

SEXUAL HARASSMENT: IDEOLOGY OR LAW?

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If we take the comments of Maggie Gallagher¹ and Michael McDonald² seriously, we now find ourselves in the midst of a great liberal witch hunt where the law of sexual harassment is used to enforce political correctness. I have no doubt that the law of sexual harassment could be misunderstood to serve this purpose, but in this respect, I think, it is more sinned against than sinning. Upon closer inspection, the actual law scarcely resembles the caricature that has been offered by its detractors—or occasionally, for that matter, by its supporters. The law of sexual harassment instead is surprisingly moderate, and for reasons that should have wide appeal, even if they do not satisfy those who would drastically restrict or expand its scope.

The framers of the law of sexual harassment are not the feminist, leftist liberals of conservative myth. The author of existing law is not Catharine MacKinnon, although she must be recognized as the single individual most responsible for raising the issue of sexual harassment.³ And neither is it the Equal Employment Opportunity Commission (EEOC), although this agency formulated the single most influential guideline on sexual harassment.⁴ Instead, the unlikely leaders of this supposed liberal witch hunt are Chief Justice William Rehnquist and Justice Sandra Day O'Connor, who, respectively, wrote the opinions in *Meritor Savings Bank v. Vinson*⁵ and *Harris v. Forklift Systems, Inc.*⁶ The standard established in these cases requires a plaintiff who alleges a hostile environment to prove that sexual advances and

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1. Maggie Gallagher, *About Sex* (Nov. 1994) (on file with Harv. J.L. & Pub. Pol'y).

2. Michael P. McDonald, *Unfree Speech*, 18 HARV. J.L. & PUB. POL'Y 479 (1995).

3. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

4. See 29 C.F.R. § 1604.11 (1993). In the comments at this symposium, Commissioner Rosalie Silberman, Vice Chairman of the EEOC, pointed out that the Supreme Court adopted the views of the EEOC as stated in its amicus curiae brief in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). See Rosalie Silberman, *Ideas Have Consequences*, 18 HARV. J.L. & PUB. POL'Y 409 (1995). As the Court remarked, however, the EEOC's position in its brief departed from its position in the guidelines on sexual harassment. *Meritor*, 477 U.S. at 70-71.

5. 477 U.S. 57 (1986) (establishing the standard for claims of sexual harassment based on a hostile environment). Chief Justice Rehnquist was then an associate justice.

6. 114 S. Ct. 367 (1993) (reaffirming and applying the standards of *Meritor*).

comments are "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" ⁷ Correctly understood and applied, this standard raises few questions under the First Amendment. To the extent that it raises any problems at all, they are problems of implementation, mainly in evaluating conflicting evidence of sexual harassment. ⁸ After discussing a few questions of free speech, I will address one problem of implementation: whether the standard for sexual harassment should be applied from the perspective of the "reasonable person" or the "reasonable woman."

I. THE FIRST AMENDMENT

Mr. McDonald and others have relied upon a variant of an old argument to find that a hostile sexual environment is constitutionally protected by the First Amendment. ⁹ The argument is this: Forms of expression that are not obscene and that do not aid independently illegal conduct constitute protected speech under the First Amendment. ¹⁰ Because such forms of expression—in particular, various forms of soft-core pornography and other non-obscene speech—can create a hostile sexual environment, any liability imposed on employers for engaging in or allowing such forms of expression violates the First Amendment. For all its appealing simplicity, this argument is simply invalid. It does not follow from the fact that speech is entitled to some protection under the First Amendment that it is entitled to complete protection, or, to be precise, to as much protection as political speech in a public forum.

This fallacy becomes plain in exactly the kind of case discussed by Mr. McDonald: discipline of a professor in a state university for remarks made in class. ¹¹ I happen to teach at a state-supported law school. Suppose that I became bored with my course in Civil Procedure and decided to devote several weeks to telling dirty jokes instead of teaching pleading and discovery. Suppose further that each of these dirty jokes had some redeeming social

7. *Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

8. See J. Harvie Wilkinson III, *The Promise and Problems of Sexual Harassment Litigation*, 18 HARV. J.L. & PUB. POL'Y 475 (1995).

9. See McDonald, *supra* note 2.

10. See *id.* at 484-85.

11. See *Silva v. University of N.H.*, No. CIV. 93-533-SD, 1994 WL 504417 (D.N.H. Sept. 15, 1994), discussed in McDonald, *supra* note 2, at 479-81.

value, so that none were legally obscene. Nevertheless, it is clear that I could be disciplined for this lapse of professional judgment. Now suppose that instead of telling dirty jokes, I simply seized on every possible opportunity to make demeaning remarks about women, expressing the view that women had no place in the legal profession. Again, my remarks would be constitutionally protected, arguably as political speech, but in a course on Civil Procedure, they would count simply as poor teaching.

Nor does this argument fare any better when it is framed in terms of academic freedom rather than protected speech. The constitutional protection for academic freedom must necessarily be qualified, not absolute.¹² Suppose that I made my remarks about the appropriate role of women in a course on employment discrimination law. Such remarks are plainly relevant to the course, but if they had the predictable effect of antagonizing all the female students in the class, these effects could be taken into account in evaluating my teaching. The point, which I will not belabor further, is that otherwise constitutionally protected speech is routinely evaluated in the academic setting without raising any claim of absolute protection under the First Amendment. Anyone who has any further doubts should merely consider the evaluations used in considering a teacher for tenure.

What holds true inside the ivory tower, at least in this one situation, also holds true outside it. Speech that receives constitutional protection may still be regulated and restricted, so long as it is not entirely prohibited. For example, certain forms of speech, such as commercial speech, receive only qualified protection.¹³ Additionally, all constitutional scholars recognize that some forms of speech, notably political speech,¹⁴ receive greater protection. Even if they do not agree with this principle, they recognize it as an accurate statement of existing law.¹⁵ As Justice Stevens wrote in a case allowing regulation of pornographic movies that were not legally obscene, "few of us would march our sons and daughters off to war to preserve the citizen's right to see

12. See Mark G. Yudof, *When Governments Speak: Towards a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 876-79 (1979).

13. See, e.g., *Central Hudson Gas v. Public Serv. Comm'n.*, 447 U.S. 557, 562-63 (1980).

14. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

15. For one scholar who does agree with it, see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 124-29 (1993).

'Specified Sexual Activities' exhibited in the theaters of our choice."¹⁶

Similarly, few of us should be concerned about the regulation of sexually harassing speech within the workplace. The supervisor's statement in *Harris*, that the plaintiff was "a dumb ass woman,"¹⁷ does not require absolute constitutional protection. Equally undeserving of such protection is the pervasive display of soft-core pornography.¹⁸ The crucial question in these cases, and in the case in which Mr. McDonald is currently representing a college professor accused of sexual harassment,¹⁹ is not the constitutional question whether the speech was immune from regulation. Undoubtedly it was not. The crucial question is whether the speech was so "severe or pervasive" as to constitute sexual harassment.²⁰ An isolated remark in casual conversation or a single pin-up inside a locker door does not satisfy this definition of a sexually hostile environment, a definition that the Court formulated wholly apart from free speech concerns. The law

16. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

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

18. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (finding that the pervasive display of soft-core pornography created a sexually hostile environment).

19. *Silva*, 1994 WL 504417. Professor Silva was charged with violating university rules against sexual harassment, not federal law and his case has more to do with the inadequacy of university procedures for investigating the charges against him than it does with the law of sexual harassment. The university rules did not explicitly require a finding of a "severe or pervasive" hostile environment. Nevertheless, the university hearing panel and appeals board both found, among other less severe incidents, that Professor Silva "used a vivid description of sexual intercourse to describe the 'focus stage' of the writing process." A letter from one of the students in the class, who apparently testified before both panels, quoted Professor Silva's comments in class in the following terms: "Let me put this in sexual terms so you will all understand. First you poke around, loosen it up, go from side to side, up & down, until you find just the right spot. That's focus."

The district court rejected any findings based on this letter and found instead that Professor Silva was disciplined solely because of the subjective reaction of six students. The court therefore entered a preliminary injunction reinstating Professor Silva to his position as a tenured professor. In another part of its opinion, the district court also held that Professor Silva had presented triable issues of fact on his claim that he was denied due process because of lack of notice of the charges against him before the hearing panel and because of bias of a member of the appeals board.

Under the recent decision in *Waters v. Churchill*, 114 S. Ct. 1878 (1994), if the university had reasonably and in good faith found that Professor Silva had made the statements attributed to him, it could have disciplined him for his remarks. See *id.* at 1893 (Scalia, J., concurring in the judgment) (allowing constitutional protection only of speech of public concern). A reasonable inference of severe harassment could be drawn from those statements, wholly apart from a judgment that effective teaching does not require the use of such bizarre and senseless images. The possible defects in the university's procedures, however, undermine any reliance on the university's findings of fact. See *infra*, note 33 and accompanying text.

20. *Harris*, 114 S. Ct. at 370.

against sexual harassment seldom raises any substantial questions under the First Amendment because it applies only to speech already found to constitute "severe or persuasive" harassment.

This practical conclusion from existing legal doctrine is obvious enough, but curiously it has been overlooked in the debates over sexual harassment. Its neglect is all the more puzzling because this conclusion reveals important structural similarities between the law of sexual harassment and the law of free speech. In both areas of law, judges evaluate individual decisions about appropriate gender roles only when necessary to secure equal opportunity for members of both sexes. Under the First Amendment, an employer is free to espouse and publicize his views about the proper role of women in society, even if the women who work for him find his views offensive. Likewise, the law of sexual harassment leaves an employer free to express those views, but he cannot use them as an excuse to deny women an equal opportunity to work in his business. Contrary to what its critics fear—and some of its supporters hope—the law of sexual harassment does not take a position on the inherent desirability of different gender roles, only on their exclusivity. Gender roles cannot be used to deny women and men equal opportunities for employment. Otherwise, like the First Amendment, the law of sexual harassment leaves the question of appropriate gender roles to be resolved by the individuals themselves.

Nor does this result follow only from liberal principles of sexual equality. It also follows from general libertarian principles of limiting governmental interference with sexual conduct. All of us should be concerned about judicial activism in making nice distinctions between proper and improper sexual advances. The "young in one another's arms" is not a subject for old men—or any judge of any age.

In a diverse society like ours, in which several different gender roles are possible for anyone, and all are objectionable to someone, only the most extreme forms of expression should be excluded from the workplace. "Extreme," in this context, should have a quite specific meaning: likely to deny women equal opportunities for employment. The law against sexual harassment is not a license for judges to censor appropriate speech and manners in the workplace. Limited by the First Amendment's protection of political speech, this form of judicial regulation

guarantees only equal opportunity, not proper etiquette.²¹ An employer who made general statements about his social philosophy, such as his belief that a woman's place is in the home, would not be held liable for harassment on that ground. I know of no case that has imposed liability for such a careful statement of political views.²² On the contrary, the standard of "severe or pervasive" harassment has been a significant barrier to finding liability based on a hostile environment.²³

Some critics of the law of sexual harassment would go further than simply barring liability for protected speech. They would also deny the use of protected speech as evidence of discrimination.²⁴ This position, however, is obviously untenable. Unlike the Fifth Amendment, the First Amendment creates no evidentiary privilege,²⁵ and even if it did, any privilege would have to be heavily qualified to allow protected statements to be used as evidence of state of mind. It is difficult to imagine how a prohibition against intentional discrimination could be sensibly administered if the best evidence of intentional discrimination could never be considered by the trier of fact. Whatever doubts that might have arisen on this score were recently laid to rest in

21. See *supra* note 14 and accompanying text.

22. The case that comes closest is *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), cert. denied 490 U.S. 1110 (1989), a case concerning the slightly different area of racial harassment. See *id.* at 348-49 n.1. The problematic passage in *Davis* is the following:

In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well.

Id. at 350.

Whatever implications might be drawn from this passage standing alone, the court's decision does not lay down a rule against expression of political views. On the contrary, the court upheld summary judgment for the employer. *Id.* Although the court should have distinguished more clearly between expression of opinions and harassment of co-workers, it did not need to address this issue at all. Its holding was quite clear and justified on entirely independent grounds: that there was no reasonable basis for finding that the employer tolerated the incidents of racial harassment alleged by the plaintiffs. See *id.* at 349.

23. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 843-47 (1991) (arguing that the pervasiveness standard applied by courts often excuses objectionable harassment).

24. Professor Kingsley Browne takes an ambiguous position on this issue, finding that "pure expression plays a large role in many of the decisions," but disclaiming discussion "at any length" of the evidentiary role of protected expression. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 490 & n.58 (1991).

25. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Wisconsin v. Mitchell,²⁶ which held that criminal punishment could be enhanced by proof that the defendant selected his victim on the basis of race.

The use of protected expression as evidence also dispenses with the argument that rules against sexual harassment have an impermissible chilling effect on speech. If employers effectively prohibit statements demeaning women—a supposition that the widespread perception of continued harassment casts into doubt²⁷—they do so for reasons in addition to their potential exposure to liability for sexual harassment. They do so because these statements, such as the supervisor's reference to "a dumb ass woman" in *Harris*,²⁸ can be used against them to prove other forms of sex discrimination. Wholly apart from legal liability, employers also have good reason to avoid the disruptive effect of harassing speech, not to mention a genuine desire, among some employers at least, to attract and retain female employees. The law against sexual harassment does not chill protected speech any more than do other forms of permissible workplace regulation.

Because these arguments for broader protection of harassing speech do not work, critics of the law against sexual harassment must move in the opposite direction: toward arguments for narrower protection under the First Amendment based on viewpoint discrimination.²⁹ Like the broader arguments for immunity of harassing speech, however, these arguments do not have much force in the only circumstances in which they can be applied: when the preliminary requirement of "severe or pervasive" harassment has been met.³⁰ These arguments presuppose that speech that demeans women needs to be protected so that it can compete on fair and equal terms with speech that carries a contrary message. In fact, however, if harassment is "severe or pervasive," it already has an overwhelming advantage. Harassing speech, therefore, cannot be treated simply as a strident and more effective form of political speech. If it were, then any form of censorship based on viewpoint would be unconstitutional. But

26. 113 S. Ct. 2194 (1993).

27. *Harris Survey Conducted on Sexual Harassment*, 145 LAB. REL. REP. (BNA) ANALYSIS/NEWS AND BACKGROUND INFO. 404 (Apr. 4, 1994) (revealing that 31% of working women polled report being sexually harassed at work).

28. See *supra* note 17 and accompanying text.

29. See, e.g., Browne, *supra* note 24, at 491-501.

30. See *supra* note 7 and accompanying text.

if it is recognized for what it is—a form of nonpolitical speech—then it is subject to a wide range of regulation based on viewpoint. Advertising for cigarettes, for instance, can be restricted while advertising against cigarette smoking is not.³¹ And in terms of an earlier example, harassing speech is different from an employer's speech that simply states his own views about appropriate gender roles.

The difference has to do both with the reason for regulating harassing speech and the way in which harassing speech distinguishes itself from political speech. The reason for regulation is to protect women from a hostile environment that discourages them from seeking employment or remaining employed. This goal is not the same as protecting women from political views that they find offensive. Harassing statements, whether sexually oriented or simply insulting, are not necessary to carry on a political debate over gender roles. On the contrary, such statements are addressed to an unwilling and captive audience that must face the choice of tolerating the speech or searching for a job elsewhere. For these reasons, harassing speech inside the workplace does not deserve the same degree of protection that either political speech in the same forum or harassing speech in a different forum deserves. People will use harassing speech as often—and in all probability far more often—to exclude women from the workplace than to carry on a political debate over feminism.

This is not to say that a bright line separates these two forms of speech. Theoretically, it may well be impossible to draw any such distinction in the abstract. But once again, the requirement of "severe or pervasive" harassment avoids most constitutional problems.³² Judging by the absence of cases imposing liability for purely political statements, this practical piece of legal doctrine has had the desired effect, at least in the courtroom. Most of the public controversy over sexual harassment has focused on cases, tried before inexperienced and inexpert tribunals, in which the law has been applied loosely and without adequate procedural safeguards.³³ These cases demonstrate both the wisdom of the existing law against sexual harassment and the need

31. See SUNSTEIN, *supra* note 15, at 222-23.

32. See *supra* note 7 and accompanying text.

33. See Richard Bernstein, *Guilty if Charged*, N.Y. REV. OF BOOKS, Jan. 13, 1994, at 11 (commenting on *Silva v. University of New Hampshire*).

to apply it correctly. In the end, Mr. McDonald's arguments in his case have less to do with the inadequacies of the law of sexual harassment than with the procedures for applying it. In some institutions, this procedural problem may be severe, but it is hardly unique to claims of sexual harassment. It can arise over any charge of serious misconduct and it can be cured only by providing the accused with a fair hearing before any finding of guilt. It cannot serve as yet another excuse for repealing the laws against sexual harassment.

II. REASONABLE PERSON OR REASONABLE WOMAN?

Another theoretical problem with the law against sexual harassment concerns the standard for severe and pervasive harassment: should it be framed neutrally, in terms of a "reasonable person,"³⁴ or according to gender, in terms of a "reasonable woman,"³⁵ or in the unusual (but not unknown) case of the male plaintiff, in terms of a "reasonable man."³⁶ In the abstract, the choice between these standards closely resembles the controversy over affirmative action: whether programs that confer advantages to members of minority groups or women on the basis of race, national origin, or sex should be subject to heightened judicial scrutiny or, indeed, prohibited altogether.³⁷ A gender-neutral standard for sexual harassment is asserted to follow from an evenhanded prohibition against discrimination, while a gender-specific standard supposedly constitutes a form of affirmative action for women.

The arguments over a gender-specific standard have largely proceeded at this level of abstraction. Critics of the "reasonable person" standard have insisted that women as a group deserve protection at the expense of men,³⁸ while their opponents have insisted that the laws against employment discrimination are not

34. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041-42 (1987).

35. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

36. Cf. *Ellison*, 924 F.2d at 879 n.11 (stating that the reasonable man standard should be used when plaintiff is a male).

37. See generally MICHAEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* (1991) (evaluating the arguments for and against affirmative action).

38. See, e.g., Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *YALE L.J.* 1177, 1223 (1990) ("One group's benefit will almost always be another's loss.").

for the benefit of any particular group.³⁹ In an understandable effort to avoid a repetition of the controversy over affirmative action, the Supreme Court has resolved the question without directly confronting it. In its recent opinion, *Harris v. Forklift Systems, Inc.*,⁴⁰ the Court firmly insisted that the standard for sexual harassment is that of the "reasonable person," stating that "conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a *reasonable person* would find hostile or abusive—is beyond Title VII's purview."⁴¹ This decision may be the law, but it makes sense only if it is not taken too seriously.

A neutral standard, paradoxically, does not even fulfill the aim of neutral treatment of men and women. To refer to a victim of sexual harassment as a person, while not technically inaccurate, ignores the very reason why that victim faced harassment. Someone is sexually harassed because she is a woman, or because he is a man, and certainly not because her or his gender is irrelevant. Even exotic variations on the usual pattern of heterosexual harassment presuppose that the victim of harassment has some identifiable gender role and some real (or imagined) sexual orientation. Harassment of persons without gender sounds more like the law of corporations than it does like the law against employment discrimination. Yet a standard framed in terms of a "reasonable person" invites us to imagine a genderless victim of harassment.

Of course, judges, and now juries under the Civil Rights Act of 1991,⁴² are not likely to accept this invitation. Instead they are likely to determine whether a reasonable person in the plaintiff's situation would find the alleged harassment to be severe and pervasive. This line of reasoning, of course, leads them to consider whether to count the plaintiff's gender as part of her (or his) circumstances.⁴³ If they do take account of gender, then they

39. See Browne, *supra* note 24, at 537-40 (arguing that cases applying a reasonable woman standard engage in a form of censorship).

40. 114 S. Ct. 367 (1993).

41. *Harris*, 114 S. Ct. at 370 (emphasis added). The "reasonable person" standard is repeated later in the Court's opinion, *see id.* at 371, and in Justice Ginsburg's concurring opinion, *see id.* at 372.

42. 42 U.S.C.A. § 1981a(c)(1)

43. This is the position taken by the EEOC in its proposed guidelines on harassment: "The 'reasonable person' standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability." 58 Fed. Reg. 51266, 51269 (1993) (to be codified at 29 C.F.R. § 1609.1(c)) (proposed Oct. 1, 1993).

have introduced a "reasonable woman" standard in practice even when it is not explicitly allowed in theory. If they do not take account of gender, then they must use some mix of the "reasonable woman" and "reasonable man" standards, perhaps leaning more toward the views of their own gender but perhaps not. Any such variation, however, seems pointless and perverse; it only increases the randomness of jury verdicts and judicial findings and decreases the likelihood of any kind of predictable consistency. Of course, any such variation would be minimal if no great differences existed between the reactions of men and women to harassment.

Empirical evidence, however, suggests that the differences are dramatic.⁴⁴ Perhaps we knew this all along, but we should be wary of relying on outdated assumptions about gender differences.⁴⁵ The study that best demonstrates the different reactions of men and women concerns the responses of men and women to increasingly explicit sexual advances. In this study, an attractive man and an attractive woman each approached members of the opposite sex on a college campus and posed one of three randomly selected questions: (a) "Would you go out with me tonight?" (b) "Would you come over to my apartment tonight?" (c) "Would you go to bed with me tonight?"⁴⁶ Among women, fifty percent consented to the first request, six percent to the second, and none to the third. Among men, fifty percent consented to the first, sixty-nine percent to the second, and seventy-five percent to the third.⁴⁷ As the sexual propositions became more and more explicit, women and men had exactly the opposite reaction: women increasingly said no as men increasingly said yes.

44. Much of the empirical evidence is summarized by David Buss in his recent book and in his contribution to this symposium. See DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* 76-85 (1994); David M. Buss, *Evolution and Human Mating*, 18 HARV. J.L. & PUB. POL'Y — (1995). This evidence is less controversial than the evolutionary explanations that Professor Buss offers for it. The soundness of the evidence of differences in sexual behavior of men and women is independent of the validity of the explanations that Professor Buss offers for those differences.

45. See *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (holding that the statistical incidence of drunk driving among the sexes was insufficient to allow gender-based discrimination).

46. Russell D. Clark III & Elaine Hatfield, *Gender Differences in Receptivity to Sexual Offers*, 2 J. PSYCHOL. & HUM. SEXUALITY 39, 50 (1989) (preceding these questions, respondents were told "I have been noticing you around campus. I find you to be very attractive.").

47. *Id.* (figures represent data from 1978 study).

This result accords with the results of other studies on the same subject,⁴⁸ and with the judgment of common sense: that women and men often react differently to sexual advances. It follows that what amounts to severe and pervasive harassment is different for a reasonable woman than for a reasonable man. Judges and juries, of course, do not need empirical studies to reach the same conclusion. But that is part of the problem, not part of the solution. In the absence of any requirement that they take account of the plaintiff's gender, they may—or they may not—tailor the standard for sexual harassment to the perspective of the particular plaintiff in the case before them. The need to take this perspective into account arises, not from the ideological differences between feminists and others, but from the actual differences in behavior of women and men. Whether or not these behavioral differences would persist in an ideal society, the law can only affect this pattern after first taking it into account.

III. CONCLUSION

If we step back from overheated arguments and look at what the law against sexual harassment really is, we see that it need not be another battleground between the sexes, or between censorship and the First Amendment, or between Eros and its enemies. Despite the best efforts of its critics—and some of its supporters—the law should not be inflated into a vehicle for transforming sexual relations in our society. It is enough if it contributes to the opportunities of women in economic and public life. In just the few decades since Title VII first prohibited gender discrimination in employment, that change has been dramatic enough.⁴⁹ There is no doubt that more and better changes could have been brought about, and in some instances, fewer and more effective changes. If legal reform is to be improved, however, it requires some attention to what the law is and what the facts are.

Paul Samuelson, in a memorable phrase, remarked that in disputes over methodology, Gresham's Law takes the form: "Hot air

48. See David M. Buss & David P. Schmitt, *Sexual Strategies Theory: An Evolutionary Perspective on Human Mating*, 100 *PSYCHOL. REV.* 204, 210-14 (1993) (discussing numerous studies indicating that males use short-term sexual strategies more often than do women).

49. See John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 *U. CHI. L. REV.* 1337, 1354-55 (1989) (discussing shifts in the supply and demand curves for female labor).

drives out cold."⁵⁰ We would do well to apply the same observation to controversies over the law of sexual harassment.

50. Paul A. Samuelson, *Professor Samuelson on Theory and Realism: Reply*, 55 AM. ECON. REV. 1164, 1164 (1965).

