolution of the late 1960s and 1970s brought enormous change to society and workplace norms. Women no longer believed that they had to endure sexually harassing conduct to earn a paycheck. See Pollack, 13 Harv. Women's L. J. at 40-41. The continued controversy over sexual harassment is, in part, a result of the debate over these changing norms. See note 6.

5. See Linda Chavez, *Many Women Don't Want to Break Glass Ceiling,* The (Nashville) Tennesseean 15A (March 23, 1995). Ms. Chavez states: "Don't call [women] victims. We've set different priorities and experienced different rewards." Id. See also Kathryn Abrams, *Gender Discrimination and the Transformation of Gender Norms*, 42 Vand. L. Rev. 1183, 1184 (1989) (commenting on a student's remark that "[w]omen have gotten just about everything they wanted . . . [and that] the time for militancy is over").

6. Compare Abrams, 42 Vand. L. Rev. at 1202-03 (stating that Title VII and the cause of action for sexual harassment presents an opportunity to correct the imbalance created by a male-centric workplace and encouraging courts to focus on the harm of sexual harassment from a woman's perspective) with Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the*

Although studies in the mid-1970s revealed the pervasiveness of sexual harassment of working women,[7] and the Supreme Court recognized the cause of action in 1986,[8] sexual harassment did not receive substantial public attention until Justice Clarence Thomas' confirmation hearings in October 1991.[9] Since then, other allegations of sexual harassment have kept national attention on the issue.[10]

Media attention, in part, spurred Congress to enact the Civil Rights Act of 1991,[11] which contains provisions allowing both compensatory and punitive damages to victims of intentional sexual harassment.[12] In addition, the Federal Judicial Conference, fearing abuse of the unwelcomeness standard by sexual harassment defendants, extended Federal Rule of Evidence 412, the federal rape-shield rule, to civil cases.[13] These recent statutory and rule changes make it more attractive for victims to bring sexual harassment claims by making available greater rewards and reducing the likelihood of further harassment during the litigation process.[14]

Optimal Level of Loss, 47 Vand. L. Rev. 427, 475 (1994) (asserting that the search for societal consensus on sexual conduct should consider the attitudes and tastes of both men and women).

7. See Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 821-22 (1991) (citing surveys consistently finding that 36 to 53% of women questioned identify themselves as victims of sexual harasssment). See also Conto, 1 *Sexual Harassment in the Workplace* § 1.1 at 2-3 (cited in note 3) (noting similar survey results).

8. See *Meritor*, 477 U.S. at 73 (holding hostile environment sexual harassment actionable under Title VII).

9. See Conto, 1 *Sexual Harassment in the Workplace* at vi (cited in note 3). The controversy surrounding Anita Hill's testimony and Justice Thomas' confirmation was so great that the Southern California Law Review devoted over 300 pages of its March 1992 issue to essays on the hearings and their societal and legal implications. See 65 S. Cal. L. Rev. 1279-1582 (1992).

10. Scandals bringing national attention to the issue of sexual harassment include the repeated allegations of sexual harassment against Senator Bob Packwood, the 1991 Navy Tailhook Convention, and Paula Jones's sexual harassment suit against President Bill Clinton.

11. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

12. Id. at § 102, codified at 42 U.S.C. § 1981a (1988 and Supp. 1993). Congress, however, placed caps on these damages so as not to encourage too much litigation or discourage settlement agreements. Hannah K. Vorwerk, Note, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment*, 48 Vand. L. Rev. 1019, 1029 (1995). Some commentators have argued that the removal of these caps would better deter employers from intentionally discriminating while serving to better compensate victims of such discrimination. See Rebort Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 Rutgers L. Rev. 921, 947 (1993).

13. See Fed. Rule Evid. 412 as amended in *Amendments to the Federal Rules of Evidence*, 114 S. Ct. 681, 686-87 (1993). As originally enacted, Rule 412 barred the admisibility of evidence of a victim's past sexual history in rape cases unless it was constitutionally required. See generally Paul N. Monnin, Note, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims after the 1994 Amendments to Federal Rule of Evidence 412*, 48 Vand. L. Rev. 1155, 1169-77 (1995) (discussing motivations behind Judicial Conference amendments to Rule 412).

14. In Septombor 1994, the Wall Street Journal reported the growing trend of defense atterneys to ask sexual harassment plaintiffs abeut their past sexual history and the negative impact this trend has on a plaintiff's willingness to prosecute her suit. See Ellen Schultz and

The case law surrounding sexual harassment also continues to develop in ways that reflect the changing nature of society and the evolving role of women. In particular, the differing judicial treatment of the two recognized types of sexual harassment, quid pro quo[15] and hostile environment,[16] underscores the societal tensions inherent in imposing legal sanctions in sensitive areas of human conduct. Courts more readily accepted quid pro quo harassment because its link to tangible terms and conditions of employment was more apparent.[17] Accordingly, courts uniformly hold employers strictly liable for quid pro quo sexual harassment.[18] Hostile environment sexual harassment, on the other hand, turns on reasonableness, and is, thus, a more pliable standard.[19] Courts have been mixed in their receptiveness to the doctrine.[20]

Junda Woo, *The Bedroom Ploy*, Wall St. J. A1 (Sept. 19, 1994). Although the amendments to Federal Rule of Evidence 412 may reduce some of this questioning during depositions and trials, some evidence of the plaintiff's past sexual history is still admissible as specific acts evidence relevant to show invitation to or provocation of the alleged harassment. Monnin, 48 Vand. L. Rev. at 1210.

15. Quid pro quo harassment occurs when a supervisor conditions job benefits (or threatens job detriment) in exchange for sexual favors. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987); *Henson v. City of Dundee*, 682 F.2d 897, 908-09 (11th Cir. 1982).

16. Hostile work environment sexual harassment occurs when an employee is subject to unwelcome sexual advances that are severe and pervasive, thus creating an abusive work environment. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993). A hostile work environment can involve harassment by a supervisor, see, for example, id. at 369; a co-worker, see, for example, *Ellison v. Brady*, 924 F.2d 872, 873-75 (9th Cir. 1991); or nonemployees, see Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Environment Sexual Harassment*, 48 Vand. L. Rev. 1107, 1112-16 (1995) (discussing *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D. N.Y. 1981) as an early bostile environment case).

17. Barbara Lindemann and David D. Kadue, *Sexual Harassment in Employment Law* 8 (BNA, 1992) (observing that while quid pro quo sexual harassment directly affects a victim's economic situation as it is based on a "put out or get out" bargain, hostile environment sexual harassment relies on claims of emotional harm not directly linked to economic detriment or benefits).

18. See, for example, *Henson*, 682 F.2d at 909.

19. *Harris*, 114 S. Ct. at 370 (noting that the governing principle is whether a reasonable person would, under all the circumstances, consider the conduct hostile or abusive).

20. Some courts readily accepted hostile environment claims and have applied the doctrine broadly. See *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (broadly defining the Title VII definition of "employer" to include supervisors who wield "significant control over the plaintiff's hiring, firing or conditions of employment"); *Ellison*, 924 F.2d at 879 (analyzing hostile environment claims under a "reasonable woman" standard). The *Ellison* court remarked: "Conduct considered harmless by many today may be considered discriminatory in the future. . . . Fortunately, the reasonableness inquiry which we adopt today is not static. As the views of reasonable women change, so too does the Title VII standard of acceptable behavior." Id. at 879 n.12 (citation omitted).

On the other hand, a number of courts continue to view these claims with some skepticism and attempt to apply the doctrine narrowly. See, for example, *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) overruled by *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (requiring conduct to cause actual psychological injury before the Sixth Circuit would find

The skepticism with which some courts view hostile environment claims may be related to underlying concerns about the potential impact of these claims on everyday workplace behavior. This distrust of hostile environment claims may stem from a fear that broad application of the doctrine would place too great a burden on private citizens to change their behavior.[21] It may stem from a belief that the elements of a hostile environment claim are too poorly and loosely defined to have any clear limit on their meaning.[22] Or perhaps it may simply stem from a belief, by a largely older, male judiciary, that the putatively hostile behavior is not so egregious to warrant imposing Title VII liability.[23]

In light of the varying levels of receptiveness courts have shown to hostile environment claims, significant circuit splits have developed in the adjudication of hostile environment claims. Until 1993, the federal courts of appeal were divided on the level of severity and pervasiveness required to bring a hostile environment claim.[24] The Supreme Court resolved this split in *Harris v. Forklift Systems, Inc.*, holding that the challenged conduct need not cause psychological

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it sufficiently "severe and pervasive" to warrant a hostile environment claim); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185 (6th Cir. 1992) (construing agency principles narrowly to avoid employer liability for the hostile environment created by one of its supervisors simply because the employer fired him); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 900-01 (1st Cir. 1988) (interpreting the Supreme Court's directive to analyze an employer's liability through agency principles as mere guidance and holding that an employer is liable only if it actually or coustructively knew of the harassment); id. at 898 (stating that unwelcomeness must be judged from both a male and female perspective and implicitly accepting certain male biases in the workplaco). See also *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that the sexual harassment of a male by another male is not an actionable Title VII claim); *Hopkins v. Baltimore Gas & Electric Co.*, 871 F. Supp. 822, 834 (D. Md. 1994) (same).

21. See *Rabidue*, 805 F.2d at 620-21. Specifically, the *Rabidue* court believed that "Title VII was not meant to—[n]or can—change [the vulgar jokes, rough hewn conversations, or presence of pornography in the workplace]. It must never be forgetten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring abeut a magical transformation in the social mores of American workers." Id. See also Vorwerk, 48 Vand. L. Rev. at 1021 (cited in note 12) (noting that although Title VII created a statute-driven revolution of gender attitudes in the workplace, these new attitudes are far from obvious to many male and female workers whose conduct Title VII governs).

22. See Reilly, 47 Vand. L. Rev. at 432-33 (cited in note 6) (noting the indeterminacy of the term "sexual harassment" and asserting that "some commentators use the torm to refer generally and without elaberation to conduct *they* consider negative"); Cahill, 48 Vand. L. Rev. at 1123-24 (cited in note 16) (discussing the overbreadth of the "unwelcomeness" element of hostile work environment harassment).

23. See Monnin, 48 Vand. L. Rev. at 1190 n.162 and 1190-93 (cited in note 13).

24. See *Rabidue*, 805 F.2d at 619 (requiring the harassment to be so severe as to affect the plaintiff's psychological well-being before a claim for hostile environment harassment would lie); *Ellison*, 924 F.2d at 877-78 (rejecting the *Rabidue* approach and stating that "Title VII's protection of employees from sexual discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance").

injury to be actionable.[25] After *Harris*, however, many issues regarding hostile environment claims remain open. For example, splits of authority continue on issues involving employer liability for harassment by supervisors,[26] the standard of reasonableness for hostile environment claims,[27] and the admissibility of evidence of a plaintiff's past sexual history in sexual harassment trials.[28]

Although much of the case law and the literature regarding sexual harassment addresses the rights of victims and the liabilities of employers, courts and commentators have begun to focus their attention on the employment rights of alleged harassers. Most of the debate surrounding this issue arises in the union context and addresses whether arbitrators should affirm an employer's termination of the alleged harasser as a proper application of the "just cause" termination provision in the collective bargaining agreement.[29] The prevailing view is that public policy supports the termination of alleged harassers in virtually all contexts.[30] In fact, in *Stroemann Bakeries v. Local 776*, the Court of Appeals for the Third Circuit

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25. 114 S. Ct. 367, 371 (1993).

26. Compare *Lipsett*, 864 F.2d at 901 and *Jones v. Flagship International*, 793 F.2d 714, 720 (5th Cir. 1986) (both requiring that an employer have actual or constructive knowledge of a supervisor's harassment before holding the employer liable under Title VII) with *Bouton v. BMW of North America*, 29 F.3d 103, 108-09 (3d Cir. 1994); *Sauers*, 1 F.3d at 1125; and *Sparks*, 830 F.2d at 1559-60 (all holding that an employer may be liable for the sexual harassment by its supervisors if they wield control over the victim's hiring, firing, and conditions of employment). See, generally, Glen A. Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 Vand. L. Rev. 1057 (discussing these cases and urging courts to apply agency principles strictly and impute employer liability in most cases).

27. Compare *Ellison*, 924 F.2d at 879 (reviewing hostile environment claims under a "reasonable woman" standard) with *Lipsett*, 864 F.2d at 898 (judging reasonableness from both the male supervisor's and the female employee's point of view). Importantly, the Supreme Court, in *Harris*, avoided this issue. 114 S. Ct. at 371 (stating: "We need not answer today all the potential questions [our holding] raises").

28. Lower courts have struggled with the issue of admissibility of past sexual conduct as proof of welcomeness and have reached inconsistent standards even within the same circuit. See, generally, Monnin, 48 Vand. L. Rev. at 1187-90 and 1206-10 (cited in note 13) (discussing this issue and surveying cases in the context of amended Federal Rule of Evidence 412).

29. See generally Chris Baker, Comment, *Sexual Harassment vs. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy*, 61 Cin. L. Rev. 1361 (1993) (discussing the competing public policies against sexual harassment and in favor of the finality of the arbitrator's decision and arguing that courts should defer to arbitrators even when they reinstate alleged harassers). See also Leslye M. Fraser, Note, *Sexual Harassment in the Workplace: Conflicts Employers May Face Between Title VII's Reasonable Woman Standard and Arbitration Principles*, 20 N.Y.U. Rev. of L. & Soc. Change 1, 45 (1992-93) (urging employers and unions to amend their collective bargaining agreements to remove the employer's decision to terminate an alleged harasser from the arbitrator's jurisdiction if the employer proves the alleged harasser guilty by a preponderance of the evidence).

30. See *Young v. Hobart Bros. Co*, 1991 Ohio App. LEXIS 141; *Stroemann Bakeries v. Local 776*, 969 F.2d 1436, 1441-42 (3d Cir. 1992).

reversed an arbitrator's decision to reinstate an alleged harasser because reinstatement would contradict public policy and would, therefore, render the arbitrator's decision unenforceable under contract law.[31] Such a broad approach may, however, be antithetical to the purposes and policies behind the Civil Rights Act because it would remove the procedural protections collective bargaining agreements provide alleged harassers and ignore the careful balancing of interests that Title VII sought to achieve.[32]

Much of the debate about sexual harassment can be understood as a conflict between two competing perspectives. The first views sexual harassment as a group issue and desires a workplace absolutely free of gender bias and harassment. The second resents government interference in the workplace and believes that elimination of all gender bias is an impossible or misguided task. Most of the academic literature on sexual harassment takes the former view on the belief that sexual harassment results from a societal imbalance between men and women[33] that can be remedied only through concerted social policy.[34] These commentators frequently urge courts to adopt rules that facilitate sexual harassment claims.[35] Other com-

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31. *Stroemann Bakeries*, 969 F.2d at 1441-42 (noting that "since collective bargaining agreements are contracts, courts may not enforce them in a manner that is contrary to public policy[, and] . . . if an arbitrator construes a collective bargaining agreement in a manner that violates public policy, an award based on that construction may be vacated by a court").

32. See Vorwerk, 48 Vand. L. Rev. at 1034-35 (cited in note 12) (noting that although the collective bargaining system may provide greater protection to alleged harassers than employers receive under Title VII, it properly allows alleged harassers an opportunity to present their case to a neutral forum). Vorwerk urges that alleged harassers in at-will employment settings should receive similar procedural protections as employees under a collective bargaining agreement to assure long-term education about workplace norms and to provide individualized remedies for alleged harassers. Id. at 1054-55.

33. See, for example, Catharine A. MacKinnon, *The Sexual Harassment of Working Women* 1 (Yale U., 1979). Specifically, Professor MacKinnon notes: "Central to the concept [of sexual harassment] is the use of power derived from one social sphere to lever benefits or impose deprivations in another. The major dynamic is best expressed as the reciprocal enforcement of two inequalities. When one is sexual, the other material, the cumulative sanction is particularly potent. American society legitimizes male sexual dominance of women and employer's control of workers. . . ." Id. See also Conte, 1 *Sexual Harassment in the Workplace* § 1.2 at 5-6 (cited in note 3).

34. See, for example, Pollack, 13 Harv. Women's L. J. at 40 (cited in note 3) (recounting that discussion groups among women led to the realization that sexual harassment was a social problem and not an individual one); Abrams, 42 Vand. L. Rev. at 1215-20 (cited in note 5) (stating that it is unwise to rely on litigation as the only means of workplace reform and urging the EEOC and employers to use broad policies to end workplace sexual harassment).

35. See, for example, Estrich, 43 Stan. L. Rev. at 833 (cited in note 7) (arguing for the elimination of "unwelcomeness" as an element of hostile environment sexual harassment because it is "fundamentally at odds with all the other elements of the cause of action"); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law*, 42 Duke L. J. 854, 902 (1993) (urging courts to judge sexual harassment claims on a "reasonable victim standard with an explicit gender analysis"); Staszewski, 48 Vand. L. Rev. at 1096 (cited in note 26) (urging that

mentators view sexual harassment as an individual wrong to be remedied by individuals[36] and believe that sexual harassment law should serve as a means of properly allocating fault based on economic efficiency[37] or assuring that women, as individuals, take responsibility for their own actions and retain their personal autonomy.[38] The individual Notes comprising this Special Project reflect these diverse viewpoints.

The first Note in this Special Project addresses the Title VII issues raised when an employer terminates an alleged harasser.[39] This Note recognizes the perceptual gap between advocates of new gender workplace norms who have met with success in amending Title VII and in litigating Title VII claims and those individuals whose conduct Title VII governs. In light of this gap, this Note discusses the procedural protections that Title VII provides to employers accused of sexual harassment and observes that Title VII gives an employer the opportunity to settle the claim or to litigate it in a neutral forum before incurring any penalty. Employees who work for the government or under a collective bargaining agreement receive similar procedural protections in that they may refute the charges against them in a neutral forum to determine the appropriate penalty, if any. In contrast, employees in at-will situations receive no procedural protection. In fact, Equal Employment Opportunity Commission ("EEOC") gnidelines insulate an employer from liability if the employer takes immediate corective action, and thus encourage immediate termination of the alleged haraser. This Note argues that

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courts apply agency principles broadly to hold employers liable for harassment committed by their supervisors); Monnin, 48 Vand. L. Rev. at 1194-95 (cited in note 13) (approving of the extension of Federal Rule of Evidence 412 to sexual harassment claims to encourage women to bring claims).

36. See Reilly, 47 Vand. L. Rev. at 434 (cited in note 6). Professor Reilly opines: "Characterizing sexual conduct based on the tastes and preferences of an individual who experiences that conduct presupposes that an individual's reaction to conduct (positive or negative) accurately reflects the value or cost of that conduct to her. She is presumptively the best judge of whether and to what extent the challenged conduct harmed or benefitted her." Id.

37. Id. at 450 (asserting that "[c]onsideration of economic efficiency can and should guide the courts in deciding sexual harassment cases").

38. See Cahill, 48 Vand. L. Rev. at 1145 (cited in note 16) (noting that "for the sexes to be equal, it is essential for women to be viewed as responsible actors" and supporting a limited assumption of risk defense to nonemployee hostile work environment claims because such a defense would hold women responsible for their voluntary choice to work in envirouments promoting sex appeal). See also Anne M. Coughlin, *Excusing Women*, 82 Calif. L. Rev. 1, 6 (1994) (noting that the law should view women as rational thinkers and criticizing the battered women's syndrome defense as resting on a belief that women are incapable of exercising self-control).

39. See Hannah K. Vorwerk, Note, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment*, 48 Vand. L. Rev. 1019 (1995).

at-will employees should receive similar procedural protections as employers under Title VII to further Title VII's goals of conciliation and long-term attitudinal change.

The second Note addresses the issue of employer liability for hostile work environment harassment committed by an employer's supervisors.[40] In *Meritor Savings Bank v. Vinson*, the Supreme Court suggested that lower courts look to agency principles when determining whether to hold an employer liable for sexual harassment committed by its supervisors.[41] This Note analyzes subsequent lower court decisions and observes that many courts do not apply agency principles faithfully. Rather, these lower courts hold employers liable only if they were negligent or if the docrine of respondeat superior applies. In contrast, full application of Section 219 of the Restatement (Second) of Agency would also give rise to employer liability when a harassing supervisor exercises apparent authority over a harassed employee or was aided by the agency relationship. Application of an apparent authority standard would result in employer liability in most, but not all situations. The second Note urges courts to embrace this standard as a matter of sound public policy in light of Title VII's broad remedial scheme.

Following this discussion of employer liability, the third Note asks whether there should be an assumption of risk defense to some types of sexual harassment claims.[42] Focusing on the lawsuit filed by several former waitresses against the restaurant Hooters, this Note discusses hostile work environment sexual harassment by co-workers and by nonemployees and uses the tort concept of assumption of risk to review the claims made by the former waitresses. This Note argues that a limited assnmption of risk defense would be useful in reviewing claims of hostile environment sexual harassment by nonemployees when the employee knowingly chose to work in a sexually charged environment. Such a limited defense would recognize that women can and do make voluntary choices about where they work and should be able to market their sexuality at a premium wage if they so desire.

Finally, the fourth Note discusses issues relating to the recent extension of the federal rape shield evidence rule to civil cases and the

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40. Glen A. Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability For a Supervisor's Hostile Work Environment Sexual Harassment*, 48 Vand. L. Rev. 1057 (1995).

41. 477 U.S. at 72.

42. Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Claims?*, 48 Vand. L. Rev. 1107 (1995).

anticipated impact that this evidentiary rule change will have on sexual harassment claims.[43] Sexual harassment claims ultimately rely on whether the sexual conduct at issue was "unwelcome." In an effort to show at trial that the conduct at issue was not unwelcome, defendants have increasingly turned to evidence of the plaintiff's past sexual history. Such evidence puts the plaintiff in an uneasy position of seeking to remedy a wrong while potentially subjecting her private life to public scrutiny. Abuse of this type of evidence in rape cases led to the enactment of Federal Rule of Evidence Rule 412, the federal rape-shield rule, and the Federal Judicial Conference extended this rule to civil cases in 1994. The final Note examines this extension of Rule 412 and analyzes the standard of admissibility of the plaintiff's past sexual history in light of the new evidentiary rule. The Note concludes that courts are bound by the language of the rule and consistent case law to admit only "specific acts" evidence of a plaintiff's prior sexual history proven te be known to the defendant.

Sexual harassment claims, particularly those involving hostile environments, are likely to be the means by which the struggle te alter workplace gender norms is achieved. Society presently lacks a consensus, however, as to what behavior constitutes sexual harassment, despite growing public awareness of the issue and increased penalties for sexually harassing conduct. As the stakes in sexual harassment suits increase, so will debate on the issues that these claims raise. The Notes in this Special Project provide insight into this growing debate as the authors analyze the state of sexual harassment law and offer recommendations on the directions in which the law should evolve.

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43. Paul N. Monnin, Note, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims after the 1994 Amendments to Federal Rule of Evidence 412*, 48 Vand. L. Rev. 1155 (1995).

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