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ARTICLES

THE DISPARATE IMPACT HOSTILE ENVIRONMENT CLAIM: SEXUAL HARASSMENT SCHOLARSHIP AT A CROSSROADS

Robert A. Kearney*

I. INTRODUCTION

Sexual harassment scholarship is experiencing profound growing pains. It has always been a unique life force—born, in more ways than not, in the academic laboratory of Catherine MacKinnon1 and others before ultimately being recognized by the United States Supreme Court. After Meritor Savings Bank v. Vinson2 and the Supreme Court’s determination that a hostile work environment can be unlawful if

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discriminatory, the category of sexual harassment claims underwent a growth spurt. Plaintiffs ultimately succeeded in cases without having to prove that their working conditions placed them on the brink of an emotional breakdown. The Supreme Court eventually recognized same-sex harassment as consistent with Title VII's terms. It also ended the debate over employer liability in these cases, at least with respect to supervisory harassment.

So for a time it appeared that the growth of sexual harassment jurisprudence had become stunted, with few great issues left to decide. One has now emerged. Surprisingly, it is a return to first principles: what is sexual harassment and what is the legal case for it? In large part, the debate over sexual harassment as a legal claim is inseparable from the text of the statute that allows for it. Academics who have joined and

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3. See id. at 64, 65-67 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

4. Of course, workplace harassment claims were filed before Meritor. See Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (comparing sexual harassment to unlawful racial harassment and concluding that "[s]exual 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"); see also Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983). Prior to concluding that sexual harassment was unlawful, courts allowed plaintiffs to prove their work environments were discriminatory because of their ethnicity, race, religion, and national origin. See Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87, 88 (8th Cir. 1977); Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976). The rise in sexual harassment complaints also can be traced to Guidelines issued in 1980 by the Equal Employment Opportunity Commission. Those Guidelines define sexual harassment as a form of sex discrimination. See 29 C.F.R. § 1604.11(a) (2002). Though the Supreme Court's decision on the sexual harassment issue was critical, once Meritor came before the Court, the viability of the sexual harassment claim had been largely settled by the courts. See Meritor Sav. Bank, 477 U.S. at 66 ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

5. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (selecting a standard that "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury" and noting that "Title VII comes into play before the harassing conduct leads to a nervous breakdown").

6. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.").

7. See Faragher v. City of Boca Raton, 524 U.S. 775, 807-808 (1998) (adopting a rule that an employer is vicariously liable for supervisory harassment that is accompanied by a tangible job action but may raise an affirmative defense in other cases); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762-63 (1998) (articulating the same standard).

8. See Katherine M. Franke, What's Wrong With Sexual Harassment?, 49 STAN. L. REV. 691, 691 (1997) (beginning her important article with two "seemingly simple" questions: "[w]hat exactly is wrong with sexual harassment" and "[w]hy is it sex discrimination").

9. Sexual harassment is unlawful as a form of sex discrimination under Title VII of the Civil
framed the debate typically fall into two groups: one which wishes to refocus the attention of courts away from the language of the statute and its requirement that harassment be "because of sex" in order to be unlawful, and another which would simply redefine those words as capable of encompassing virtually all offensive speech in the workplace. Perhaps because of its deceptive simplicity, the term "because of sex" has become the great gate standing in the way of would-be plaintiffs, many undoubtedly affected by poor and even hostile working conditions, but not necessarily because they, as in the typical case, are women. For some the term stands as a statutory irony, meaning its own opposite. They would look to the harm a hostile environment causes, not the motivating force behind it.

Recasting "because of sex" as a term that draws its meaning purely from the effects of harassment would unhinge the gate from any statutory moorings. Perhaps that is the intent. If so, then it is

Rights Act of 1964, which makes it "an unlawful employment practice for an employer... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000); see also Meritor Sav. Bank, 477 U.S. at 65-66 (citing to a substantial body of case law finding harassment on the basis of protected characteristics, such as race, to be unlawful and concluding that "nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited").

10. See infra Parts III-V. In the former group, see Cheryl L. Anderson, Thinking Within the Box: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law, 19 Hofstra Lab. & Emp. L.J. 125, 170 (2001) (arguing that the "nature of the harm," not the motivation of the harasser, "should be the starting point in the analysis"); Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L. Rev. 1169, 1223 (1998) ("The based-on-sex requirement... needs substantial revision."); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683, 1762 (1998) (proposing that sexual harassment be "broadened" to include all conduct that has the "purpose or effect of undermining the perceived or actual competence of women (and some men) who threaten the idealized masculinity of those who do the work"); see Franke, supra note 8, at 772 (arguing that "sexual harassment is sex discrimination precisely because its use and effect police hetero-patriarchal gender norms in the workplace"). In the latter group, see David S. Schwartz, When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law, 150 U. Pa. L. Rev. 1697, 1784 (2002) (arguing for a "sex per se" rule in which all sexual conduct is interpreted as "because of sex").

11. The term "because of sex" is almost always quoted in this way, so the author will do so as well. It is worth noting, however, that "because of sex" is shorthand for what the law forbids, which is discrimination "because of such individual's... sex." 42 U.S.C. § 2000e-2(a)(1).

12. See Anderson, supra note 10, at 157 (arguing against "elevating a method of proof over the nature of the harm"); see also Franke, supra note 8, at 772 (advocating that sexual harassment be viewed in "systemic terms, rather than in terms that elevate a method of proof ('but for') over the nature of the harm itself").

13. See Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (1989). Price Waterhouse contains the Supreme Court's lengthiest discussion of the term "because of sex" to date. The Court never even considered that the term referred to anything other than causation. "The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that
particularly curious why these scholars, and indeed, some federal judges, do not seize upon the obvious alternative: pushing for the recognition of a new sexual harassment claim that, consistent with employment discrimination law, allows for an alternative path through the gate in cases where some groups are profoundly affected by employment practices. In those cases, however well-intentioned the practice, its imbalanced effect is, in fact, the focus of the plaintiff’s claim. A disparate impact sexual harassment claim comes with its own difficulties, as discussed below, but it avoids this primary one: redacting statutory terms that rule out the claims of those who simply were not injured in the way the statute contemplated.

With fewer great issues to wage within sexual harassment jurisprudence, scholars (and judges) have instead chosen the worst possible course: challenging what we already know about the statute and have long accepted. What is particularly curious is the why. “Because of sex” is not a statutory term that will fall easily, nor is it a trifling to be ignored. So why challenge it? Arguing for the adoption of disparate impact sexual harassment would save them the trouble of doing so, and though it would be an effort that should probably fail on its own account, that is more a prediction than a certainty. So sexual statute.” Id.
harassment scholarship and jurisprudence, now seventeen years after *Meritor* and, thus, a teenager of sorts, is faced with the kind of dilemma that often comes with youth: to wage a hopeless insurgency against authority—here, the command of the statute’s terms—or to respect that authority while charting a new, creative path. Some have already chosen the more difficult task and suffered predictable results.

The purpose of this article is three-fold: first, to discuss the current state of sexual harassment scholarship (particularly as it relates to three named plaintiffs in sexual harassment cases); second, to demonstrate how some scholars have mistakenly set out to rewrite the terms of Title VII in an attempt to recast sexual harassment as a general civility code and a law that ignores the motivation behind speech in the workplace; and third, to critique that attempt in the context of an alternative that is consistent with employment law theory. That alternative—a disparate impact sexual harassment claim—itself is flawed in part because of the difficulties involved in creating a new, complex claim within existing law. Though if what stands against the alternative is, as it appears to be, the academic and judicial creation of a new law (a re-written Title VII) to fit existing claims, then the choice is clear. Arguing for the recognition of a new claim is the legitimate work of scholarship. Rewriting statutory terms is not.

II. PROFESSOR ANDERSON’S CASE AGAINST THE SEVENTH CIRCUIT

A. Sweeney v. West: Where is the Abuse Because of Sex?

In her article, *Thinking Within the Box: How Proof Models are Used to Limit the Scope of Sexual Harassment Law*, Professor Cheryl Anderson argues that courts should approach sexual harassment claims within a new paradigm: one that focuses on the harm that harassment inflicts rather than the precise mechanics of stating a viable harassment

scholarly attempts at re-writing a statute.

19. Of course the argument that sexual harassment is sex discrimination pre-dates the Supreme Court’s decision in *Meritor*, but the significance of the Court’s decision is unmistakable. See Franke, supra note 8, at 692 (asking fundamental questions anew “more than ten years after the Equal Employment Opportunity Commission and the Supreme Court first embraced the notion that sexual harassment is a form of sex discrimination”).

20. See infra Parts I, II.

21. See infra Part III.

22. See infra Parts IV, V.
She refers to a metaphorical box in which courts insist that plaintiffs formulate their claims pursuant to established methods. Think "out of the box," she instructs courts, in order to free these plaintiffs from the limitations of harsh pleading rules. Take Nancy Sweeney, a civilian Army employee who sued for sex discrimination and retaliation. She once complained that one of her superiors (a male) had rooted through her personal locker without her consent. A few years later the same supervisor purportedly went into her office when she was on leave. Sweeney also once alleged time card fraud on the part of her female supervisor, but the Department of the Army's Inspector General's Office concluded that there had been no wrongdoing. According to the Army, Sweeney had her own performance problems. The record corroborated them. Twice her supervisor—the same one Sweeney made allegations about—issued counseling statements to Sweeney relating to double pay she purportedly had received, "unsatisfactory job performance in failing to correct a payroll problem of an officer, and behavior [that] is 'unbecoming of a civilian employee of the federal government.'" The last charge related to an incident in which Sweeney allegedly bragged that she could get her supervisor (the one who entered her locker and office) fired from the Army. Sweeney claimed that the counseling statements were unlawful retaliation for her complaints about her supervisors. But for our purposes—and the court's—the most curious part of her complaint was her claim of sex discrimination. Indeed, her claim of sex discrimination borrowed from sexual harassment terminology. Sweeney claimed of an "impermissible hostile work environment" even though there was no

23. See Anderson, supra note 10, at 150 (arguing that in general "plaintiffs are denied the opportunity to proceed under the model of discrimination that is most likely to address the nature of the harm they have suffered").

24. Id. at 126-27, 148-50. The "box" is a metaphor that Anderson uses throughout her entire article. At one point it appears to shrink in size, becoming a "tight box." Id. at 150. By the end of the article it has become a magic box, capable of accomplishing a "doctrinal slight of hand." Id. at 170.


26. Id. at 553. Sweeney complained to the Army's EEO officer about the locker incident and claimed the invasion constituted sex discrimination—she and the Army settled her discrimination claim without disclosing the terms of the settlement. Id.

27. Id. This time Sweeney wrote to the Army's Major General about her supervisor, and she was eventually reprimanded for not going through the proper chain of command. Id.

28. Sweeney, 149 F.3d at 553.

29. Id.

30. Id.

31. Id.
The court correctly pointed out that "workplace abuse does not have to be sexually explicit or suggestive to violate Title VII." In the general case, "[a] Title VII violation could occur if the abuse altered the plaintiff’s working conditions and was directed at members of one sex but not the other. The statutes and case law clearly prohibit disparate treatment between sexes." But lacking from Sweeney’s case was any evidence of disparate treatment, or, because she used the sexual harassment terminology, any evidence of hostility or abuse. It is true that her supervisor—the woman—did tell her at one point that no one liked her, but, as the court noted, "that can hardly be called abusive, even if it were not true." Incredibly, Sweeney’s lawyers compared her environment to that of Teresa Harris, who prevailed in the Supreme Court on her claim of sexual harassment. The president of Harris’ company often insulted her because of her sex. He once suggested that the two of them go to a hotel to negotiate her raise; on other occasions he asked her and other female employees to remove coins from his front pants pocket. The court then made the obvious contrast between Harris’ environment and Sweeney’s: "The harassment [Sweeney] alleges involves no sexual remarks or conduct whatsoever.”

Sweeney v. West would seem a curious springboard for Professor Anderson to make her "out of the box" argument. Anderson is apparently most unhappy with the court’s conclusion that Sweeney had not raised a sexual harassment claim because she could not point to a single sexual incident. This is an odd criticism, for what is sexual

32. Id. at 554. Once on appeal the issues in discrimination cases tend to narrow and gain focus, but in Sweeney’s case the opposite occurred. The court noted that Sweeney’s claim appeared to be one of simple retaliation (beginning with the chain-of-command reprimand). Sweeney, 149 F.3d at 554. But on appeal Sweeney continued to claim a hostile work environment in addition to her retaliation claim. She supported both claims with the same occurrences, which made it difficult for the court to “parse out a sex discrimination claim from what in all respects looks like a simple case of alleged retaliation.” Id.
33. Id. at 555.
34. Id.
35. Id. ("More fundamentally, even if we assumed that Sweeney experienced hostility capable of altering her working conditions and making her work environment abusive, we search the record in vain for anything tying that (mis)treatment to her sex."). Sweeney, 149 F.3d at 555.
36. Id.
38. Id. at 19.
39. Id.
40. Sweeney, 149 F.3d at 555.
41. Anderson, supra note 10, at 144 ("[T]he panel’s response [to Sweeney’s harassment claim] is indicative of the difficulty judges have when claims do not include clearly sexual
harassment if not descriptive of a sexually charged discriminatory hostile work environment? Would not a racially hostile work environment contain some measure of racial hostility? If it did not, how would we possibly know it when we saw it? As the Sweeney court itself acknowledged, abusive work environments can be asexual and yet unlawful if they are discriminatory, but that describes a general disparate treatment sex discrimination claim, not the special case of sexual harassment. Would Anderson like to see the sexual harassment claim broadened to include non-sexual workplace abuse, even if there was no evidence that such abuse—as in Sweeney’s case—could be tied to her sex? Apparently yes. In that case Anderson is far too modest. If, using her metaphor, the box is the law which limits and shapes legal argument, then under Anderson’s approach there is no need for the box at all. This is because if Sweeney’s version of the facts is capable of supporting a hostile environment sexual harassment claim, then it is hard to imagine a set of facts which could not.

Indeed, what the court of appeals did for Sweeney appears to have been positively generous. Finding no evidence of a hostile environment, it reconsidered her case as one of general sex discrimination, not sexual harassment. The court looked through the record to determine if there was any evidence that Sweeney’s supervisor targeted her because she was a woman, and finding none, it affirmed the summary judgment already entered against her. Where is the error here? Not only is there

behavior.\textsuperscript{42}). Anderson is correct in noting that “the Seventh Circuit has stated that claims cannot be construed as sexual harassment [when] the acts the plaintiff alleges were not sufficiently sexual in nature.” Id.

42. In one sense, Anderson is correct that Sweeney had done enough merely to claim that she was treated differently because of her sex (though the court noted that even this argument was more the result of the court’s own efforts, not Sweeney’s attorneys). The court, however, was appropriately dumbfounded that Sweeney’s attorneys would believe they had a claim of actionable sexual harassment. Where were the words or conduct of a sexual nature, as the EEOC’s definition requires? Where was the hellishness in the workplace, as Anderson correctly observed has been the standard in the Seventh Circuit since Judge Posner’s decision in Baskerville v. Culligan International Co., 50 F.3d 428, 430 (7th Cir. 1995). Indeed, where was any evidence that Sweeney had been subjected to severe or pervasive mistreatment that was both prompted by her sex and was sexual? There was none.

43. Anderson, supra note 10, at 144 (“Forced to proceed under general disparate treatment theory, the plaintiff’s claim failed, because the court found nothing in the record to tie her alleged mistreatment to her sex.”).

44. Id. at 126 (“To think within the box is to be constrained by the familiar parameters of a problem.”).

45. See Sweeney, 149 F.3d at 558. Of course, as the court pointed out, it had no obligation to act as Sweeney’s “auxiliary lawyer” and engage in an “uncharted record search” for evidence of sex discrimination. Id. at 555 n.3. The court “scoured the record” on Sweeney’s behalf and found nothing. Id.
none, but the court appears to have exhibited the very same "outside the box" thinking that Anderson advocates.

Most importantly, Anderson appears to misunderstand the Seventh Circuit’s sexual harassment jurisprudence. The circuit is not saying that non-sexual behavior can never be discriminatory. Indeed, it says just the opposite.\(^\text{46}\) Non-sexual harassment (showering a woman with verbal abuse but not similarly targeting men) is subject to the same statute—Title VII—that governs sexual harassment. The only requirement is that the harassment materially alter the victim’s work environment, a requirement that rules out low-level harassment.\(^\text{47}\) In theory, any conduct that evidences different treatment (i.e., discrimination) on the basis of sex could quite possibly raise a legal claim.\(^\text{48}\) Sexual harassment is one form of discrimination, but surely there are countless others. Say a supervisor demeans a woman because he thinks she is overpaid. The only question is whether he would target a man he also thought to be overpaid.\(^\text{49}\) If not (and there may be evidence of this), then the woman has an actionable discrimination claim. But if so, then it appears that the woman’s pay, not her sex, entirely motivated the supervisor’s abhorrent behavior. He should be fired, of course, but under these facts there would be no legal case against the company.\(^\text{50}\)

The confusion between sexual and non-sexual harassment might well come from the term itself. Sexual—as in sexual harassment—is

\(^{46}\) Id. at 555 ("Of course workplace abuse does not have to be sexually explicit or suggestive to violate Title VII. A Title VII violation could occur if the abuse altered the plaintiff’s working conditions and was directed at members of one sex but not the other.").

\(^{47}\) Low-level meaning the harassment is not severe enough to make out a federal case. As the Seventh Circuit stated in Brill, a case applying Judge Posner’s hellishness standard articulated in Baskerville, the line between workplace vulgarity and actionable harassment “is not a bright line,” but “neither will the line be blurred by confusing the distasteful or inappropriate remarks with the deeply offensive and sexually harassing ones.” Brill v. Lante Corp., 119 F.3d 1266, 1274 (7th Cir. 1997).

\(^{48}\) See Sweeney, 149 F.3d at 555 ("The statutes and case law clearly prohibit disparate treatment between sexes.").

\(^{49}\) "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 v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring). Justice Scalia quoted Justice Ginsburg in Oncale, the Court’s same-sex harassment opinion. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998). It is worth noting that Justice Scalia, whose textualist philosophy is well known, was not dropping the “because of sex” requirement from harassment cases. He was saying that evidence of a difference in treatment may constitute proof that the treatment was “because of sex.” Id.

\(^{50}\) Title VII, as amended by the Civil Rights Act of 1991, requires plaintiffs to establish that a protected, impermissible characteristic was a “motivating factor” in the challenged employment decision. 42 U.S.C. § 2000e-2(m) (2000). In this hypothetical case, there is only one reason for the supervisor’s behavior, and it has nothing to do with her sex.
simply too close to the word sex—as in sex discrimination. It was a poor choice from the start, and it should be no surprise that it has caused only confusion. It is a subset of the broader discrimination claim. That means it is not possible to commit actionable sexual harassment without also committing sex discrimination.\footnote{51} But in a hundred ways is it possible to commit sex discrimination and not sexual harassment?\footnote{52} After recognizing the sexual harassment claim, the discussion should have ended. Instead, what was loosed from the courts was what Anderson correctly points out to be years of senseless debate as to the different ways harassment can occur.\footnote{53} The claim of sexual harassment was dissected and studied and then bifurcated as only lawyers can do. Instead of one claim of sexual harassment, there would be two, depending on how far the sexuality went. If the plaintiff was propositioned, or an ultimatum was included, then it would be called quid pro quo harassment.\footnote{54} Other cases required courts to take a good whiff of the employee’s entire working conditions. It would be called hostile environment harassment.\footnote{55} But what good is a bifurcation without different accompanying standards of liability? The result was that

51. “Since the [EEOC’s] Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment.” Meritot Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (emphasis added).

52. See Sweeney, 149 F.3d at 555 (stating that workplace abuse may violate Title VII even though it is not sexual in nature because “[t]he statutes and the case law clearly prohibit disparate treatment between sexes”).

53. See Anderson, supra note 10, at 130-35 (discussing the development of quid pro quo and hostile environment claims).

54. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 902 (1982) (citing Catherine MacKinnon favorably for distinguishing between hostile environment and quid pro quo claims and holding that “[a]n employer may not require sexual consideration from an employee as a quid pro quo for job benefits”); see also Eugene Scalia, The Strange Career of Quid Pro Quo Sexual Harassment, 21 HARV. J.L. & PUB. POL’Y 307, 310 (1998) (“Henson was the first published federal decision to use quid pro quo to describe sex discrimination, and continues to be cited as the seminal quid pro quo case and as black letter law.”).

55. In its 1980 Guidelines defining sexual harassment, the EEOC included conduct that “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a)(3) (2002) (using the same language in its most recent version). The EEOC believes that whether a working environment is unlawfully hostile requires it to “look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” Id. § 1604.11(b). In other words, “determination of the legality of a particular action will be made from the facts, on a case by case basis.” Id. In Harris, the Supreme Court took a similar big-picture approach. Harris v. Forklift Sys., 510 U.S. 17 (1993). The Court chose to look “at all the circumstances,” including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Id. at 23.
employers would nearly always be liable for supervisory ultimatums, but that negligence would be the predominant rule of law in cases with hostile environments. At that point, with the creation of varying classes of injury and legal standards, not to mention the Supreme Court’s over-read and over-interpreted admonition that general agency principles should inform courts in harassment cases, there was no turning back.

B. DeClue v. Central Illinois Light Co.: A Conspiracy Against Sexual Harassment Plaintiffs?

Audrey Jo DeClue worked as the only female lineman for an electric company’s crew. In fact, she was the only female lineman in the entire company. Unquestionably, the environment was sexually charged and hostile towards her because she was a woman. Her coworkers urinated on the ground near where she was working. Why did they relieve themselves in the open in the first place? Because there was no bathroom—for either them or DeClue—to use. They clearly took delight in her reluctance to be as open as they were when urinating outdoors. They repeatedly touched her (even pushed and hit her) in sexual ways and flaunted their pornographic magazines before her. And though she complained—principally about the lack of

56. This is the rule that ultimately emerges from the Supreme Court’s 1998 companion cases. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). Those cases held that an employer would be vicariously liable for hostile environments created by supervisors, subject to an affirmative defense in cases where no tangible employment action was taken against the employee. See Faragher, 524 U.S. at 807. But the road to that standard was not direct. Ellerth, for example, came from the Seventh Circuit, where the employer liability issue was argued en banc to eleven judges, who produced eight separate opinions on the matter. Ellerth v. Burlington Indus., Inc., 123 F.3d 490, 490 (7th Cir. 1997).
57. See, e.g., Faragher, 524 U.S. at 806-07 (discussing reasonable care standard); see also Wilson v. Chrysler Corp., 172 F.3d 500, 508 (7th Cir. 1999) (stating that the rule of negligence applies in these cases); Perry v. Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997) (stating that the standard in the circuit for co-worker harassment cases is negligence).
58. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (“We therefore decline the parties’ invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.”). Exactly what the Court meant by “agency principles” was left unsaid, an incompleteness largely responsible for the eight separate opinions issued by the Seventh Circuit in Ellerth. See Ellerth, 123 F.3d at 490.
59. See DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 436 (7th Cir. 2000).
60. Id.
61. Id. at 435-36.
62. Id. at 436 (“Linemen work where the lines are, and that is often far from any public restroom; nor do the linemen’s trucks have bathroom facilities.”).
63. Id.
bathroom—by all accounts the company did little for her. At one point they offered her a truck to drive to the nearest restroom, which might be miles away and therefore presumably counted on her to plan well ahead.

An easy case? Not exactly. A plaintiff who complains that she does not have the use of a private bathroom and is forced to watch her male coworkers relieve themselves has two very different kinds of facts at her disposal. The lack of a bathroom is itself not an instance of harassment, sexual or otherwise, but does arguably affect her work environment much more than the men, who were allegedly happy to tell and show DeClue they did not need one. Nor is the bathroom omission evidence of a targeted, or intentional difference in treatment. So no intentional tort.

Any law student having graduated with a course in employment law would recognize that a disparate impact claim—or unintentional discrimination—was the only viable claim with respect to the lack of a toilet. Unfortunately for DeClue, her lawyers never raised a disparate impact claim—not even on appeal (though it would have been too late at that point). That leaves the plaintiff's hostile environment case, which in one sense cannot be separated from the bathroom issue. The lack of a bathroom made her more vulnerable to the very environment created by her coworkers, who urinated in front of her and teased her for not feeling free to do the same. DeClue's best argument was that the employer's facially neutral policy (of not providing a bathroom) had an unfair effect on her as a woman; but it also had a secondary effect, which was that it created a work environment that DeClue's coworkers were only too

64. DeClue, 223 F.3d at 436 ("[W]hile the defendant's male linemen were untroubled by the absence of bathroom facilities at the job site, the plaintiff was very troubled and repeatedly but unsuccessfully sought corrective action, for example the installation of some sort of toilet facilities in the linemen's trucks.").
65. Id. at 439 (Rovner, J., dissenting in part).
66. Id. at 436 (Rovner, J., dissenting in part) ("[T]here are respects in which the refusal to provide female employees with restrooms can be understood as creating a hostile work environment as well.").
67. DeClue did not argue that the lack of a bathroom was intentional in the first instance. Id. at 437.
68. An employee may also complain about an employment practice if while not deliberately discriminatory it bears harder on the members of a protected group, that is, in the jargon of discrimination law, has a 'disparate impact' on that group, and the employer 'fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.' DeClue 223 F.3d at 436 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000)). Both the majority and the dissent agreed that DeClue had a viable disparate impact argument to make. See id. at 436, 438.
69. See id. at 437 ("But this case has not been litigated as a disparate-impact case.").
happy to use to their advantage and to humiliate DeClue. Anderson is correct that these facts are enough to put the defendant on notice concerning a discriminatory work environment. The lack of a bathroom may have been unintentional, but her coworkers still intended to embarrass and demean her, and did just that.

Anderson’s principal complaint against the DeClue panel is similar to her criticism of the Sweeney court: it failed to think “outside the box” and chose to focus on how DeClue should have framed her legal case rather than on how she was actually harmed. On the issue of harm, Anderson’s specific complaint is with Judge Posner, the DeClue author, who “quickly dismissed the significance of any of the facts regarding the hostile working conditions, with the exception of the lack of restroom facilities, which he characterized as an ‘omission.’” Anderson’s criticisms of DeClue could be taken more seriously if she had fairly reported and discussed the real reason the court of appeals focused almost exclusively on the lack of a women's toilet. According to the court, DeClue herself “particularly emphasize[d]” the lack of restroom facilities for her. With good reason. With the exception of the toilet omission, DeClue complained about incidents occurring before the 300-day limitations period that applies to Title VII cases. Exposure to urination and pornographic materials are serious enough to put the employee on notice that she has a claim, said the court, meaning DeClue

70. See id. at 439. The thrust of the dissent’s argument is that DeClue’s particular work environment, which included male coworkers who regularly urinated in her presence, was discriminatorily hostile.

71. Anderson, supra note 10, at 156 (noting DeClue’s employer certainly should have exercised more care concerning DeClue’s work environment). After all, it had a duty to exercise reasonable care to prevent and stop the harassment. In DeClue’s case, “that duty might have included adopting reasonable policies that allowed the plaintiff access to the nearest restroom facilities, and prohibiting other employees’ indiscriminate (and sometimes retaliatory) habits of public urination.” Id.; see also supra note 57 (citing authority for the negligence standard).

72. In truth, there is a large difference—ignored by Anderson—between the two cases. The Sweeney court reframed the plaintiff’s case as a general disparate treatment sex discrimination case after concluding it was not a proper sexual harassment claim. Then, in all events, it found the disparate treatment claim unsupported by the record. The DeClue panel recognized that her best chance was a disparate impact, not disparate treatment claim, but concluded that—on appeal—it was far too late to switch tracks. That conclusion doomed her case.


74. See DeClue, 223 F.3d at 436.

75. Id. at 435-36; see also 42 U.S.C. § 2000e-5(e)(1) (2000). Under the statute, an employee can sue over discriminatory incidents within the preceding 300 days. 42 U.S.C. § 2000e-5(e)(1). An exception applies if the incidents are not severe enough to put the employee on notice that she has grounds to sue, in which case the “continuing violation” theory allows her to extend the period beyond the statutory timeline. Id.
filed her charge of discrimination too late. By the time she filed, the court was constrained to restrict its scope to a 300-day period. The court of appeals plainly did not create this limitations period—Congress did. In an effort to think "out of the box," as Anderson would have the court do, should it disregard the statute and the 300-day period? That would not amount to "out of the box" thinking. It would constitute law-making—perhaps worse, law-negating on the court’s part.

Left with the bathroom issue, the Court of Appeals properly set out to determine whether failing to provide a bathroom could create a hostile work environment. Indeed, the majority’s first sentence frames the issue:

This suit under Title VII by a female lineman for an electric company requires us to decide whether an employer’s failure to alter working conditions that just happen, without any discriminatory intent, to bear more heavily on its female than on its male employees can be an actionable form of sexual harassment.

Anderson may not want to reduce the debate to the bathroom issue, but the dissent (authored by Judge Illana Rovner) appears to have no problem with it, arguing that “there are respects in which the refusal to provide female employees with restrooms can be understood as creating a hostile work environment.” In fact, it is hard to argue with that assertion. The argument supporting Judge Rovner’s dissent would simply be that the lack of a bathroom left the female employee particularly vulnerable. It left her in a position where her male colleagues were comfortable urinating before her because they had no separate toilet either. But though both are distasteful, public urination by men is surely more common than by women. The majority appears to

76. See DeClue, 223 F.3d at 436.
77. It is worth noting that Anderson would have been correct to take on Judge Posner concerning his interpretation of the statute’s 300-day limitations period as applied to hostile environment cases. Had she done so, she would have found later support in a higher authority: the United States Supreme Court. The Court ruled in 2002, two years after DeClue and a year after Anderson’s article was published, that the Seventh Circuit’s interpretation of the 300-day period was generally too narrow in hostile environment cases. See Nat’l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061, 2075 (2002) (discussing the 300 day requirement and “continuing violation” theory) (citing and criticizing Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996)). Though the Court allowed for employer defenses such as equitable tolling and laches if the plaintiff sits on her claim too long, it determined that a hostile environment claim is timely if at least one act occurred within the 300-day limitations period. Id. at 2074 (“Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”).
78. See DeClue, 223 F.3d at 435.
79. Id. at 438.
understand this much: “Women are more reticent about urinating in public than men.” And it is not a stretch to say that most men would rather not live in a world where women were as uninhibited as men in this area.

So the issue becomes the lack of a toilet, whether Anderson wants it that way or not. As a matter of legal theory, she, and the dissent, may well be correct. The failure to provide bathroom facilities for either sex clearly affects women more than men. Depending upon the severity of the effect, that may constitute a disparate impact theory in its own right. In fact, the majority in DeClue agrees with this too, but found any disparate impact claim to have been waived by the claimant. Or, as in DeClue, it may leave the employee exposed to an environment in which her sex—and her reasonable preference to urinate in private—is attacked. If so, the employee’s claim is simply a hostile work environment and the court’s job is to determine if the atmosphere is sufficiently “hellish.”

For the majority, this dangerously blurs the distinction between a disparate impact claim and a hostile environment harassment claim. DeClue did not argue disparate impact, which means her employer never had the opportunity to defend on the typical grounds of necessity or undue cost. And this is where the law—and proof models—cannot overcome poor advocacy. Given the 300-day limitations period and the waiver of any disparate impact claim, DeClue’s best chance on appeal was to argue that the lack of a bathroom left her vulnerable to a hostile environment. In other words, the argument is that at some point the bathroom omission became intentional (the company did not provide one on a consistent basis until after she filed her charge of

80. Id. at 436.
81. Id. at 437 (“But this case has not been litigated as a disparate-impact case.”).
82. The hellishness standard comes from Judge Posner’s opinion in Baskerville v. Culligan International Co., 50 F.3d 428, 430 (7th Cir. 1995). See generally supra note 42.
83. Curiously, while Anderson spares no opportunity to criticize Judge Posner’s critical reasoning throughout her article, she places none of the blame for the result in DeClue on DeClue’s lawyers. The reality is that in many respects cases are only as good as the lawyers who litigate them on behalf of their clients. In Sweeney, the Seventh Circuit re-characterized the plaintiff’s claim as general sex discrimination when it was clear that she—or her lawyers—had mislabeled it as one of sexual harassment. Sweeney v. West, 149 F.3d 550, 554-55 (7th Cir. 1998). Sweeney’s lawyers were using the wrong language and perhaps even the wrong legal theories. Id. That was not their only error. Id. In discussing Sweeney’s retaliation claim, the Court discovered another fundamental error in her attorneys’ argument: they made almost no attempt to challenge the Army’s reasons for reprimanding her. Id. That failure alone would have doomed her claim had she established a prima facie case of retaliation, which she could not do. Id. at 555-58.
discrimination), and that intentional omission contributed to her coworkers' treatment of her. There is no reason that an employment policy (such as not providing restrooms to employees) cannot, under particular circumstances, form the basis of either a disparate impact or hostile environment harassment case. Admittedly, it is a nuanced argument: the lack of a bathroom was the opening her coworkers may well have been waiting for; they were relentless at belittling her for requiring such privacy. Because no similar comments were made to men, it is fair to conclude that her sex prompted their treatment of her. Understood this way, DeClue's claim is one of simple sex discrimination grounded in the treatment she received by her coworkers. But that argument becomes a tough sell only because DeClue's lawyers chose to ignore the disparate impact theory that would have provided an obvious basis to her claim.

C. Proof Models, Legal Theories and Legal Language: Attacking the Wrong One

One lesson of DeClue is that disparate impact discrimination is a legal theory that is subject to waiver. This is unquestionably correct, as advocacy and lawyering skills should matter in these cases and defendants should not be required to shoot at moving targets. Anderson thinks otherwise. Indeed, she points to the Seventh Circuit's rigidity when it comes to insisting that plaintiffs, such as DeClue, choose a discrimination theory (disparate treatment or disparate impact); at the same time she argues that such "proof models" are overly formalistic. The problem with this argument is that disparate impact discrimination is not a proof model at all. It is a distinct legal claim. McDonnell Douglas burden-shifting—the principal way that plaintiffs with indirect evidence prove discrimination—is an example of a proof model.

84. See DeClue, 223 F.3d at 439.
85. Id. DeClue's crew leader was apparently very annoyed at the prospect of DeClue needing privacy in order to urinate. See id. at n.2.
86. According to the Seventh Circuit, DeClue's failure to plead the correct claim (disparate impact) could not be forgiven because she had "prevented the defendant from trying to show that it would be infeasible or unduly burdensome to equip its linemen's trucks with toilet facilities sufficiently private to meet the plaintiff's needs." Id. at 437.
87. See Anderson, supra note 10, at 170.
88. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). The McDonnell Douglas framework allows a plaintiff without direct evidence of discrimination to prove her case through inferences. See Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir. 1997). She begins by establishing a prima facie case of discrimination. Id. If successful, then the defendant must forward a reason for its decision, and if that reason is nondiscriminatory, "the ball returns to the plaintiff's
An argument that proof models (properly understood as ways plaintiffs marshal record evidence on their behalf) should be simplified, if not discarded, is not new and certainly worthy of argument. 89

Perhaps it is time to simplify the language lawyers and courts use in these cases. Consider the plaintiff’s burden in proving sexual harassment. It is, in part, to point to sexual speech or conduct in the workplace. But if non-sexual harassment can be unlawful too, so long as it is prompted by an individual’s sex, might “sex,” not “sexual harassment,” be the better term? 90 Indeed, as a doctrine the term “sexual harassment” has only lead to confusion. It leads one to believe that any harassment that is sexual in nature is unlawful. Of course it is not. The harassment itself must be motivated by the victim’s sex, and though that is not a high hurdle to clear in most opposite-sex cases, 91 it is important. Courts have properly dismissed some cases of alleged harassment (both of the opposite-sex and same-sex variety) where it is more clear the harassment is rooted in personal animosity than a hostility toward the victim’s sex. 92 So the term “sex harassment” is a small step forward. The harassment need not be sexual, but it must target the victim because of his or her sex. A similar argument can be made with race harassment. In both instances, it comes down to the question: why is the


90. A hostile work environment is discriminatory even if the harassment is entirely non-sexual. And it is noteworthy that this is the standard relied upon by the court in Sweeney. Sweeney v. West, 149 F.3d 550, 552 (7th Cir. 1998). Judges Posner and Rovner were both on the Sweeney panel and both signed onto the opinion in its entirety. Id. at 552. In DeClue, the two went separate ways: Judge Posner wrote the majority opinion and Judge Rovner dissented. DeClue v. Cent. Ill. Light Co., 223 F.2d 434, 435, 437 (7th Cir. 2000).

91. An inference of discrimination exists when the conduct is sexual in a male-female environment. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("Courts and juries have found the inference of discrimination easy to draw in most male-female harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.").

92. See, e.g., Davis v. Coastal Int’l Sec., Inc., 275 F.3d 1119, 1126 (D.C. Cir. 2002) (affirming dismissal of same-sex harassment claim after declining to “elevate gross workplace dispute into a federal case”); Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 366 (4th Cir. 2002) (reversing jury award for plaintiff and directing district court to enter judgment for defendant in opposite-sex harassment case); Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (affirming dismissal in same-sex harassment case after concluding that the dispute between the plaintiff and co-worker was strictly personal and not because the plaintiff was male). For a further discussion see infra Part. II.A.
victim mistreated in a hellish manner? The answer must be because she is a woman, or because she is black, and so on. These are the answers that state a claim.

Contrary to Anderson's repeated assertions, there is no conspiracy in the Seventh Circuit against sexual harassment plaintiffs.⁹³ Neither, though, is there a generous effort outside of Sweeney to redo their lawyers' work.⁹⁴ DeClue's evidence of a hostile work environment was mostly untimely, with the exception of the bathroom issue. However, without any evidence that the bathroom was not provided intentionally, her only claim was that its absence caused a disparate impact on her as a woman. At that point she may even have been able to re-introduce the evidence that her environment was hostile, perhaps including the public urination and the pornography, because that evidence would not have been the real basis of her claim. It was only evidence of the policy's impact. Instead, DeClue appears to have sought, as Anderson does, the complete abandonment of legal categories and theories, choosing instead to argue that the lack of a bathroom created for her a hostile environment.⁹⁵ A policy that is administered even-handedly could contribute to a hostile environment (a policy that workers can work shirtless in the hot sun comes to mind),⁹⁶ but in that case the environment

⁹³. The conspiracy theory runs through much of Anderson's article, and Judge Posner gets the brunt of her attack. See generally Anderson, supra note 10. According to Anderson, Judge Posner had more in mind than the merits of the case when he authored the DeClue opinion. Id. at 155 ("The decision in DeClue is explicitly driven by a desire to keep sexual harassment doctrine a distinct and narrow theory."). The charge brought by Anderson concerning another case, Heuer v. Weil-McLain, 203 F.3d 1021 (7th Cir. 2000), is even more forceful. Id. at 159. In that case, Anderson charges that the court's consideration of the statute of limitations was actually dishonest and merely served as a "convenient device" for a court "inclined to find that there was no sex-based component to the conduct in the first place." Id. at 165. It is worth noting that Heuer was also authored by Judge Posner. Id. at 159. Moreover, according to Anderson, what is the Seventh Circuit's motivation in these cases? Not a legitimate one, which would be a "concern for keeping separate wrongs separate," but rather an interest in "keeping sexual harassment law narrowly confined in the face of Supreme Court precedent that could set it loose." Anderson, supra note 10, at 168. For Anderson, a few cases, such as DeClue, Sweeney, and Heuer, are enough to indict the entire circuit and its "ongoing attack on hostile environment sexual harassment doctrine." Id.

⁹⁴. In Sweeney, the Seventh Circuit reconsidered the plaintiff's claim as one of general sex discrimination even though she basically had brought a sexual harassment claim. Sweeney, 149 F.3d at 554-55.

⁹⁵. See DeClue, 223 F.3d at 437 (expressing surprise and skepticism that the plaintiff chose to litigate her case as a hostile environment case rather than a disparate impact case).

⁹⁶. For a hypothetical woman to take advantage of the policy, it would require her to risk prosecution for indecent exposure, and because the policy means that only some will be committing a crime, it is fair to say that its impact is uneven and unfair. Or perhaps the woman could cool herself by wearing only a sports bra. In that case, she is actually revealing less of her body than men but she is right to be more uncomfortable in doing so. Granted, the need to cool down is not the same as the need to relieve oneself, but the point is that in both cases the plaintiff's case is one of

http://scholarlycommons.law.hofstra.edu/hlelj/vol20/iss2/1
itself, not the policy, is the issue and DeClue is back where she started: that evidence was waived.

In the end, Sweeney and DeClue are poor choices for criticism. Sweeney, because the court acknowledges that discriminatory harassment need not be sexual to be unlawful, and DeClue, because the plaintiff committed double forfeiture by first letting the limitations period run on her hostile environment claim and then by pleading the wrong legal theory in support of her discrimination case. They both argued intentional discrimination, and in the record evidence that remained timely, there were no such cases to make. No massaging or discarding of proof models or legal language would have saved either plaintiff. To save DeClue’s case would have required the court to either abandon the rule of waiver or the distinction between disparate impact and disparate treatment cases, thereby treating all discrimination the same, regardless of motivation.  

To her credit, it appears that Anderson stops just short of making that suggestion, though her near-exclusive emphasis on the harm that discrimination causes is in tension with her acknowledgment that it must be “sex-based.” Others, though, are not nearly so reluctant. As the remainder of this article demonstrates, they would read “because of sex” and its accompanying emphasis on intent as a small obstacle in the way of recognizing all speech, whatever the forces that prompted it, as potentially unlawful. In a way, it does not appear to be a fair fight—the simplicity of three words (“because of sex”) is pitted against the scholarship that argues for its irrelevance. But as this article ultimately concludes, it is a curious fight too, that provides its own irony.

unintentional (disparate impact) discrimination. In the shirt case, perhaps the employer would be responsible for finding suitable (lawful) ways for the woman to cool herself while keeping her shirt on. If the shirtless men start comparing their bodies (perhaps their breasts) to the woman’s, and sexually touch and grab her, then her case is co-worker sex harassment. At that point the relevance of the policy about shirts is almost zero. It is not a defense to intentional (co-worker) harassment for an employer to claim that the harassment was largely set in motion by a seemingly even-handed workplace rule not intended to make anyone uncomfortable.

97. The court refused to blur the lines between disparate treatment (intentional) discrimination cases and disparate impact (unintentional) discrimination cases because the distinctions between the two types of claims were “important.” DeClue, 223 F.3d at 437. It did allow that, as a “purely semantic matter, it might be possible to argue that an employer who fails to correct a work condition that he knows or should know has a disparate impact on some class of his employees is perpetuating a working environment that is hostile to that class.” Id.

98. Anderson, supra note 10, at 170 (encouraging courts to focus on the harm experienced by “employees like Audrey DeClue” at the same time acknowledging that their experience must be “sex-based”).

99. See infra Part III.

100. See infra Part V.
The claim that would save these scholars so much trouble—and preserve the plain meaning of the statute’s terms—is the very same claim that Audrey Jo DeClue’s lawyers failed to make and, ultimately, waived.

III. “BECAUSE OF SEX”: DOES MOTIVE MATTER?

A. Ocheltree v. Scollon Productions, Inc.101

As Anderson’s article suggests, the last several years have caused scholars and courts to reconsider the meaning of the word “sex” under Title VII. Fueled in part by courts’ acknowledgement that some harassment that is sexual is also discriminatory, some changed the question from whether sexual conduct can be discriminatory to whether sexual conduct necessarily is discriminatory.102 But while the distance between sex and sexuality will continue to generate commentary, in many respects the debate has now turned to first principles: if conduct that is “because of sex” is unlawful, what exactly does “because of” mean? Consider the work environment experienced by Lisa Ocheltree, hired by Scollon Productions to help make game mascots in South Carolina.103 She worked in an all-male work environment and her coworkers routinely used foul, vulgar and profane language, and told sexually-oriented jokes.104 They mimicked having sex with mannequins.105 They talked about how they had sex with their wives and girlfriends and whether their partners “gave good head,” “swallowed,” or “liked it from behind.”106 They sang songs with verses such as: “come to me, oh baby, come to me, your breath smells like cum to me.”107

101. 308 F.3d 351 (4th Cir. 2002). During the editing of this article, the Fourth Circuit voted to re-hear the Ocheltree case en banc. The Court heard oral arguments on the case on February 25, 2003. The re-hearing en banc means that the original panel decision has been vacated. While the published opinion is no longer citeable by lawyers, it remains fair game for academics and it does, after all, provide insight into how the judges on the original Ocheltree panel saw the case. Indeed, the rehearing en banc of Ocheltree only serves to draw attention to the case and the problems with sexual harassment jurisprudence. What remains to be seen is how the Fourth Circuit’s final decision in Ocheltree will resolve the issues discussed in this article.

102. See, e.g., Schwartz, supra note 10, at 1784 (arguing for a “sex per se” rule in which all sexual conduct is interpreted as “because of sex”).

103. Ocheltree, 308 F.3d at 353.

104. Id. at 353-54.

105. Id. at 354.

106. These facts are brought to light by the dissent in Ocheltree. Id. at 369 (Michael, J., dissenting) (criticizing the majority for not explicitly restating Ocheltree’s evidence because “the majority’s reticence blunts the force of Ocheltree’s case”).

107. Id. at 354.
They showed her a picture of a man with pierced genitalia. And even her supervisor showed a photograph of a nude woman around the shop and engaged in several sexually explicit conversations with Ocheltree's coworkers. The same supervisor once stated that he enjoyed having sex with young boys; as in the case of many of the other incidents, the point was to see Ocheltree's reaction. After only eighteen months on the job, and after she had beseeched her coworkers to clean up their act, the company fired her for excessive absenteeism.

Ocheltree's sexual harassment case against Scollon did not exactly speed through the courts. Her case was initially dismissed by a district court that did not yet have the benefit of the Supreme Court's Ellerth-Farragher vicarious liability standard in cases of supervisory harassment. Ocheltree filed her appeal pro se and won; the court of appeals reversed the dismissal on her hostile environment claim and remanded the case. Scollon's dispositive motions were denied by the district court and while a jury did not find her in need of much compensation for her injuries—only $7,280—it hit Scollon with $400,000 in punitive damages. The district court saw her case differently and reduced her award to a total of $50,000 in both compensatory and punitive damages. This time Scollon appealed.

Not only did Scollon convince the court of appeals that Ocheltree should not have won, it convinced the court to reverse and remand with instructions for the district court to enter judgment in favor of Scollon. For the court of appeals, the reason was fundamental: the evidence demonstrated "conclusively" that she "would have been exposed to the same atmosphere had she been male."

Indeed, the court could find only three incidents—the vulgar song, the body-piercing photograph, and the simulated sexual acts with the mannequin—which were directed at Ocheltree. The remainder of the conduct surrounded Ocheltree, but
her presence did not prompt it. Indeed, said the court, it was important
that most of the conduct existed long before she arrived on the scene.\footnote{119} Therefore, Ocheltree's case had a fundamental flaw: she could not prove
that the undeniably sexual environment that surrounded her existed
"because of" her sex. And what of the three incidents in which she was
actually targeted? According to the court, only the vulgar song and the
mannequin incident could be interpreted as sex-related harassment.\footnote{120}
Once reduced to these two incidents, the remaining support for
Ocheltree's case easily crumbled. The court noted it had "no difficulty
concluding that the two arguably gender-related incidents directed at
Ocheltree during the year and a half that she was employed at Scollon
Productions were not severe or pervasive for purposes of Title VII."\footnote{121}

The dissent saw it differently in two important ways: first, it
believed it important that Ocheltree was the only woman in her
production area at Scollon.\footnote{122} Rather than demonstrating that the sexual
conduct was a byproduct of a mostly male work environment, the
dissent believed it to be more likely caused by the fact that Ocheltree
was the first woman who had dared to intrude into a male terrain.\footnote{123}
Secondly—and even more importantly—the dissent argued that
whatever the exact motivation behind the harassment, it was undeniable
that the atmosphere affected Ocheltree more than the men who worked
there.\footnote{124} It did so in large part because much of the sexual language
described women as subordinate to men. Language and conduct that
depicts women as subordinate may be experienced by both men and
women—and therefore it may not precisely target one or the other—but
whatever its intent, its disproportionate impact on women was enough to
satisfy the "because of sex" statutory language.\footnote{125} Therefore, even if the
dissent was wrong that several coworkers targeted Ocheltree for
harassment precisely because she was the first woman in the shop, it
believed that the lopsided effect of the harassment experienced by
Ocheltree was sufficient to prove that she suffered discrimination

\footnote{119. Id. at 357.}
\footnote{120. Id. at 359.}
\footnote{121. Id.}
\footnote{122. Id. at 372 (noting that Ocheltree was the only woman among "ten or eleven" males).}
\footnote{123. Ocheltree, 308 F.3d at 372 ("I think a reasonable jury could see the harassment as rooted
in male resentment of Ocheltree's intrusion into 'their' workplace and in resentment of her demands
that they clean up their act.").}
\footnote{124. Id. (noting that even if "Ocheltree was a mere bystander to the sexual remarks in her
workplace," and not the target of any of them, she should have a claim under the theory that the
sexuality made her "working environment more hostile to her as a woman").}
\footnote{125. Id. at 372-73.}
"because of" her sex. Curiously, like several scholars (discussed below), the dissent was more comfortable conceptualizing Ocheltree's treatment as the product of intentional discrimination ("because of" her sex) than it was embracing the clear alternative: the argument that under traditional disparate impact theory, effect, not motive, matters. As this article concludes, setting aside its legitimacy, a disparate impact sexual harassment claim is clearly preferable to the argument that seeks to prove discriminatory intent merely by looking at discriminatory effect.

B. "Because of Sex"

The debate over the next several years indeed will focus on the meaning of three simple words: "because of sex." Do the words mean that the plaintiff's sex prompted the workplace speech (and sexual innuendo), or that the plaintiff's sex made it more likely that she (as opposed to a man) would be negatively affected by her environment? The answer is critical in posturing these cases for summary judgment. The first formulation focuses on the speaker's state of mind, which makes some sense as discrimination is often considered an intentional tort (notwithstanding disparate impact claims). It means that the most critical question asked during the plaintiff's deposition will be: why do you believe you were treated that way? (or exposed to those comments, and so on). If the plaintiff answers, "because they clearly did not like me," or "they were out to get me," then her claim may very well have failed on the spot. Those answers describe harassment motivated by

126. Id. at 372.

127. Of course the harasser's actual, not perceived, motivations or intentions are the issue. See Shepherd v. Slater Steels Corp., 168 F.3d 998, 1011 (7th Cir. 1999); see also Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539, 555 (5th Cir. 1997) (noting that the plaintiff's "subjective interpretation of [a supervisor's] comments is insufficient to raise a fact issue as to sexual harassment"). Ordinarily it would be difficult to convince a court that the intentions were illegitimate and unlawful if the plaintiff himself does not perceive them to be so. Shepherd was authored by Judge Illana Rovner, who also authored Doe v. City of Belleville, a case that came close to saying that all sexual conduct in the workplace could be interpreted as "because of sex." 119 F.3d 563, 593 (7th Cir. 1997) (questioning "whether it makes a whit of difference why [the plaintiff] was singled out for abuse" considering the fact that his genitals were grabbed to determine his gender and a co-worker regularly threatened to sexually assault him). Without question, Doe is in considerable tension with another Seventh Circuit decision decided just one month later. See Johnson v. Hondo, Inc., 125 F.3d 408, 413 (7th Cir. 1997). In more recent cases, Judge Rovner has tried to limit the holding of Johnson to cases with "run-of-the-mill horseplay and vulgarity." See, e.g., Shepherd, 168 F.3d at 1010. Narrowly confining Johnson is the only option after the Supreme Court singed Doe out and rejected the flexible approach Judge Rovner took in defining behavior that satisfied the "because of sex" statutory term. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (citing Doe as a decision suggesting "workplace harassment that is sexual in
personal animosity, not her sex, unless of course she and her lawyers can make the fairly nuanced argument that her coworkers' dislike for her was in turn rooted in her sex. But if the second formulation is the correct one—that she need only prove that the comments would affect her more than they would affect a man—then the employer's job becomes much more difficult. The questions at the plaintiff's deposition would focus on her male coworkers' reactions and the employer's defense would be that the comments were the type of garden-variety boorishness that everyone within shouting distance experienced. The focus would also be on the comments themselves and whether they were the type to subordinate women more than men.

The problem with these cases is two-fold. First, blue-collar work environments are often rougher than professional work environments. Second, while women may be exposed to the same sexual comments as men in many work environments, it would be hard (though not impossible for some) to contend that, as a matter of law, they should not be more offended by them. As to the first: it is not a surprise that many of the cases in this area involve blue collar employees. Sociologists and other social scientists are far more qualified than I to explain why this is so. But a few possibilities come immediately to mind. It may be that workplace harassment is, in fact, to a degree a function of education. In other words, higher educated employees in professional environments harass less (or at least harass less openly, for they may simply do so in more subtle ways) than workers in blue-collar environments. It may also be that professional workplaces (such as banks) offer more access to the public, which in turn is a limiting force and deters harassment that would otherwise exist. I suppose a third possibility focuses on the victims themselves. Perhaps women in the blue-collar environments are targeted more specifically because they are not professional employees, while women in professional jobs are targeted less because they are respected more. Or perhaps women in blue-collar environments complain more. There are many possibilities, some more attractive than others.

content is always actionable, regardless of... motivations” and later rejecting such an “automatic[] discrimination” rule). Id. at 80.

128. See Ann Juliano & Stewart J. Schwab, The Sweep of Sexual Harassment Cases, 86 CORNELL L. REV. 548, 593 (2001) (studying reported sexual harassment opinions and finding that “a disproportionate number of plaintiffs are blue-collar or clerical”).

129. See, e.g., Ocheltree, 308 F.3d at 363 (rejecting as “paternalistic” the suggestion “that women are more insulted and demeaned by sexual banter... particularly discussions of oral sex, than are men”).
But whatever the answer, the anecdotal evidence is fairly persuasive. And if it is actually true that blue-collar work environments are inherently rougher and infused with more sexuality than white-collar environments, then the next question is why. If they are more sexual because they have historically been dominated by men (and therefore never had to clean up their act), then it is not the woman’s pioneering presence in the workplace that has caused the harassment. It was always that way. Indeed, the majority in *Ocheltree* relies on this very fact—that the workplace at Scollon was always rough—in concluding that the workers did not subject Ocheltree to a hostile work environment because of her sex. Rather, they subjected her to a hostile work environment because she was an employee. This is the problem with hostile environment harassment as a subset of sex discrimination law. The harassment must always be motivated by a victim’s sex in order to be unlawful. It is no different than pay differentials in the workplace. Paying all of your employees poorly—like exposing all of your employees to a hostile environment—is an error in managing human resources, perhaps, but not a legal matter.

This is where the second argument comes into play—namely, that women are right to be more offended by some workplace conduct than men. If so, then it would not be a defense to claim that all of one’s employees experienced the same environment, or that the environment was just as hellish before the first woman showed up. In a sense, it is a disparate impact argument because it focuses on the effects of the harassment rather than the motivation behind it. And there is appeal to it. Consider the first black employee in an environment that is filled with racist innuendo and hostility. Say employees call each other “niggers” just as they might call each other “bitches” in an all-male workplace. They do it because they think it is funny, or because they wish to offend, or because they believe it binds them together. Whatever their

130. *Id.* at 359 (citing “uncontroverted evidence” that the challenged behavior pre-dated Ocheltree’s employment with Scollon).

131. The majority in *Ocheltree* relies at least in part on the fact that Ocheltree’s profane and vulgar coworkers “continued to engage in the behavior around the other men while Ocheltree worked there.” *Id.*

132. This is not so far-fetched. Even the Seventh Circuit has recognized that in today’s sexualized culture sexual language is commonplace. *See, e.g.*, Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996) (“some heterosexual male teenagers have taken recently to calling each other ‘bitch’”), *overruled in part on other grounds by Nat’l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061, 2074 n.11 (2002). In such an environment, context is everything. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (noting that, in evaluating allegations of harassment, “common sense” and “social context” are more important than “a simple recitation of the words used or the physical acts performed”).
motivation, they continue to do it around their first black co-worker. What result then? Can we imagine a court that would not take into account the effect of the comments on black employees in drawing a conclusion that they were uttered with the intent to marginalize and demean these workers?\textsuperscript{133} So his claim is prompted by his race even if initially the slurs were not motivated by it.

IV. VERSIONS OF TITLE VII: THE SCHOLARSHIP

A. Professor Schwartz’s Version

In his article, \textit{When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law}, Professor David Schwartz argues for the adoption of a per se rule under which all sexual language in the workplace would be interpreted as presumptively “because of sex.”\textsuperscript{134} The same argument was made by the majority in \textit{Doe v. City of Belleville},\textsuperscript{135} a Seventh Circuit case Schwartz says is the “most sophisticated and well-reasoned” sexual harassment decision to date.\textsuperscript{136} \textit{Doe} involved a sexual harassment claim brought by twin brothers hired to cut weeds and grass at a cemetery.\textsuperscript{137} The abuse suffered by the boys was unquestionably sexual.\textsuperscript{138} Jeff Dawe, an ex-employee and a consummate bully, doled out most of the abuse.\textsuperscript{139} Dawe ridiculed one of the boys for wearing an earring.\textsuperscript{140} He called him a fag and a queer,\textsuperscript{141} then threatened to rape him.\textsuperscript{142} At one point he grabbed the boy’s testicles and announced that he would “finally find out if you are a girl or a guy.”\textsuperscript{143} In the opinion, authored by Judge Illana Rovner, Doe won the case that

\textsuperscript{133} \textit{Oncale} appears to encourage this conclusion. “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.” \textit{Oncale}, 523 U.S. at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

\textsuperscript{134} See Schwartz, supra note 10, at 1705 (“Under a sex per se rule, sexual conduct in the workplace is always, without more, ‘because of sex.’”).

\textsuperscript{135} 119 F.3d 563 (7th Cir. 1997).

\textsuperscript{136} See Schwartz, supra note 10, at 1725.

\textsuperscript{137} \textit{Doe}, 119 F.3d at 566.

\textsuperscript{138} See id. at 567.

\textsuperscript{139} See id.

\textsuperscript{140} Id.

\textsuperscript{141} Id.

\textsuperscript{142} \textit{Doe}, 119 F.3d at 567.

\textsuperscript{143} Id.
he previously lost at the district court level. But it was close: Judge Daniel Manion authored a dissent, and at least one later case in the circuit has conceded that the decision should not be read too far.

Schwartz believes *Doe* comes very close to supporting a "sex per se" rule, that is, a rule by which nearly all sexual speech is presumptively because of sex (and therefore unlawful if it is otherwise actionable). He is correct that *Doe* does, in fact, come close to making that rule, which prompted Judge Manion's pointed dissent. And if he is also correct that *Doe* stops a bit short (clearly the dissent thinks it does not), then it was the right decision. Especially in an all-male work environment, sexual speech is not necessarily "because of sex." The fact is that males, especially those in an all-male work environment (of which there apparently still exist many), often choose sexually explicit language as a means of emasculation. Under those conditions, epithets such as calling a co-worker a "bitch" or telling him to "suck my dick"

144. The district court had granted the city's motion for summary judgment on the Title VII claims (as well as a claim under the Equal Protection Clause of the United States Constitution). *Id.* at 566. In a 2–1 decision joined by Judge Ripple, the court reversed the dismissal and remanded for a trial on those claims. *Id.*

145. See *Johnson v. Hondo, Inc.*, 125 F.3d 408, 413 (7th Cir. 1997). In fact, *Doe* was effectively gutted by the Supreme Court. See *Oncale v. Sundowner Offshore Servs.*, Inc. 523 U.S. 75, 79-80 (1998) (singling out *Doe* in its relatively brief opinion and going on to reject any rule whereby language with sexual content or connotations is "automatically discrimination").

146. Schwartz, *supra* note 10, at 1727 ("The court came close to adopting a sex per se theory in a manner more explicit than any court had previously done.").

147. See *Doe*, 119 F.3d at 602 (contrasting the dissent's view with the majority's approach "that motive should be irrelevant and that, in effect, 'sexuality harassment'—harassment somehow sexual in nature—is prohibited by Title VII").

148. Nor did the Supreme Court in *Oncale*. *Oncale*, 523 U.S. at 79 (citing *Doe* as one court among "others [which] suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations").

149. The most important case to say so is clearly *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997). *Johnson* involved a same-sex harassment claim brought in a rough, all-male work environment. *Id.* at 410, 412. Ollie Hicks, Johnson's co-worker, repeatedly threatened Johnson with sexual language, such as "I'm going to make you suck my dick," "come down to the carwash and suck my dick," "come across the street and suck my dick," and the like. *Id.* at 410 n.1. Though admittedly vulgar, what was missing from the comments was any indication that Hicks uttered them because of Johnson's sex. As the court explained, "[m]ost unfortunately, expressions such as 'fuck me,' 'kiss my ass,' and 'suck my dick,' are commonplace in certain circles." *Id.* at 412. The court added that when these expressions are uttered, particularly by men speaking to other men, "they are simply expressions of animosity or juvenile provocation" and their use "has no connection whatsoever with the sexual acts to which they make reference." *Id.* In *Davis v. Coastal International Security Agency*, the United States Court of Appeals for the District of Columbia found the case before it "virtually identical" to *Johnson* and reached the same conclusion about vulgarity exchanged between male coworkers. 275 F.3d 1119, 1124 (D.C. Cir. 2002). At most, said the court, the case involved "a gross workplace dispute," and not one consisting of discrimination because of sex. *Id.* at 1126.
are not gender-motivated but personal in nature. The line separating the two is often not a bright one in these cases. The trick is to distinguish the “harasser” who chooses a sexual insult because of its effectiveness (that is, it affects the target) and the one who chooses the same insult because the victim is a man or a woman.

Of course, even then some are not satisfied. Schwartz is one of them. He would treat all workplace sexuality as gender motivated and therefore “because of sex.” After all, he argues, when a male worker shares pornography with other males, it is at the very least a test of that male’s allegiance to a “heteropatriarchy.” Those who do not “salute” are traitors and “treated accordingly.” Of course the problem with this thinking is that the “sex per se” rule is larger than it needs to be in order to support the man’s claim. The male he describes may have a claim of sex discrimination simply because he does not live up to the kind of male stereotype that his harassers insist upon. If so, then his claim is simply one of sex discrimination—not sexual harassment—under the Supreme Court’s decision in Price Waterhouse v. Hopkins, which allowed for a sex-stereotyping discrimination case.

B. Professor Franke’s Version

In her article, What’s Wrong With Sexual Harassment?, Professor Katherine Franke argues that sexual harassment is unlawful because it perpetuates gender norms—or, in her words, “hetero-patriarchal gender

150. See Johnson, 125 F.3d at 412 (noting that expressions were based in personal animosity); Davis, 275 F.3d at 1126 (finding that conduct was vulgar but not prompted by biological sex).

151. Sexual harassment cases are difficult on many levels. Even if the plaintiff is able to point to conduct motivated by his or her sex, he has won nothing unless the conduct itself is sufficiently severe. There, again, the issue is largely interpretive, but the line between workplace vulgarity and actionable harassment nonetheless exists. As the Seventh Circuit has stated, “[i]t is not a bright line . . . [b]ut neither will the line be blurred by confusing the distasteful or inappropriate remarks with the deeply offensive and sexually harassing ones.” Brill v. Lante Corp., 119 F.3d 1266, 1274 (7th Cir. 1997).

152. Though not a harassment case, Price Waterhouse is helpful on this point. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (“The critical inquiry, the one commanded by the words of [the statute], is whether gender was a factor in the employment decision at the moment it was made.”).

153. Schwartz, supra note 10, at 1784-85 (finding as persuasive Katherine Franke’s similar argument).

154. Id. at 1785.

155. See Price Waterhouse, 490 U.S. at 250-51 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).
There can be little doubt why some scholars (and even courts) prefer to use the term "gender" rather than sex. Of course sex is the term Congress chose, but by almost every definition it is limiting. It refers to one's biological sex—given, rather than chosen (though conceivably alterable)—which in turn is based on an individual's reproductive organs. The term sex is a means of classification—as either male or female—while the term gender relates to the way an individual animates their given sex. Accordingly, one may be a masculine or feminine male and a masculine or feminine female. Once framed as "gender," attacking an individual's sexuality (rather than their sex) becomes a case of sexual harassment, and, accordingly, sex discrimination. Gone is the bifurcation written into the statute, that is, the notion that what is unlawful is different treatment, or different treatment because of sex (or race, and so on). It is replaced with the sense (and sensibility) that gender norms are the enemy and any speech that perpetuates them constitutes harassment. Gone too is any need to determine what motivated the speech in the first place; almost exclusive emphasis is placed on the fact that there is a victim and that someone has been injured.

The second point first: the cause is not irrelevant. Though some would like to rewrite the statute to read "based on sex" rather than "because of sex," the statute that Congress wrote is the one that must be enforced. Setting aside the extent of the injury, exactly what motivated

156. Franke, supra note 8, at 772.
158. Justice Scalia has voiced his own objection to using "gender" and "sex" interchangeably. Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male. The present case does not involve... femininity or masculinity... The case involves, therefore, sex discrimination plain and simple.
159. See Franke, supra note 8, at 772 ("The wrong of sexual harassment must consist of something more than that the conduct would not have occurred 'but for' the sex of the target.... [S]exual harassment is sex discrimination precisely because its use and effect police heteropatriarchal gender norms in the workplace.").
160. Of course "because of," rather than "based on," is the correct statutory recitation. See 42 U.S.C. § 2000e-2(a)(1). But "based on" is closer to Franke's vision of the statute as it focuses on the effect, not the cause, of the harassment or discrimination.
161. See Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) ("The critical inquiry, the one commanded by the words of [the statute], is whether gender was a factor in the employment decision at the moment it was made."). The primary importance of the motivation or causation issue is demonstrated by the very research that seeks to redefine "because of sex." After arguing at length
the speaker, the harasser, the decision-maker is, in fact, the single most important fact in any discrimination case. Congress did not outlaw a mere difference in treatment, it legislated against a difference in treatment prompted by specific motivations (sex, race, color, religion, and national origin). For this reason and for no other have courts appropriately adopted the "honest belief rule," which simply holds that an employer that makes a mistake in favoring a man over a woman cannot be sued for discrimination. Whether or not the employer intended to discriminate on the basis of sex, the result is the same: the woman has been unfairly disfavored. But actus reus is not enough. In drafting what amounts to an intentional tort statute, Congress determined that a decision maker's mens rea was also critical.

Perhaps most peculiar is the suggestion by these scholars that "all sexual conduct is 'because of sex.'" How could that be?

A sexual act creates and reinforces the gender of the person acting and the person acted upon. The relationship between gender and any instance of sexual conduct is one of both cause and effect; sexual conduct is necessarily "because of" the gender of all persons involved. Again, since 'gendered' beings are located in 'sexed' bodies, 'because of gender' also necessarily implies 'because of sex.'

The world Schwartz describes (not to mention Franke's) is downright scary. One imagines a metaphorical city of overly sexed humans; every conversation—indeed, every word—is rooted either in

for a vision of Title VII that focuses on harm rather than intent, Franke contends that she does "not suggest that we reject existing doctrine." Franke, supra note 8, at 772. Indeed, her entire thesis is that a "gender norm" understanding of Title VII discrimination claims is consistent, not antithetical, with proving discrimination "because of sex"; see generally Franke, supra note 8. Schwartz concludes his article by pleading to scholars that they take the issue of causation seriously. Schwartz, supra note 10, at 1794. Of course everything that precedes that plea—such as his "sex per se" rule—undermines it. It is at least noteworthy here that he believes he is working within the very "box" that Anderson rejects. That is, he reluctantly recognizes that courts will continue to look to the cause of the harassment in these cases. Id.

162. See, e.g., Sweeney v. West, 149 F.3d 550, 557 (7th Cir. 1998) (noting that employers are entitled to make mistakes and that "arguing about the accuracy of the employer's assessment is a distraction . . . because the question is not whether the employer's reasons for a decision are 'right but whether the employer's description of its reasons is honest'") (quoting Kariotis v. Navistar, 131 F.3d 672, 677 (7th Cir. 1997)).

163. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 793-804 (1998) (discussing supervisory harassment as an intentional tort and determining those conditions under which an employer, as master, should be liable for the torts of its servants).

164. See Schwartz, supra note 10, at 1784 (agreeing with the assertion and attributing it positively to Franke).

165. Id.
sexual attraction or sexual domination of one sex by another.\textsuperscript{166} Freud himself would be challenged to agree. But beyond its oversexualization, the argument fails because it is so circular. How do we know that sexual innuendo and sex speech in the workplace is “because of sex?” Because the speech was uttered by a person, who necessarily has a sex (one wonders how they would approach the androgynous speaker) and is necessarily, to use their term, “gendered.” The gender is inseparable from the speech, and therefore the speech is uttered “because of sex.” In other words, sexual speech is uttered “because of sex” because it is uttered by one sex or another. It renders the statutory language nugatory; all sexual speech (that is hostile enough) is unlawful in the workplace.\textsuperscript{167}

In addition to discarding any concern over causation, Franke and others appear to exhibit equal indifference toward the term “discrimination.” By any definition it means a difference in treatment or to treat unequally. But Franke believes that men who resist heteropatriarchal norms (by which I interpret she is referring to sex-based understandings of male and female roles, the latter being subordinate) are victims, too, and should be able to sue over sexual speech in the workplace that perpetuates those roles.\textsuperscript{168} Accordingly, both a man and a woman could sue over the same speech, which conceivably may have targeted neither.\textsuperscript{169} To be sure, men can be affected by sex-speech too, even when it comes from “the boys.” And though they may be less likely to be targets of such speech, or tested by it, they can be horrified by it, too. But if they are equally harmed by the speech, it is because of their sensibilities (clearly laudable ones), not because of their sex. The problem is that the statute forbids harassment prompted by the target’s sex, not sensibility.\textsuperscript{170}

\textsuperscript{166} Mostly, the latter of the two. “This ideology also includes a sexual hierarchy in which women are regarded as inferior to men, and femininity is regarded as inferior to masculinity.” Franke, supra note 8, at 762. Much of this research can be traced back to Catherine MacKinnon, who views sexism as the means by which men dominate women. See MacKinnon, supra note 1, at 174-77.

\textsuperscript{167} This is precisely the result achieved by Schwartz’s “sex per se” rule. Schwartz, supra note 10, at 1793-94 (arguing that the sex per se rule solves the problem of what to do with the equal opportunity harasser).

\textsuperscript{168} See Franke, supra note 8, at 759 (“Workplace sexual conduct may injure women because it objectifies them as sex objects, and it may injure men because it assumes that all men conform to and join into a kind of sexualized hetero-masculine culture.”).

\textsuperscript{169} See id. (conceding that this formulation, “while failing a test of ‘but for’ causation . . . should not necessarily render the conduct something other than sex discrimination”).

\textsuperscript{170} Under this interpretation, it would not be actionable sexual harassment for a man to target another man with vulgar, sexual language simply because the harasser understands the man objects to such profanity. In that case, the harasser has chosen the man because the man is an easy target, not because of the man’s sex. Presumably, the harasser would choose a sensitive woman, too.
I do not believe that Franke, Schwartz, and Anderson are actually comfortable squeezing their conceptualization of sexual harassment into Title VII. Focusing on the injury that sex speech does to women (or men) rather than the other three-fourths of a successful claim (what prompted the speech, whether it was unwelcome and whether there is a basis for employer liability) leaves them in what is presumably an awkward position. It requires them to ignore statutory language and replace it with "norms," specifically "hetero-patriarchal" ones. This is not to say that injury without intent can never be unlawful under Title VII. That describes a disparate impact—not disparate treatment—case, but historically sexual harassment has resided squarely in the intentional tort camp. Indeed, what Franke and others appear to propose—whether knowingly or not—is the equivalent of a disparate impact sexual harassment claim. A plaintiff-employee, say a woman, would not claim that she was targeted on the basis of her sex or treated differently in any way. Instead, she would argue that her environment, infused with sexual innuendo and vulgarity, caused more harm to her on account of her sex (female), whether or not the speech existed prior to her arrival and whether or not it was targeted at her. In a disparate impact case, evidence of disproportionality is the key, and here it would be argued to exist along the lines of sex.

Specifically, DeClue's claim would not be that the bathroom caused a disparate impact, or that she was the target of intentional harassment. Her claim would be that the single-sex environment in which she worked, including the sexual vulgarity, affected her more than

171. See supra note 159 and accompanying text.
172. In addition to pointing to harassment that is severe or pervasive enough to alter a working environment, these are usually given as the remaining components of a plaintiff's prima facie case. See, e.g., Quantock v. Shared Mktg. Servs., Inc., 312 F.3d 899, 903 (7th Cir. 2002); Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 356 (4th Cir. 2002).
173. See Franke, supra note 8, at 772; Schwartz, supra note 10, at 1784-85.
174. See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (encouraging "careful attention to the requirements of the statute" which "is directed only at 'discriminat[ion] . . . because of . . . sex'").
175. Frank, supra note 8, at 772. Schwartz clearly understands this. See Schwartz, supra note 10, at 1773.
176. After all, in disparate impact cases, intent does not matter. An employment practice or policy that has no discriminatory intent whatsoever may still be unlawful based on its disproportionate impact on a protected group. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988) ("In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.").
177. In disparate impact cases, disproportionality typically is proven by pointing to statistical disparities. Id. at 987.
other employees because of her sex. And courts would no longer be able to rely on the fact that some workplaces were sexually charged long before women arrived on the scene. That fact, though relevant to an intentional discrimination claim because it shows a lack of intent to target women, would not be relevant in a disparate impact claim. The reality of the female employee's special harm on account of the speech would be the court's focus and the employer's legal vulnerability. Although it aligns their arguments with the statute's language and the accompanying jurisprudence, the disparate impact sexual harassment claim has a few drawbacks. First, it would require Franke and others to concede that women (in most cases) can be harmed more by sexual speech than men. They may interpret that as perpetuating the very norms they believe to be hetero-patriarchal. Second, it would require these scholars to agree that the focus of the statute rests in differences, not similarities, meaning that if two workers (one male, one female) were equally offended by sex speech, neither would have a viable claim. Intentional harassment—which when typical involves a female victim—would still be actionable as a disparate treatment case. But in other cases, where motive is unclear or improvable, a disparate impact claim is the only claim that is consistent with the statute's precise terms.

C. What's Wrong With the Scholarship: An Over-Sexualized Statute

The real problem with this scholarship is its strained attempt to reconcile itself with the statutory language Congress wrote in 1964. It chooses this round peg in a square hole approach rather than: (1) recommending that Congress change the law to forbid all sexual

178. See generally infra Part V.

179. Franke makes a point to allow for the possibility that both men and women could find certain sexual conduct in the workplace to be equally offensive. See Franke, supra note 8, at 759. That would appear to leave little room for a different, or disparate, impact argument. At least one court has rejected the disparate impact argument as "paternalistic and contrary to Title VII itself." Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 363 (4th Cir. 2002).

180. For Schwartz, the answer to the "equal opportunity" or "bisexual" harasser dilemma is the sex per se rule. Under his construction of that rule, the victim of the bisexual harasser—who clearly would not be able to rely on disparate impact theory—could nevertheless claim intentional discrimination "since all sexual conduct is 'because of sex.'" Schwartz, supra note 10, at 1793. As Schwartz explains, while the bisexual harasser may be "impartial" to the sex of his target, impartial "is not the same as 'oblivious.'" Id.

181. See Juliano & Schwab, supra note 128, at 593 (studying reported federal court cases involving sexual harassment and finding that male victims comprised less than 6% of the cases).

182. Even then the disparate impact claim has too many holes to succeed. See infra Part V.
speech in the workplace regardless of motivation (and any concern for discrimination), or (2) arguing that sexual speech should not be uttered no matter whether it would be allowed under the 1964 law. But because these scholars choose to engage (and distort) three simple words ("because of sex") in the statute, the counterargument must be equally text-based. Consider these problems with their approach. Is it possible that Congress intended the words in the statute to have no meaning? Unlikely. Then what meaning is appropriate? Most dictionaries define "because of" as "by reason of" or "on account of." These are words of causation. If we were capable of peering into the heart of the decision-maker at the time of his decision, or in the heart of the speaker (in a hostile environment case), what would we find? Animus toward the employee or victim because of her sex, or race, and so on? Or dislike rooted in personal conflict independent of their respective sexes and races? "The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision at the moment it was made." The Supreme Court has made it clear that epithets—whether sexual, racial, or otherwise—are not unlawful unless motivated by the target's association with a protected class.

Beyond the problem of oversexualizing Title VII, the problem with the sexual speech equals sex school of thought is that it transforms the courts into a federal monitor of workplace civility. To be sure, many workplaces are rough. But they are not all unlawful.

Most unfortunately, expressions such as 'fuck me,' 'kiss my ass,' and 'suck my dick,' are common place in certain circles, and more often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference—even when they are

185. "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination... because of... sex.'" Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).
186. See Oncale, 523 U.S. at 80 (recognizing the criticism that Title VII risks becoming a general civility code and explaining that the risk "is adequately met by careful attention to the requirements of the statute").
187. Off-work places can be rough, too. See Juliano & Schwab, supra note 128, at 593 (finding that while most harassment occurs at work, 20% of the cases involved off-work harassment).
188. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment."); see also Perry v. Harris Chernin, Inc., 126 F.3d 1010,1013 (7th Cir. 1997) ("The workplace that is actionable is the one that is 'hellish.'").
accompanying, as they sometimes were here, with a crotch-grabbing gesture. Ordinarily, they are simply expressions of animosity or juvenile provocation. In a single-sex work environment, a presumption should develop that, absent evidence concerning the speaker's motivation, sexually-laced epithets are not uttered "because of sex." This presumption should be added to others that already serve to connect black letter employment law to common sense. The same hirer-firer presumption is no different, nor is the presumption that (contrary to Professor Anderson's theory), conspiracies do not easily exist.

The statute that Congress wrote limits the reach of the sexual harassment doctrine. As it is presently written, it simply cannot reach all incivility in the workplace. Language which is guttural may not be unlawful, either. The statute forbids creating a hostile environment on account of the target's sex, or race, or other protected characteristic. If the same environment is created for any other reason, common law tort may provide an answer where federal law cannot. And it is worth noting that sexual harassment plaintiffs are not singled out in this regard. Plaintiffs who claim any form of discrimination under Title VII, especially those who rely on the McDonnell Douglas burden-shifting method (as opposed to providing so-called direct evidence under Price Waterhouse), are often defeated not because they failed to point to an

190. See Oncale, 523 U.S. at 82 ("Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.").
191. "We have previously held that when an employee is hired by the same decision-maker in a relatively short time span, a presumption, or inference, of nondiscrimination arises." Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 399 (7th Cir. 1997).
192. See Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985) ("[T]he story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it"); see also Brill v. Lante Corp., 119 F.3d 1266, 1272 (7th Cir. 1997) (rejecting, without any "circumstantial evidence that would make the theory plausible," plaintiff's contention that her evaluators conspired to rate her poorly in order to cover up their discriminatory animus).
193. "Rejecting this preposterously broad interpretation of Title VII requires little discussion, for such a theory would convert the statute from a law aimed at eradicating discrimination to one that prescribes a 'general civility code for the American workplace.'" Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1125 (D.C. Cir. 2002).
194. See id. at 1125-26 ("We find only that however vulgar [the plaintiff's coworkers'] behavior, no reasonable jury could believe that it constitutes discrimination because of sex.").
196. 411 U.S. 792, 802-05 (1973) (describing the evidentiary gate-keeping method by which plaintiff with indirect evidence of discrimination must first establish a prima facie case).
injustice, but because they failed to prove that their membership in a protected class—rather than an honest mistake or something else—motivated the employer's decision. The so-called honest belief rule means an end to many cases in which, at best, the plaintiff can prove that he should not have been fired (or demoted, and so on). Perhaps not. But what caused the decision is all that matters. A decent employer would, of course, remedy the mistake, just as it would do its best to provide a work environment free from sexual epithets and vulgarity.

Even in an economy short of full employment, competition for human capital should be enough to persuade employers to clean up their workplaces. But if they do not, Title VII is not the answer. Courts are not super-personnel departments, and under the statute, indecent workplaces may still be lawful.

In some respects employment law—and the academics who study it for a living—is at a crossroads. The principal statute regulating the workplace, balancing the infusion of new cultures, new kinds of employees, and, to be sure, the equal opportunity of two sexes, is simply not equipped to do what is presently asked of it by some scholars. In 1964, 38.4% of American women worked outside the home. As of 2001, over 60% did. Indeed, the concept of a woman as a single wage earner was unrealistic in 1964 but more possible today. Our notions of equity and equal opportunity have evolved over the years, too. But the way we read laws and interpret them should not. Perhaps a good argument can be made that workplace harassment that is not "because of sex" is worthy of its own law. But let the argument be made rather than

concurring) (defining "direct evidence" as evidence that did not include stray remarks in the workplace). Justice O'Connor's concurrence is routinely interpreted as the decisive vote in a plurality opinion.

198. "Plaintiffs lose if the company honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless." Hartley v. Wis. Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997).

199. And just as it would speak to an employee's personal physician before concluding, on the basis of a videotape filed by a private investigator hired by the company, that the employee was fraudulently taking leave. See Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 678 (7th Cir. 1997) (questioning why the company allowed the video to speak for itself and at the same time affirming the principal that even the most medieval corporate practices are—if not discriminatory—none of a court's business).

200. "In essence, [the plaintiff] is asking that this court take on the mantle of a super-personnel department reviewing the business decisions of his employer. We shall not assume such a role." Bahl v. Royal Indem. Co., 115 F.3d 1283, 1292 (7th Cir. 1997).


202. See id.
continue to treat Title VII, and its sparse language, like a Rorschach test.\textsuperscript{203} Treating all sexual language as sex-based does exactly that; it wrings the sense out of a statute short on words but long on promise.

In the end, it would be more direct for these scholars to suggest a change to the language of the statute explicitly rather than by implication. The answer cannot be a series of iterative writings on the subject that serves to stretch the meaning of three simple words ("because of sex") beyond recognition. Consider the evolution between Franke’s version of Title VII and Schwartz’s. For Franke, all sexual discourse in the workplace—no matter what the real motivation behind it—satisfies the "because of sex" proscription if it contributes to gender norms and hierarchies.\textsuperscript{204} For Schwartz all sexual speech is because of sex, period.\textsuperscript{205} The issue—or dilemma—of proving causation has disappeared entirely, and with it the language of the statute. There may well come a day when the statutory construction suggested here—in this article—is interpreted as the most radical to date. “Because of sex” will be the equivalent of a statutory appendage: an historical curiosity without contemporary relevance. Sometimes it is easier to ignore a statutory term than to eliminate it, not because what is discarded lacks meaning, but because what is ignored means too much.

V. AN ARGUMENT FOR GROUPINGS AND PRESUMPTIONS

It may be that the only way to get a handle on these cases is to place them into analytical groupings. There tend to be four different types of sexual harassment cases. In Type I, both the harasser and the victim work in a mixed (male and female) work environment.\textsuperscript{206} The male disrupts the female’s work environment through either verbal or physical conduct that is infused with sexuality. He comes on to her, often pathetically, and if he is a supervisor the advances (and her resistance to them) are particularly pernicious.\textsuperscript{207} Still, whether he is a co-worker or her boss, what he does must be terribly offensive in order for her to state

\textsuperscript{203} Admittedly, the language in the statute is “inherently vague.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Scalia, J., concurring).

\textsuperscript{204} See Franke, supra note 8, at 772.

\textsuperscript{205} See Schwartz, supra note 10, at 1705 (“Under a sex per se rule, sexual conduct in the workplace is always, without more, ‘because of sex.’”).

\textsuperscript{206} Most harassment cases take place in mixed workplaces. See Juliano & Schwab, supra note 128, at 593.

\textsuperscript{207} Surprisingly, in the study conducted by Juliano & Schwab, almost 80% of the cases involved supervisory harassment at least in part. See id.
a case. It must cross the line between boorishness and hellishness and reside squarely in the latter camp. Sometimes, as in Sweeney, it does not come close.

In Type II harassment, both the harasser and the victim work in a same-sex work environment. In almost all cases, both are men, and the victim is singled out because he is not manly enough, which falls within Price Waterhouse’s prescription, or because he is disliked. In the second case sex is the animating, but not motivating, influence behind the harasser’s treatment of the victim. Non-sexual words and epithets would be used if the harasser could be confident that they could get the job done.

In Type III harassment, a woman is exposed to harassment in what used to be an all-male work environment. As in Ocheltree, the working environment is highly sexually charged. Much of the sexual discourse involves oral sex, which could be interpreted as subordinating. There is no question that the environment is the same even though the work crew is no longer single sex. In other words, she did not bring it out in them. But the question remains whether they have altered the environment or increased its sexuality because of her presence. In that case, she would

See Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997).

See id.

See Sweeney v. West, 149 F.3d 550, 555 (7th Cir. 1998) (“The record does reveal that [Sweeney’s supervisor] purportedly told Sweeney that no one liked her, but that can hardly be called abusive, even if it were not true.”).

See Juliano & Schwab, supra note 128, at 593 (comparing mostly male and mostly female workplace complaints and finding that “only a tiny handful of cases involve mostly-female workplaces”).

See Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

In other words, the sexual language is chosen precisely because of its effect on the victim. See Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997).


See id. at 369.

See id. at 359.

In Ocheltree, the majority concluded that they did not. See id. at 357 n.4. However, the majority may be drawing a fine line when reviewing the trial testimony, which after all should be interpreted in Ocheltree’s favor because she won her case before the jury. The majority notes that some testimony may support a finding that the atmosphere surrounding Ocheltree grew cruder after she was hired. Nevertheless, the court found “no evidence, however, that the behavior worsened or became more crude because of Ocheltree’s gender.” Id. In other words, it appears that the court is saying that Ocheltree’s presence, not her sex, may have prompted any increased hostility or vulgarity. That is a question of fact, not law, and given the trial testimony cited by the court, a case can be made that there is sufficient evidence to support the opposite inference—that her sex, not her
need to prove that it was her sex—not her newness—that caused them to turn up the heat. Evidence that they test all new employees in the same manner would seemingly doom her case.

Type IV involves an employee who is not identified as a target but complains of "second-hand" harassment. In that case, she is offended by the sexual nature of her working environment—and the way others are treated—and argues that the injury is nevertheless personal. Rarely does this plaintiff prevail, let alone get to a trial on her claim.218

Finally, it is worth noting that harassment by a gay worker (or supervisor) of a same-sex worker (often a subordinate) should not describe a separate category. It makes little sense to distinguish this form of harassment from Type I, which includes heterosexual sexual advances. The Supreme Court has told us exactly that.219 The specific sexual orientation of the harasser is irrelevant. What is relevant is his motivation, and if it is rooted in sexual attraction, then it is necessarily "because of sex."220

In addition to analytical groupings, legal presumptions would help. I suggest three. In the case of sexually charged language uttered to a member of the opposite sex (most commonly uttered by men towards women in these cases), the first presumption should be that the speech was indeed prompted by the target's sex.221 But it would be rebuttable, as in the case of Ocheltree. If the target is the first woman (or man) in the work environment, evidence that the work environment was historically as sexually charged might be probative. But that evidence may well be counterbalanced by any indication that the heat was turned up on the first woman in a way that it was never done to men added to the work environment. Perhaps the sexuality was meant to test her ability to assimilate (for surely she is allowed to keep her gender identity in her new workplace) or is prompted by anger over her breaking the gender presence, prompted the increased vulgarity.

218. See Juliano & Schwab, supra note 128, at 593 ("Successful cases are likely to involve sexualized conduct directed at individual victims. Sexual harassment claims involving differential but nonsexual conduct and conduct demeaning to women in general are far less successful.").


220. See id. at 81.

221. Id. at 80.

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

Id.
barrier that existed. In those cases, if severe or pervasive enough, the harassment could well be actionable because it was motivated by her sex.

A second presumption would be that sexual epithets uttered in a same-sex environment are not, by themselves, evidence of discrimination. The plaintiff would have to point to specific evidence leading a fact-finder to believe that his sex prompted the treatment. Evidence that the harasser was gay and was motivated by attraction would be sufficient, and at that point would be treated no differently than an opposite-sex harassment case. Evidence that the harasser did not believe the target appropriately adhered to gender stereotypes would be equally probative. But evidence that the employee, if new to the work environment, was targeted simply because he was new (the equivalent of a hazing) would mean that his sex had little to do with his treatment and, accordingly, his case would fail.

A third working presumption concerns the language and sexual epithets so common in these cases. Because epithets such as "bitch," "sick bitch," "fucking cunt," and "suck my dick," are impossible to interpret without context, more evidence is needed before they can support a discrimination claim. The words may be uttered as insults, or they may well be tied to the sex of the target and rooted in the belief that women do not belong in the workforce or are not entitled to equal treatment with males. If context is everything, then despite the efforts of some academics, it makes little sense to categorize them as presumptively hostile towards a protected class. In Oncale v. Sundowner Offshore Services, Inc., a unanimous Supreme Court agreed that "common sense" and "social context" will equip courts and juries with the tools they need to distinguish between speech which is rooted in a personal conflict and speech which is rooted in the target's membership in a protected class. If courts and judges can make these distinctions, surely academics can, too.

V. THE FUTURE: DISPARATE IMPACT SEXUAL HARASSMENT

While the above groupings and presumptions would surely provide needed order to sexual harassment cases, they apply only to disparate
treatment cases—that is, those cases where motive matters. But what if Franke, Schwartz (and to some extent Anderson) are correct in arguing that some sexual speech impacts women more than it does men? In that case, a “sex per se” argument (as Schwartz calls it) is even more curious because it is unnecessary. A better argument (though ultimately not persuasive, as seen below) is right around the corner. Instead of arguing that sex speech (or race speech) constitutes discrimination “because of sex” by virtue of its effects (rather than its motivation), Franke and others could make a legitimate argument that traditional disparate impact analysis provides the better basis for a plaintiff’s claim. True, a disparate impact theory typically involves the administration of a facially neutral employment practice. But “neutral” can be overread—it does not in this sense mean legitimate, or even preferred. It means a practice that, on its face, does not set out to target one particular protected group. A practice of not hiring women is a disparate treatment case. A practice of not hiring employees below six-feet in height is a disparate impact case. A practice of allowing sex speech in the workplace whereby women are targeted by men is a disparate treatment case (and an easy one). A practice of allowing sex speech in the workplace which targets no particular employee but is prevalent throughout the workplace is at least an arguable disparate impact case if the speech affects one group more than another. Here Schwartz and the dissent in Ocheltree give away too much. It is not made a substantially less viable claim on the grounds that such speech could never be justified by business necessity (the employer’s typical defense in a disparate impact case). A claim’s viability does not depend on the existence of a defense. So the disparate impact claim proceeds without a business necessity defense on the employer’s part (a defense that a sexually charged workplace is a business necessity would surely not be a good idea).

But ultimately the claim breaks down. Not because it is theoretically impossible, for who could deny that some racially charged speech (e.g., “nigger”) is potentially much more harmful to black employees than white ones, thereby eliminating the argument that such

225. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988) (“In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.”).

226. See id. at 988-89 (describing different disparate impact cases).

227. Id. at 997-98.

228. Sexual harassment cases involving supervisors are an example. A plaintiff alleging a hostile work environment can raise a viable claim even if the employer chooses not to raise an affirmative defense. See Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
speech is lawful because it "was always that way." Intent is not the issue in a disparate impact case. But injury is, and it is hard to imagine that scholars and the courts could ever agree on particular speech that is more injurious to one group over another. Even the word "nigger" is sometimes used by blacks, giving a hypothetical court a particularly nasty problem: how to evaluate the injury caused by some speech on one group when the same speech may be used by the plaintiffs themselves. Or, in the case of sexually charged workplaces such as Ocheltree's, perhaps judges would be asked to determine whether it is reasonable for women to be more offended by comments such as "she swallows" than men. And what if some men in the workplace are, in fact, as offended? Does their sensitivity and civility mean that the plaintiff's claim fails because she can no longer point to an uneven impact? And because disparate impact cases typically include evidence of statistical disparities, how would a plaintiff like DeClue prove her case? She cannot point to other women in her workplace and argue that, from a statistical perspective, significantly more women than men in her workplace are offended by the sex speech. She is a sample size of one. The best she can do is point to women in the general population, perhaps, and argue that more of them would be offended if they worked at Scollon.

Which brings us to another problem with the disparate impact claim in this context. The claim assumes that the plaintiff can point to actual, not hypothetical, injured parties. In a typical disparate impact case (such as the requirement that a dishwasher have a high school diploma), she could point to the verifiable educational breakdown of the population and prove its disparate impact on minorities. But in Ocheltree's case she would have to point to the results of something far less verifiable: social science surveys documenting the offensiveness of certain words to women (or other protected groups). The surveys and their accompanying results would themselves be the subject of endless expert debate over issues such as reliability and validity. Though these issues are almost never discussed, it is the only logical reason why Franke and others cling to reformulating the term "because of sex" and disparate treatment

229. "Blacks also debate the resurgent appropriation of the word 'nigger' within their community. While some maintain that the co-option of this term can be empowering, others mourn the reemergence of the word and its hateful connotation." Amy Adler, What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression, 84 CAL. L. REV. 1499, 1553 (1996).

230. Schwartz concedes that because of these issues it "would be burdensome to shift sexual harassment plaintiffs into the disparate impact mode of proof." See Schwartz, supra note 10, at 1774.
sex discrimination theory as motivation-neutral. They free themselves from the nightmare of proving a difficult disparate impact case by instead establishing that sex speech—even though it does not target either sex and even without any evidence concerning its intent—is nevertheless spoken “because of sex.” But they make the case exclusively by relying on the effects of such speech, and while those effects are undeniable in many cases, impact is relevant in an intentional discrimination case only when it comes to assessing damages.

What Franke suggests—that some sex speech is uttered “because of sex” on the basis of it perpetuating gender norms in the workplace—Anderson and Schwartz carry further. Schwartz argues that “because of sex” need not imply motivation at all and favors Franke’s approach. And though he argues against a disparate impact sexual harassment claim largely on the basis of a jury instruction problem (itself a curious objection as jury trials are not allowed in disparate impact cases), he suggests what is the next logical iterative step in this area of scholarship: a per se rule that sex speech is, in fact, uttered “because of sex.”

A per se rule would solve the problem of surveying women (or blacks, in the case of racist speech) to determine whether some words are particularly offensive, but it does nothing short of transforming Title VII into something that the courts—including the Supreme Court—have stated it is not: a general civility code in the workplace. Having federal courts police the sexual banter of coarse or boorish workers would seem to be the option of last resort, and I am not sure we are there yet.

So where does that leave us? At a divide. Some scholars, and a few judges, would like to create a disparate impact sexual harassment claim, but implicitly recognize the difficulties of doing so. But even a poor attempt at a difficult task would be preferable to what they have chosen as an alternative route: to eliminate any requirement of intent from a Title VII disparate treatment claim and instead consider all sex speech as inherently discriminatory because of its imbalanced impact. To be sure, they are right on some critical points, most importantly this one: hostile speech in the workplace does, in fact, have the potential of harming certain protected groups more than others, even if in the best world all employees would be equally offended. But the effect of the speech, while relevant, is not the focus of the law Congress wrote.

231. *Id.* at 1781 ("Linguistically, ‘because of’ does not necessarily mean ‘motivated by.’").
232. *Id.* at 1774-75.
233. See supra Parts II, III.
“Because of sex,” answers the question, “why was the plaintiff targeted?” and not, “how was the plaintiff harmed?” The disparate impact claim is the appropriate counterweight to the statute’s emphasis on intent. It recognizes that some conduct is unlawful even with the best of intentions because the goal established by Congress is more than rooting out the bad actor—it is providing an environment of true equal opportunity in the workplace. So the result is clear. Like DeClue, who failed to plead the right claim (disparate impact) and thereby found herself to have effectively waived her best chance to prevail, scholars and judges who seek the result of disparate impact sexual harassment must plainly confess to seeking its adoption. Or they risk waiver, too.

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