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HOW IS SEX HARASSMENT DISCRIMINATORY?

*Noa Ben-Asher**

What is sexual harassment, and what is its actual harm? Since the 1980s, these two questions have perplexed lawmakers, policymakers, feminists, and the public.¹ Today, with the rise of #MeToo, and with increased national attention to Title IX claims regarding sexual violence on college campuses, these questions are once again in the spotlight. As some commentators have observed, in the last several years lawmakers and policymakers have been increasingly influenced by a feminist antisubordination approach to sexual harassment and assault.² This growing influence is currently reflected in more strict standards of consent (“affirmative consent”) to sex, in higher procedural and substantive burdens on those accused of sexual harassment or assault, and in closer governmental monitoring of institutional settings, such as public universities.

*Feminist Judgments*³ takes us to a key moment in the history of sexual harassment law. In *Meritor Savings Bank v. Vinson*,⁴ the Supreme Court recognized for the first time that both quid pro quo and hostile environment sexual harassment violate Title VII of the Civil Rights Act of 1964.⁵ It also held that to be actionable under Title VII, sexual advances must be (1) “unwelcome”⁶ and (2) “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁷ The latter part of the test (“sufficiently severe

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1 See Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

2 See, e.g., Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 887–91 (2016); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 418–19 (2016); Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS (SPECIAL ISSUE) 257 (2016).

3 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

4 477 U.S. 57 (1986).

5 See *id.* at 65.

6 *Id.* at 68 (citing 29 C.F.R. § 1604.11 (1985)).

7 *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). “Unwelcome” conduct has typically been understood as one which an employee did not solicit or incite and which is regarded as undesirable or offensive. See Kristen Konrad Tiscione, *Commentary on Meritor Savings Bank v. Vinson*, in FEMINIST JUDGMENTS, *supra* note 3, at 297,

or pervasive”) fits well into the liberal-feminist judicial attitudes in the 1970s and 1980s that emphasized gender equality and the integration of women in the workplace.⁸ The problem with sexual harassment under this Ginsburgian liberal framework is that it impairs the equal participation of women in the workplace. The first part of the *Meritor* test (unwelcomeness), however, has been subject to intense debates among feminists. What does it mean for a sexual advance to be *unwelcome*? Is the test objective or subjective? Does welcomeness have to be conveyed affirmatively? Can passive silence indicate welcomeness? Does provocative dress matter? The answers to these questions often depend on the branch of feminist thought that appeals to you. For instance, according to antisubordination feminism, the primary harm of sexual harassment is sexual subordination: men use sexuality as a primary means to subordinate women to male power.⁹ By contrast, for liberal feminism, the focus is not so much on *sexual* subordination as it is on unequal opportunity in the workplace.¹⁰

Interestingly, the fascinating feminist rewriting of *Meritor* by Angela Onwuachi-Willig reflects the large-scale shift toward antisubordination feminism in sexual harassment law. Most importantly, Onwuachi-Willig rejects *Meritor*’s unwelcomeness standard. As Kristen Konrad Tiscione explains, the unwelcomeness test “distracts the decisionmaker from what should be the central inquiry: *the behavior of the harasser* and the effect of that behavior on both the workplace and the victim.”¹¹ Namely, the problem with the unwelcomeness test is that due to power differentials between supervisor and subordinate, it is common for a subordinate to say “yes” if they wish to “be accepted, get promoted, or save [their] job.”¹² Onwuachi-Willig’s normative position is that Title VII is violated by acts that “unreasonably interfere with the complainant’s work performance, create a hostile or intimidating environment, and/or help to preserve patterns of sex segregation in employment.”¹³ If harassment enforces “the notion of the dominant and powerful man over the subordinate woman,” a hostile environment exists.¹⁴ In addition, the work environment ought to be evaluated from the perspective of a “reasonable

298 (quoting *Henson*, 682 F.2d at 903). The Court also concluded that Vinson’s clothes and speech were relevant to the merits of her claim (under EEOC guidelines “the totality of circumstances” are to be evaluated in sexual harassment claim), *Meritor Savings Bank*, 477 U.S. at 69, and that employers are not automatically liable for hostile environment sexual harassment by supervisors. *Id.* at 72.

⁸ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Fourteenth Amendment precludes Virginia from maintaining a males-only public institution of higher learning in the VMI); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (mandating the provision of equal benefits to both servicemen and servicewomen serving in the military); *Reed v. Reed*, 404 U.S. 71 (1971) (recognizing under the Fourteenth Amendment the unconstitutionality of a statutory preference for males when selecting an estate administrator); see also Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187 (2016).

⁹ See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

¹⁰ *Id.*

¹¹ FEMINIST JUDGMENTS, *supra* note 3, at 301 (emphasis added).

¹² *Id.*

¹³ *Id.* at 315.

¹⁴ *Id.* at 316.

victim in the complainant's shoes,"¹⁵ and "dress is not relevant to the inquiry of welcomeness."¹⁶ In contrast with the original Supreme Court decision, Onwuachi-Willig also finds employers "strictly liable" for the actions of their employees because they are "best positioned to communicate to all employees how they must treat others in the workplace."¹⁷ Under this strict liability standard, employers could be perfectly vigilant, yet be held liable for an employee's sexual harassment of another by mere relationship of employment.

In this feminist rewriting of *Meritor*, the legal investigation into sexual harassment in the workplace does not explicitly include an inquiry into what the complainant wanted or even communicated to the accused. The question of unwelcomeness is left out. What matters is *how the accused behaved*. This feminist judgment, which echoes antisubordination feminism, has important overlaps with the current shifts toward greater regulation of sex on college campuses and "affirmative consent" standards.¹⁸ While it is beyond the scope of this Essay to assess whether the growing dominance of antisubordination feminism in this area of law is desirable, it will be interesting to see whether the influence of #MeToo will lead courts, lawmakers, and employers, toward the more plaintiff-friendly standards suggested by Onwuachi-Willig.

15 *Id.* at 315.

16 *Id.* at 321.

17 *Id.* at 320.

18 *See* Gruber, *supra* note 2, at 429–40; Halley, *supra* note 2.