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# Liberating Sexual Harassment Law

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# LIBERATING SEXUAL HARASSMENT LAW

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*Sexual harassment law and the proposed solutions to that paradigm's deficiencies teach a disheartening and peculiar lesson to women and gender performance minorities: "You may be disadvantaged at work because of your gender or your gender performance nonconformity. Discrimination against you is okay." This albatross has inexplicably burdened sexual harassment law for the more than thirty-five years since it emerged as a redressable form of unlawful discrimination under Title VII of the Civil Rights Act of 1964. This Article coherently explains the reason for it. It makes a simple claim: Sexual harassment law has failed to eradicate workplace gender discrimination, not because that goal is beyond its capacity, as is frequently claimed, but because it is beyond its scope. Sexual harassment law might have changed workplace relations (for the better), but it has not made sexual harassment an anomaly because it was not meant to do so. To accomplish its task, the Article reframes the intractability of problems within the sexual harassment paradigm by viewing the law as an educative process structured by a clear curriculum. Drawing together educational literature and sexual harassment discourse, it (1) maps how sexual harassment law conforms to the essential elements of the dominant curriculum model; (2) shows how existing critiques function within that model; and (3) proposes an alternative critique of sexual harassment law that pinpoints the main deficiency of sexual harassment in its conformity to a educational model that serves to maintain the status quo and inhibit, rather than promote, liberatory social change. On this foundation, the Article argues that the challenge is to create a "dialogical" method for law in which the beneficiaries of sexual harassment law are empowered to determine what behaviors serve to*

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*entrench their marginalization and, thereby, define their world and the change they want to see in it. Through its reframing of sexual harassment law, this Article liberates sexual harassment law from its reified limitations, creating space for a legal revolution that will liberate workers.*

> *"Education either functions as an instrument which is used to facilitate the integration . . . into the logic of the present system and bring about conformity to it, or it becomes 'the practice of freedom,' the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world."*
>
> *"Leaders who do not act dialogically, but insist on imposing their decisions, do not organize the people—they manipulate them. They do not liberate, nor are they liberated . . . ."*
>
> *—Paulo Freire, Pedagogy of the Oppressed*

## INTRODUCTION

With respect to gender, Title VII of the Civil Rights Act of 1964 seems to make a simple pronouncement: do not discriminate against employees because of their gender. Nevertheless, in the thirty-five years since courts first recognized sexual harassment as a form of prohibited gender discrimination under Title VII,[1] sexual harassment remains not just "a seemingly endless source of controversy"[2] but also a seemingly intractable and evasive problem. This intractability has been evidenced empirically.[3] For example, even drawing positive inferences, available data suggests that sexual harassment has held fairly steady throughout the life of the law, even

1. The U.S. Supreme Court first explicitly recognized the existence of a Title VII cause of action for sexual harassment in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). However, the Equal Employment Opportunity Commission had previously promulgated guidelines to that effect, and lower federal courts upheld them. *See, e.g.*, Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
2. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 26 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) [hereinafter DIRECTIONS].
3. *See* Equal Emp't Opportunity Comm'n, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2011 (2012) (reporting the number of cases filed with EEOC and the state and local employment); Equal Emp't Opportunity Comm'n, Charge Statistics FY 1992 through FY 1996 (1997) (reporting the number of cases filed with EEOC and the state and local employment).

while its modalities have evolved. In addition, there has been a constant barrage of criticisms from both supporters and opponents of this reading of the law. Consider these hard cases: bi-sexual, or equal opportunity, harassment (i.e. targets both sexes with sexual behavior);[4] intersectional harassment (i.e. motivated by sex *and* some other characteristic);[5] same-sex harassment;[6] non-sexualized harassment; non-sexualized workers in the sex industry (e.g. a computer programmer for Hustler, Inc.);[7] multiple-setting harassment (i.e. occurring or having effects outside the workplace).[8] These and other similar examples represent significant challenges for the sexual harassment paradigm and are the factual pivots around which policy debates revolve. Since the inception of sexual harassment law, such hard cases have led to proposed revisions to the law. These revisions attempt to resolve the law's myriad problems with theoretical reformulations and clarifications of the underlying principles of the prohibition of sex discrimination and by recasting the legal elements and tests developed in the existing body of case law and administrative guidance.

Notwithstanding this work and the undeniable advancements in the American workplace that are, at least partially, a result of the "protection" Title VII offers to women and, more recently, to all gender performance minorities,[9] sexual harassment canon continues to teach a surprising and disheartening lesson. Through its complex and inert array of categories and

4. *See* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (framing the problem for the first time). *See also* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (stating equal opportunity harassment is not gender discrimination); *Henson*, 682 F.2d at 905 n.11 ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex."); Bundy v. Jackson 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike."); Raney v. District of Columbia, 892 F. Supp. 283, 288 (D.D.C. 1995) (stating that there is no discrimination in cases where a supervisor harasses both sexes equally).

5. *See generally*, Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991 (2011) (reviewing case statistics).

6. *See, e.g.*, Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After* Oncale, 11 YALE J.L. & FEMINISM 155 (1999); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale: *Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677 (1998).

7. Lua Kamál Yuille, *Sex in the Sexy Workplace*, 9 NW. J. L. & SOC. POL'Y. 88 (2013).

8. Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012).

9. I use the term "gender performance minorities" to denote those individuals—male or female—who do not conform to the dominate standards for gender performance. For example, a stereotypically effeminate man and a masculine woman would be considered gender performance minorities.

tests, sexual harassment canon effectively tells women and gender performance minorities not to get comfortable: "You may be disadvantaged at work because of your gender or your gender performance nonconformity. Discrimination against you is okay." Rather than offer a magical solution to sexual harassment's intractability or reverse the law's pessimistic message, this Article reveals the reason for it, liberating sexual harassment law from its intrinsic limitations and opening the door to developing solutions.

Existing sexual harassment discourses frame the legal problem of sexual harassment in the workplace as intractable because of the inherent limitations or unsuitability of law as a tool of social liberation. However, to understand the root of sexual harassment's intractability, the law must be viewed as an educative process aimed at shaping and managing behaviors to ends deemed best for society. Law (in its thick sense) is not just *analogizeable* to a curriculum—i.e. the content, form, and structure of education—it *is* a curriculum. That is, sexual harassment law is the content, form, and structure of learning about workplace gender relations. Accordingly, it can and should be studied using the analytical tools developed in the educational fields of curriculum and pedagogy. Using this novel approach, it is possible to see that sexual harassment law has not eradicated workplace gender discrimination, because that goal is beyond its scope, not because it is beyond its capacity. Sexual harassment law might have changed workplace gender relations, but it has not made sexual harassment an anomaly because it was not meant to do so.

Mapping the curricular structure of sexual harassment law illustrates that such limitations are not inherent, but are the result of the pedagogical model that the sexual harassment curriculum reflects. So long as that curriculum maintains an objectivist orientation, it will be incapable of ever achieving its emancipatory aims. As Paulo Friere explained,

> [O]ne does not liberate someone by alienating them. Authentic liberation . . . is not another deposit to be made in [a person]. Liberation is a praxis: the action and reflection of men and women upon their world in order to transform it. Those truly committed to the cause of liberation can accept neither the mechanistic concept of consciousness as an empty vessel to be filled, nor the use of banking [pedagogical] methods of domination . . . in the name of liberation.

For sexual harassment law as a form of pedagogy, this means that top-down, traditional models of hard law that narrowly dictate the meanings of gendered workplace interactions, which deposit static conclusions about discrimination, are innately incapable of achieving wholesale workplace gender

equality. The challenge, then, is to find an emancipatory pedagogy—a dialogic praxis—for the law. In this new legal method, the beneficiaries of sexual harassment law must be empowered to determine what behaviors serve to entrench their marginalization and, thereby, define their world and the change they want to see in it.

Part I of this Article recasts dominant sexual harassment discourses as revolving around several themes that express reservations about the possibility and propriety of pursuing societal transformation though the law. Instead of accepting the limitation or fashioning a limited solution, this Article suggests a new analytical lens: pedagogy.

Part II applies that lens. Using insights from education theory, this Article maps sexual harassment law and discourse onto the essential elements of an objectivist curricular model, as outlined by Ralph W. Tyler. In this iterative model, actors increasingly remote from their audience curate knowledge by rigidly defining gender discrimination and how sexual harassment manifests this ill. Then, effective mechanisms of dissemination—corporate training programs and civil lawsuits—are deployed to integrate sanctioned epistemologies and generate conformity with the established order. Part II shows how existing critiques function within that model rather than challenging it.

Against this image of sexual harassment law, Part III proposes a novel appraisal that locates the law's main deficiency in its conformity to the "Tylerian" model, which serves to inhibit rather than promote liberatory social change. Drawing together the streams of scholarship with which the Article engages, Part V outlines the features of an emancipatory "problem-posing" or "dialogical" approach to pedagogy to which sexual harassment law must be oriented in order to overcome its limitations. The Article concludes with reflections on the broader value of legal analysis through the pedagogical lens.

## I. Registers of Sexual Harassment Law

The prohibition of sexual harassment in the workplace takes the form of a relatively straightforward pronouncement. Title VII 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 . . . sex."[10] Though the prohibition of sexual harassment can be inferred from this language, scholars, courts and, finally, the Equal Employment Opportunity Commission, which is charged with administering Title VII, made the concept of sexual

10. 42 U.S.C. § 2000e-2(a)(1) (Westlaw through P.L. 114–61).

harassment explicit. Its guidelines, eventually given the imprimatur by the Supreme Court, provide:

> Harassment on the basis of sex is a violation of . . . Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[11]

However, from its earliest days, a claim of discrimination based on sexual harassment has never been an easy or uncontroversial means of legal protection. Women have always faced considerable obstacles in showing that events, conditions, or circumstances in the workplace violate Title VII's prohibition on sexual harassment. That difficulty is pronounced in so-called *quid pro quo* sexual harassment cases, where the claim is that some employment benefit (including the benefit of employment itself) has been conditioned upon the provision of some sexual favor.[12] And, the difficulty is multiplied where the claim is based on a hostile environment theory, under which hazing, comments, pictures, and/or other conduct or conditions that are sexualized or gender aggressive pervade the workplace. The application of the content elements of prevailing sexual harassment doctrine shows that Title VII provides, at best, inconsistently satisfactory "coverage." The obstacles presented by the core elements of either type of sexual harassment claim make it easy to ignore or discount a broad range of discriminatory behavior. Sexual or sex-based threats, coercion, or retaliation constitute actionable *quid pro quo* harassment only if they actually result in a tangible outcome. Even if everything a woman claims is true, it is disturbingly easy to defend the position that there has not been hostile work environment sexual harassment because the conduct could not be considered unwelcome,[13] severe or

11. 29 C.F.R. 1604.11.

12. For example, the Supreme Court has narrowed the usefulness of the *quid pro quo* harassment category by defining it narrowly only to include "threats to retaliate against [a plaintiff] if she denied some sexual liberties" where those "threats are carried out." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).

13. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986).

pervasive,[14] or based on sex[15]—the three well-known elements of the hostile work environment claim, each presenting its own quagmire.

Not surprisingly, it has been argued that these straightforward pronouncements have raised more questions than they have answered. And, sexual harassment law and the scholarship and commentary borne from it have grappled with that claim since the law's infancy. In vocal music, the term "register" refers to the different tones that are produced by the same vibratory pattern of the vocal cords, resulting in the notes possessing a common quality.[16] A note sung in a singer's head voice will have distinctly different qualities when sung in the singer's chest register. Though popularly typologized as falling into two main models (sexual desire-dominance versus structural),[17] sexual harassment canon can, like vocal music, be heard in several registers.[18] The same, similar, or complementary ideas are often addressed across registers, but they are colored by the register in which they sound.

The range of these, often overlapping, registers can be cast in several ways.[19] However, three salient characterizations reflect sexual harassment's situation at the intersection of anti-discrimination and employment law, as well as its paradigmatic modalities of speech, violence, and disrespect. A "rights register" is the most prominent and frames sexual harassment as a discriminatory violation of rights, which reflects sexual harassment law's connection to "second-wave feminism," as well as its legal hinge in a civil rights statute. A "management register" harmonizes with the rights register, but it highlights the impact of sexual harassment on productivity and efficiency, which resonates more strongly with employers and reflects Title VII's workplace terrain. Finally, a "revisionist register" is comprised of com-

14. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

15. *See, e.g.*, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).

16. Harry Hollien, *On Vocal Registers*, 10 COMMUNICATION SCIENCES LABORATORY QUARTERLY REPORT 1 (1972).

17. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692–748 (1998) [hereinafter Schultz, *Reconceptualizing*] (providing an in-depth history and critique of the sexual desire–dominance paradigm); Katherine Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) [hereinafter Franke, *What's Wrong*].

18. While they influence the present topic, given space and thematic constraints, the discussion that follows will not engage the voluminous bodies of scholarship examining sexual harassment in other contexts (e.g., schools and universities), Title VII's application to other suspect classes, or sex discrimination more generally.

19. *See, e.g.*, ANNA-MARIA MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE (2005) (outlining "feminist injustice," management, and sexual freedom "frames"); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet* Title VII*: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994) (outlining motivational, structural, and cultural approaches).

peting and contradictory perspectives about the validity, purpose, and nature of sexual harassment law. These perspectives share the common quality of reevaluating the sexual harassment project by analyzing its collateral consequences, extending its premise, or examining its under-appreciated and hidden complexities.

The discussion that follows briefly sketches these registers, reaching a surprising conclusion that catalyzes the inquiry at the core of this Article. Sexual harassment canon sends a disheartening message of impotency and futility: The law is inherently ill-equipped to dismantle and redress the kinds of discrimination that manifest themselves as sexual harassment. Thus, women and gender performance minorities must accept some form or degree of subjugation in the workplace . . . at least until the broader society evolves.

### *A. Rights Register*

In all its versions, the history of sexual harassment law is tied to feminist activists' conscious mapping of the phenomenon eventually called sexual harassment to the then (relatively) new civil rights paradigm for combating racial discrimination in the workplace. The movement was informed by the Thirteenth Amendment notion of "abolishing all badges and incidents of slavery"[20] and focused on the equal treatment notion of discrimination prohibited by the Fourteenth Amendment. That narrative centers the rights register, the most famous exemplar of which is the now-canonized book, *The Sexual Harassment of Working Women*.[21] There, Catherine MacKinnon delineated a framework for viewing sexual harassment as unlawful discrimination.

MacKinnon understands sex discrimination as "a system that defines women as inferior from men, that cumulatively disadvantages women for their differences from men, as well as ignores their similarities."[22] Thus, sexual harassment constitutes discrimination because it expresses and reinforces the social inequality of women to men by "using her employment position to coerce her sexually, while using her sexual position to coerce her economically."[23] From this "inequality view" (or dominance approach)[24] the concept of sexual harassment is "socially incarnated in sex roles", which

20. Civil Rights Cases, 109 U.S. 3, 28 (1883).

21. CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

22. *Id.* at 116.

23. *Id.* at 7.

24. Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination (1984), *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 40 (1987).

determine the allocation of social and economic resources in the workplace based on gender.[25] As MacKinnon explains, "[w]omen are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality."[26]

MacKinnon also showed how to reach the same conclusion from what she considered the flawed—but already legally sanctioned—paradigm of the race discrimination Title VII cases, which focused on the harm of arbitrary differentiation. Her version of this "differences" view[27] most readily incorporated into enforceable doctrine is that sexual harassment constitutes Title VII discrimination because men are not, or would not be, placed in comparable positions to women.[28] That position and its more radical inequality version (i.e. that no man would ever be in the same position as a woman)[29] founded and continues to influence the rights register.

The contributions of several well-known feminist scholars round out MacKinnon's theoretical melody. Katherine Franke critiques the three perspectives offered in MacKinnon's account that have the most traction in cases and commentary: the "but for" argument (sexual harassment is discrimination because it violates formal equality—it would not have happened but for the victim's sex), the "anti-sex argument" (sexual harassment is discrimination because the expression of sex is prejudicial to women in the workplace), and the "subordination argument" (sexual harassment is discrimination because it sexually subordinates women to men).[30] For Franke, the first two, which are the core of the judicial approach to sexual harassment, explain only *how* sexual harassment differentiates, but not *why* that differentiation constitutes discrimination.[31] The third argument addresses the *why*. However, it is inadequate because it relies too heavily on the biological dichotomy between men and women, failing to account for the roles of gender-identity orthodoxy and socially enforced constructions of masculinity and femininity.[32] Franke resolves these deficiencies by recasting biological subordination as heteropatriarchal subordination. Sexual har-

25. MACKINNON, *supra* note 21, at 178.

26. *Id.* at 174.

27. *Id.* at 106–16.

28. *Id.* at 192–200.

29. *Id.*

30. Franke, *What's Wrong*, *supra* note 17, at 701–29. Franke draws these argument framings from Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1188–94 (1998) [hereinafter Abrams, *New Jurisprudence*].

31. Franke, *What's Wrong*, *supra* note 17, at 705–25.

32. *Id.* at 725–29. *See also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1–2 (1995) (providing sustained analysis of the deficiencies of the sex–gender dichotomy).

assment is the "technology" of this subordination.[33] That is, sexual harassment is a specialized, almost scientific, methodology[34] applied in the workplace to construct and enforce gender identities, masculinities, and femininities according to fundamental gender stereotypes of male as sexual subject and female as sexual object.[35]

Kathryn Abrams resists unitary principles of equality or subordination in the context of sexual harassment because, she argues, such principles fail to appreciate that sexual harassment's diverse functions in work relations may require equally diverse preventative and/or remedial measures.[36] From this anti-essentialist orientation, she reinvigorates these themes by understanding harassment as a practice that operates against women as a group to preserve male control and expresses or entrenches masculine norms in the workplace.[37] Sexual harassment, for Abrams, does a lot of work, and it may or may not employ the usual suspects of sexuality or desire or be wielded by the same players. Inherently pluralistic, its leitmotif is interference with the "primary form of agency we retain as complex subjects in the world of multiple social selves—biological being, gendered subject, worker, sexual actor—to create a particular, contingent whole. . . ."[38]

Vicki Schultz honed in on the desire-dominance doctrinal focus on sexuality to show how it is both under- and over-inclusive, prohibiting sexualized behavior that should (arguably) be embraced[39] and rendering invisible dangerous non-sexualized behavior.[40] For Schultz, focusing on how work environments serve as a means to "reclaim favored lines of work and work competences as masculine identified turf"[41] is more indicative of the kind of workplace inequality with which the law actually is (and should be) concerned. Accordingly, she advocates for a sex segregation, or "competence-

33. Franke, *What's Wrong*, *supra* note 17 at 762–71.

34. WEBSTER'S THIRD INTERNATIONAL DICTIONARY (2002) (defining technology as "the practical application of knowledge especially in a particular area . . . [or] a manner of accomplishing a task especially using technical processes, methods, or knowledge . . . [or] the specialized aspects of a particular field of endeavor. . . . ").

35. Franke, *What's Wrong*, *supra* note 17 at 762–71. *See also* Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998) (expanding the technology-as-sexism argument and considering its implications).

36. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1192 (1989).

37. Abrams, *New Jurisprudence*, *supra* note 30, at 1205–20.

38. *Id.* at 1220.

39. Vicki Schultz, *The Sanitized Workplace*, 112 Yale L.J. 2061, 2069–70 (2003) [hereinafter Schultz, *Sanitized*]; *see also* Vicki Schultz, *The Sanitized Workplace Revisited*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (Martha Albertson Fineman et al. eds., Ashgate Publishing 2009).

40. Schultz, *Reconceptualizing*, *supra* note 17, at 1774–89.

41. *Id.* at 1755.

claiming," approach that evaluates workplace interactions in the context of the degree of gender segregation in the particular worksite, asking whether the conduct marked women as incompetent.[42] Her focal point is not the behavior's sexuality, but whether, regardless of its sexual nature, it contributed to keeping the trajectory of workplace spoils skewed towards males.[43] Schultz claims this approach allows the law to consistently and satisfactorily account not only for non-sexualized discriminatory behavior, but for same-sex behavior, subordinate behavior, and other vexing problems presented by sexual harassment law-in-action.[44]

Drawing on, preceding, reorienting, and reframing the kinds of theoretical insights offered by MacKinnon, Franke, Abrams, Schultz, and others, scores of scholars have offered doctrinal analyses and critiques of sexual harassment law in the rights register. For example, Susan Estrich draws an analogy to rape law as a way to outline the ways in which the judicial development and application of the doctrine has undermined its rights protection potential, and to offer the most comprehensive set of revisions to each of the elements of a claim.[45] Rich bodies of doctrinal work also focus on particularly troublesome aspects of the law, like the reasonability standard.[46]

The rights register includes positions that compete both ideologically and theoretically. However, its diverse notes sound with common qualities, the crux of which is the clear statement of the ways both sexualized and non-sexualized behavior can function as categorical exclusion from, or disadvantage in, the workplace that turns on (some conception of) gender or sex. From there, it is possible to understand how the legal elements of a sexual harassment claim and their construal by courts promote or undermine goals grounded in these understandings.

### *B. Management Register*

The genealogy of the management register of sexual harassment discourse has been traced to the "managerialization of the law."[47] This concept

42. *Id.* at 1762–89.

43. Schultz, *Sanitized*, *supra* note 39, at 2136–62; Schultz, *Reconceptualizing*, *supra* note 17 at 1762–74.

44. Schultz, *Reconceptualizing*, *supra* note 17, at 1774–95.

45. *See generally* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991).

46. *See infra* Part III.C (summarizing critiques of specific elements of the sexual-harassment claim).

47. Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1592 (2001) (examining interplay between managerial diversity rhetoric and civil rights law, resulting in a process by which legal ideas are refigured by managerial ways of thinking) [hereinafter Edelman,

recognizes the insight of law and society literature that considers the businesses charged with complying with employment regulations to be ground zero.[48] At this level, organizations imbue (and sometimes override) the stated aims of statutes with managerial values, principles, and competencies.[49] The concern of sexual harassment law becomes less about arbitrary differentiation, sexual coercion, gender inequality, or enforced femininities or masculinities, and more about maintaining productive and efficient workplaces in evolving social contexts.[50] Thus, the greatest harm of sexual harassment is not necessarily an institutionalized, organizational harm to an individual based on group membership—as in the rights register—but a harm caused by individuals to the organization.[51]

Though often framed in these managerial tones in organizational and risk management literature,[52] this reorientation is rarely explicit in academic or judicial texts. Nonetheless, it can be heard in the undertones of several noted scholars and judicial opinions. For example, the maintenance of established workplace structures is the undercurrent of the now-repudiated sex-plus doctrine that sexual harassment is not discrimination under Title VII without an additional basis of discrimination because Congress "in all

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*Diversity Rhetoric*]; *see also* MIA L. CAHILL, THE SOCIAL CONSTRUCTION OF SEXUAL HARASSMENT LAW: THE ROLE OF THE NATIONAL, ORGANIZATIONAL AND INDIVIDUAL CONTEXT 43–56 (2001); *see* Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993) [hereinafter Edelman, *Internal Dispute*] for an example of managerialization in civil rights law.

48. *See generally* Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (analyzing "legal and organizational realms as integrally intertwined and mutually constitutive").

49. *See, e.g.*, Edelman, *Diversity Rhetoric*, *supra* note 47, at 1592; CAHILL, *supra* note 47; Edelman, *Internal Dispute*, *supra* note 47, at 497–98 (stating that employers essentially privatize or internalize civil rights law).

50. *See* Lauren B. Edelman et al., Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace, 27 Law & Soc'y Rev. 497, 529 (1993) ("[organization]s' conception of dispute handling appears to subsume law within the broad confines of the managerial realm . . . Fair treatment is seen as a means both of compliance and of attaining a productive business environment with good working relationships and high employee morale."); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 3 (2003) (offering in-depth analysis of how "the rules of employer liability for harassment are calculated to ensure that employers adopt basic policies and procedures with respect to workplace harassment, not, surprisingly, to ensure that they actually prevent it.").

51. MARSHALL, *supra* note 19, at 80–84.

52. One clear example of this framing can be found in Grant E. Buckner et al., *Managing Workplace Sexual Harassment: The Role of Manager Training*, 26 EMP. RESP. & RTS. J. 257 (2014) (expressly theorizing sexual harassment as a management issue).

probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications" that would disrupt traditional ways of doing business.[53] In *Burlington Industries, Inc. v. Ellerth*, the Supreme Court made clear the managerial orientation of Title VII, stating that its purpose is to "encourage the creation of anti-harassment policies and effective grievance mechanisms."[54] The target is not substantive rights to a particular outcome, but managerial procedures.

Scholars working primarily in the rights register also sound management refrains. Schultz, who is sharply critical of its utilization,[55] adopts the management register in her collateral validation of her sex segregation approach, noting how the (desegregated) "un-sanitized" workplace supports productivity by making workers happier: "For employees, workplace intimacy, in all its forms, is a vital mechanism for combating alienation and building morale and enthusiasm for the job. Paradoxically, in their rush to sanitize the workplace wholesale, some firms may even be sacrificing organizational productivity."[56] Abigail Sayguy's interviews with prominent American feminists sound the same productivity and efficiency refrain.[57] She cites MacKinnon's claim that "somebody ought to be concerned about the fact that no work is getting done."[58]

Many tort approaches to sexual harassment channel the management register directly. Ellen Frankel Paul's critique of the "defective" anti-discrimination model posits that the blame for sexual harassment is more properly placed on the individual perpetrator because "it seems bizarre to interpret the power the employer gives to a manager . . . to include such flagrant abuses of trust as sexual harassment . . . ."[59] Though couched in individual rights terminology, a crucial pillar of her argument is foundationally about fair management of employment misconduct.[60]

Law and economics approaches even more directly sound in this register. For example, Marie T. Reilly frames the problem of sexual harassment

53. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975).

54. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).

55. *See, e.g.*, Vicki Schultz, *Understanding Sexual Harassment Law in Action—What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 101 (2006).

56. Schultz, *Sanitized*, *supra* note 39, at 2186.

57. Abigail Cope Saguy, *Sexual Harassment in France and the United States: Activists and Public Figures Defend Their Definitions*, *in* RETHINKING COMPARATIVE CULTURAL SOCIOLOGY 56 (Michèle Lamont & Laurent Thévenot eds., 2000).

58. *Id.* at 66.

59. Ellen Frankel Paul, *Sexual Harassment as Sexual Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 357 (1990).

60. For another example, see Mark Mclaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375, 437 (1998).

as centered on "sexual conduct loss."[61] Her solution involves devising a loss allocation mechanism that optimally bridges the gap between men's and women's perceptions of appropriate sexual conduct at work by allocating such loss in a way to maximize wealth.[62] John Donohue uses law and economics tones to support Title VII's regulation of sexual harassment.[63] He rejects "static" economic perspectives in favor of a dynamic analysis that recognizes discrimination as an inherent inefficiency that anti-discrimination law is well-positioned to mitigate.[64] These narratives elevate managerial priorities—productivity, efficiency, worker satisfaction—above rights talk.

Sexual harassment discourse stemming from within organizations is the most self-consciously managerial.[65] Lauren Edelman, with various collaborators, has provided detailed accounts of how, in the workplace, the construction of anti-discrimination law becomes subsumed in managerial goals. This turns compliance with the law into a management question and leads to recasting discrimination complaints in terms more familiar to, accessible for, and addressable by management (e.g. poor management, personality clashes, etc.).[66] Guides to addressing sexual harassment in the workplace bear out these observations,[67] which demonstrate that, even if the rights register resonates symbolically, much of the work of sexual harassment law occurs in the management register.

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61. Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss*, 47 VAND. L. REV. 427 (1994).

62. *Id.* at 434–36.

63. John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986). For a complementary critique, see Toni Lester, *Efficient but Not Equitable: The Problem with Using the Law and Economics Paradigm to Interpret Sexual Harassment in the Work Place*, 22 VT. L. REV. 519 (1998).

64. Donohue, *supra* note 63, at 1411–12.

65. *See* Meryl R. Kaynard & Cynthia G. Cook, *Employer Policies for Addressing Sexual Harassment, in* SEXUAL HARASSMENT IN THE WORKPLACE: PROCEEDINGS OF NEW YORK UNIVERSITY 51ST ANNUAL CONFERENCE ON LABOR 587 (Samuel Estreicher ed., 1999) (providing an explanation of the law and issues employers should consider); *see also* CAHILL, *supra* note 47, at 43–56 (describing how managers have responded to the law); MARSHALL, *supra* note 19, at 206–07 (providing a brief human resources bibliography).

66. *See* Estrich, *supra* note 45 and *infra* Part III.C for general examples of managerial approaches to sexual harassment. *See also* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions,* 13 Harv. Women's L.J. 35, 37–38 (1990) (providing an example of poor management).

67. *See, e.g.*, YOU JUST CAN'T DO THAT! WHAT ARCO WANTS YOU TO KNOW ABOUT SEXUAL HARASSMENT, *reprinted in* SEXUAL HARASSMENT IN THE WORKPLACE: PROCEEDINGS OF NEW YORK UNIVERSITY 51ST ANNUAL CONFERENCE ON LABOR 679, 686 (Samuel Estreicher ed., 1999) (describing the impact and costs of sexual harassment).

Voices sounding in the management register highlight the set of complementary, and sometimes countervailing, considerations. These considerations must accompany the discussion of workplace sexual harassment in any political-legal system that is concerned with protecting and maximizing wealth and that, accordingly, must be responsive to such aims.

### *C. Revisionist Register*

Although they play in counterpoint, the rights and management registers correspond to traditional framings of sexual harassment law in day-to-day reality. For courts, the Equal Employment Opportunity Commission, and subject entities,[68] claims of sexual harassment invoke a specific litmus test. What is going on is either (A) the purposeful, often pogromatic, denial of equal rights or (B) categorically benign workplace misconduct having little to do with a systemic pattern of systematic, overt discrimination. The cacophony of voices sounding in the revisionist register rejects these points of departure to center sexual harassment on different notes. The following discussion briefly highlights, in turn, the tenor of the three main starting points that dominate this register: free speech, dignity, and critical theory.

#### 1. Freedom of Expression

One stream of scholarship reorients discourse to freedom of expression.[69] At the center of these, primarily critical, treatments is whether sexual harassment law "steers into the territory of the First Amendment."[70] Eugene Volokh argues that Title VII imposes content- and viewpoint-based restrictions on speech by prohibiting the direct or indirect expression of perspectives or ideals thought to entrench the subordination or inequality of women.[71] Kingsley R. Browne argues that it constitutes *de jure* and *de facto*

68. Not all entities acting as employers are subject to the prohibitions on discrimination set forth in the law. Under Title VII, parties may bring suit against a private, local, or state entity only if it employs or employed at least fifteen "employees" who worked for the employer for at least twenty calendar weeks during the same year as the alleged discrimination or the year preceding the alleged discrimination. 42 U.S.C. § 2000e(b) (Westlaw through P.L. 114–61) (defining employer).

69. *See, e.g.*, Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL'Y & L. 127 (1996); Robert Post, *Sexual Harassment and the First Amendment*, *in* DIRECTIONS, *supra* note 2, at 382–98.

70. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir. 1995).

71. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819–43, 1846 (1992) [hereinafter Volokh, *Freedom*]. *See also* Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563

censorship because of the substantial chilling effect on expression resulting from the vagueness of its standards (i.e. what is impermissible is unclear), as well as the imposition of employer vicarious liability, which incentivizes the prohibition of a much broader swath of expression than necessary to address discrimination.[72] This, Browne argues, is particularly dangerous because sexual harassment's anti-sexism viewpoint represents just the type of powerful consensus that should be open for debate. Accordingly, he urges a return to "the traditional notion that noxious ideas should be countered through juxtaposition with good ideas in the hope that the bad ideas will lose out in the marketplace of ideas."[73]

A contrary group of voices focuses on sexual harassment's First Amendment implications to illustrate that the concerns of commentators like Volokh and Browne are outweighed by the benefits of sexual harassment law. More radically, some scholars claim that First Amendment concerns actually support the rigorous application of sexual harassment law.[74] Suzanne Sangree, for example, argues that by promoting workplace equality,

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(1995); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997).

72. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 501–10 (1991) [hereinafter *Title VII as Censorship*]. *See also* Kingsley R. Browne, *The Silenced Workplace: Employer Censorship Under Title VII*, *in* DIRECTIONS, *supra* note 2, at 399.

73. Browne, *Title VII as Censorship*, *supra* note 72, at 548.

74. Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 451 (1996) [hereinafter *Can a "Dumb Ass Woman"*]. *See also*, CATHARINE A. MACKINNON, ONLY WORDS 49, 45–68 (1993); Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Charles R. Calleros, *Same-Sex Harassment, Textualism, Free Speech, and* Oncale*: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment Liability*, 7 GEO. MASON L. REV. 1 (1998); Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person"*, 58 OHIO ST. L.J. 1217, 1218 (1997); Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1; Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729, 735–40 (1995); Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment is Wrong*, 19 CONST. COMMENT 391 (2002); David B. Oppenheimer, *Workplace Harassment and the First Amendment: A Reply to Professor Volokh*, 17 BERKELEY J. EMP. & LAB. L. 321, 326 (1996); Juan F. Perea, *Strange Fruit: Harassment and the First Amendment*, 29 U.C. DAVIS L. REV. 875, 884–86 (1996); Suzanne Sangree, *A Reply to Professors Volokh and Browne*, 47 RUTGERS L. REV. 595 (1995); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 558–61 (1995) [hereinafter Sangree, *Title VII*].

sexual harassment law advances the First Amendment's underlying purposes, which include the "marketplace of ideas" concept.[75]

Cynthia Estlund proposes a model that compromises these poles by casting the workplace as "a satellite domain of public discourse."[76] She asserts that it contributes to public discourse in a special institutional context amenable to opening spaces for the cultivation of civility. To resolve this tension, she offers time, place, and manner constraints on expression that provide a high level of protection from harassment without relying on value-laden, subject-matter limitations on the expression of viewpoints.[77]

### 2. Dignity

A flourishing refrain in the current debate expresses a view focused on respect, civility, and dignity. Anita Bernstein set out this perspective in detail, arguing that the crux of the sexual harassment problem is the harm it does to individual dignity.[78] Her dignity approach detaches sexual harassment from the account of it as a systemic tool of categorical harm; sexual harassment is not discrimination against or oppression of women and gender performance minorities. Instead, Bernstein's approach centers on the individual, psychological harm such conduct can cause; sexual harassment is acutely disrespectful mistreatment of a person.[79] This emphasis necessitates Bernstein's evaluative reorientation from the reasonable person to the "respectful person."[80] More recently, and drawing on the approach frequently adopted in European jurisdictions, scholars have begun to expand Bernstein's dignity model to address what they consider the core of the problem: the harassment, not the discrimination. These anti-bullying, or "mobbing," approaches explore whether and how to extend the umbrella of legal protec-

75. Sangree, *Title VII*, *supra* note 74, 558–61. *See also Esptein*, *supra* note 74 (arguing that the government's interest in advocating gender equality greatly outweighs any conflict sexual harassment creates with freedom of expression).

76. Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 718–36 (1997) [hereinafter Estlund, *Freedom of Expression*]. *See also* Cynthia L. Estlund, *The Architecture of the First Amendment and the Case of Workplace Harassment*, 72 NOTRE DAME L. REV. 1361 (1997).

77. Estlund, *Freedom of Expression, supra* note 76, at 741–45.

78. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446 (1997) [hereinafter Bernstein, *Treating*]. *See also* Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231 (1998) [hereinafter Bernstein, *Old Jurisprudence*]; L. Camille Hébert in *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1345 (2014) (reviving Bernstein's approach in the U.S. context).

79. Bernstein, *Treating*, *supra* note 78, at 454.

80. *Id.* at 483–94.

tions provided in the American workplace, which expressly rejects the idea that Title VII and similar laws constitute a "general civility code,"[81] to provide more universal protections against harassment.[82] Underlying bullying or mobbing perspectives, which reverberate in academic as well as political and managerial discourse,[83] is the idea that harassment of all forms is an affront to basic human dignity.[84] A second key to this perspective is the notion that the harm of mistreatment that is not status-based is no less severe, debilitating, or important than the harm caused by status-based mistreatment.[85]

Scholars in the critical traditions have looked at sexual harassment from outside the dominant registers in order to reveal the ways discrimination is obscured by failing to take into account influences and complexities other than sex and gender. Kimberlé Crenshaw's analysis of race and gender and sexual harassment illustrated her concept of "intersectionality" at work.[86] While most conceptions—academic, judicial, political, and popular alike—view race and gender-sex as independent categories capable of aggregation, Crenshaw argues that race actually shapes the form of sexual harassment for women of color resulting in a whole new, unfamiliar beast.[87] That unfamiliarity, in turn, limits the victim's ability to challenge discriminatory harassment as either racial or sexual in existing legal frameworks.[88] Her

81. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).

82. *See, e.g.*, Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European "Mobbing" Laws?*, 35 GA. J. INT'L & COMP. L. 53 (2006); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91 (2003); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999); Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250 (2010); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251 (2010).

83. *See generally* Yamada, *supra* note 82 (reviewing implementation of broad anti-bullying initiatives and policies).

84. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 523–24 (2000).

85. *See id.* at 483–84 (describing psychological and economic impacts of bullying).

86. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, *Demarginalizing*]; Kimberlé Crenshaw, *Race, Gender and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

87. Crenshaw, *Demarginalizing*, *supra* note 86, at 159.

88. *See id.*

path-breaking idea has been elaborated in the growing body of critical race and critical race feminist literature critiquing sexual harassment law and similar legal frameworks.[89]

In a different critical turn, Kenji Yoshino tackles what he terms "bisexual erasure" and its use, misuse, and ultimate rejection in sexual harassment law. Yoshino's treatment forms part of his broader project that reveals how law has an epistemic commitment to a homosexual-heterosexual binary that not only disadvantages bisexuals but also makes bisexuality itself invisible.[90] Janet Halley takes on the dominance of the male-female binary in sexual harassment law. She argues that certain perspectives (she labels them "gay-identity thinking," queer theory, and "sex2-positive feminism") are reshaping the sexual harassment debate to be inclusive of more complex views on sex, sexuality, and the regulation of both by the state.[91] For Halley, considering new perspectives on the debate, in turn, illuminates how values—like sexual agency—could be lost in the dominance paradigm.[92] These themes of failing to adequately account for insight gained by abandoning binaries continue to be explored today.[93]

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89. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 182–95 (1997); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992); Katherine M. Franke, *What Does A White Woman Look Like? Racing and Erasing in Law*, 74 TEX. L. REV. 1231 (1996); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Tanya K. Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & The Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235 (2006); Charles R. Lawrence III, *Cringing at Myths of Black Sexuality*, 65 S. CAL. L. REV. 1357 (1992); Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1980*, 79 CAL. L. REV. 775 (1991).

90. *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

91. Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS, *supra* note 2, at 182, 189, 193–95.

92. *Id.*

93. *See, e.g.*, Christopher N. Kendall, *Gay Male Liberation Post* Oncale*: Since When Is Sexualized Violence Our Path to Liberation?*, *in*, DIRECTIONS, *supra* note 2, at 221, 226; Marc Spindelman, *Discriminating Pleasures*, *in id.* at 201; Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375 (1995); Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271 (2006); Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 889 (2000).

Though taking starkly different positions on the nature, severity, and importance of sexual harassment in the workplace, the voices sounding in the revisionist register begin their discussions removed from the rights and management registers. The central contribution of this work is airing concerns and perspectives that are often muted or underplayed in those registers.

### *D. Common Notes*

The categorization into the preceding registers is inexact. Most notably, there is considerable overlap among doctrinal and theoretical approaches falling into the registers presented in this account. For example, while tort models are presented in the management register, anti-bullying revisions frequently suggest tort remedies.[94] Critical work described above often suggests remedies in tune with the rights or management registers.[95] Nonetheless, it is useful to understand these registers in order to view the general, dominate tenor(s) of existing discourse.

More striking than the incidental commonalities among otherwise competing or distinct approaches, however, is the tune that sounds throughout the registers: the law has limited ability to achieve the underlying aims of Title VII. Notwithstanding debates over the propriety of such an endeavor,[96] sexual harassment law (as part of the broader project of the Civil Rights Act) self-consciously positions itself as effecting liberatory social change. This notion of liberation is embodied in the anti-discrimination project. Whether the goal is to remedy past discrimination or prevent future discrimination, the only purpose for such programs is to free its beneficiaries from the yoke of the targeted discrimination.[97] Anomalously, then, a

94. *See, e.g.*, *Old Jurisprudence*, *supra* note 78 at 1242–44 (connecting the respect standard to tort remedies).

95. Tanya Katerí Hernández, *The Racism of Sexual Harassment Law*, *in* DIRECTIONS, *supra* note 2, at 479, 486, n.77 (citing Franke's technology of sexism as an implicit solution in her intersectional examination of the racism of sexual harassment); Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 926 (2006) (using an implicitly managerial framework to suggest contract law-based "good faith" sexual harassment claim).

96. *Compare* Ronald J. Colombo, *Toward A Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 22 (2012) ("Law is limited in its ability to make people virtuous"), *with* Victor Rabinowitz, *The Radical Tradition in the Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 310–18 (David Kairys, ed., 1982)(advocating use of law to effect radical change).

97. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating that the purpose of Title VII is the elimination of "those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

refrain in each of the registers—including those that favor the idea of eliminating sexual harassment (however conceived)—is of uncertainty about the law's ability to achieve this aim.

Casting such doubt may be part of the critical project. Convinced by Derrick Bell's civil rights law-skeptic theory of "interest convergence,"[98] critical theorists tend to reveal the racialized, patriarchal, heteronormative, etc., tensions in the law not only as deficiencies within particular legal regimes but also as obstacles inherent in legal approaches to rights.[99] So, to the extent critics offer solutions, they admit that they are limited.

The tone of the free speech contingent, as well as much of the managerial discourse, is also unsurprisingly skeptical of not only the law's ability but its suitability for the promotion of prescribed social change. The free-speech perspective values content-neutrality, while efficiency/productivity-minded concerns weigh against the law's interference for unrelated agenda.[100] Thus, Volokh and Estlund agree that not all expression that undermines or even attacks women's presence, position, competence, or security in the workplace should be eliminated.[101] Similarly, law and economics models openly engage the idea that some conduct taken to be discriminatory in the rights register will be permissible.[102]

What is very surprising, however, is the power of the hypothesis within the rights register. After setting out her technology of sexism theory, Franke couches her suggestions in limited terms: "Title VII cannot and should not be the vehicle by which we dismantle every hyper masculine or hyper feminine microculture."[103] This sentiment is reminiscent of the oft-

98. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

99. *See, e.g.*, Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 377–78 (1992); Kimberlé Williams Crenshaw, *Race, Reform, And Retrenchment: Transformation And Legitimation In Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350 (1988); Duncan Kennedy, *The Critique Of Rights In Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 148–65 (1991).

100. *See, e.g.,* Lester, *supra* note 63, at 525 ("the exclusive goal of legal policy is economic efficiency, and that legal policies that cannot be justified on efficiency grounds are . . . inferior or at least unscientific.") (*quoting* Herbert Hovancamp*, Law and Economics in the United States: A Brief Historical Survey*, 19 Cambridge J. Econ. 331, 332 (1995) (*citing* RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981)).

101. Volokh, *Freedom*, *supra* note 71, at 1871–72; Estlund, *Freedom of Expression*, *supra* note 76, at 757–58.

102. *See, e.g.*, Reilly, *supra* note 61, at 430–31.

103. Franke, *What's Wrong*, *supra* note 17, at 769.

quoted pronouncement that social mores are outside the natural purview of sexual harassment law:

> Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.[104]

Without belaboring the point or implying that every voice in the register hedges its claims in this way, the importance of this instinct to discourse in the rights register is underscored by the fact that MacKinnon, too, has dedicated substantial attention to unveiling and grappling with this consideration.[105]

Against the background of, and animated by, the registers of sexual harassment discourse traced above, the legal regime develops in the lives of real people. This development is pushed, shaped, and highlighted by contentious cases making their way to courts. The cycle of emerging perplexing problems that are not satisfactorily resolvable by suggestions sounding in any of the dominant registers is a salient feature of this development, and it is integral to the continual reframing of the debate.

It is possible to identify how theoretical and doctrinal reformations of sexual harassment law are incapable of providing stable groundwork from which to attack sexual harassment. However, this brief survey suggests that consensus has been reached: there is no holistic approach that adequately accounts for the ever-evolving technologies of sexual harassment. What is more, in the lives of real people, sexual harassment persists. The problem looks intractable. Some sexual harassment will go unredressed. Some discrimination is acceptable.

The most common response to such intractability is to posit a theoretical or doctrinal solution.[106] The easiest response is to embrace the intuitive

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104. *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984).

105. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1325–26 (1991) (tracing the development of sex equality laws, focusing on the ways the process challenges the nature of law).

106. For example, elsewhere I have suggested a bifurcated work-related/non-work related conduct analysis that relied on some concept of a bona fide occupational requirement (i.e., exposure to sexual materials) and the "business necessity defense" to provide a reasoned, if imperfect, way to narrow some of the gaps in hostile environment paradigm. The standard could read something like this: If an employee cannot perform the job in dispute or properly carry out the functions of the business without the particular sexual conduct, then that conduct is work-related and must be ex-

refrain sounding in all the registers of sexual harassment discourse: law is an inherently inadequate or inappropriate or limited tool for the type of social change necessary to address the issues that plague the sexual harassment paradigm in theory and in practice. A third response, adopted here, is to view the intractability of sexual harassment problems as suggesting the potential for analysis in a new register.

## II. A Pedagogical Register for Sexual Harassment Law

Drawing on the explicitly pedagogical and necessarily educative nature of sexual harassment law, the discussion that follows lays the groundwork for a pedagogical register of legal analysis. It claims that law is a societal pedagogy—a purposeful process of educating society. To support this claim, it first outlines the concept of pedagogy as understood in the education literature and translates that use to the legal context, drawing on implicit uses existing in the legal literature. After presenting the Tyler Rationale, the dominant rubric for curricular planning and pedagogical analysis, this section of the Article maps the landscape of sexual harassment law on to that Rationale, recasting the history of sexual harassment law in pedagogical terms. In so doing, it unveils an ostensibly perverse outcome. One would think that sexual harassment law's lesson would embody the anti-discrimination principle. But, as will be developed below, something more is happening.

### *A. The Concept of Pedagogy*

Like law, the academic field of education is staged on contested terrain. Indeed, it may be the only field in which the subject of study is left primarily undetermined. Thus, to argue that law operates as a "societal pedagogy," one must first establish what is meant by its foundational concept: pedagogy.

Understood as the "method and practice of teaching" (i.e. the act of teaching), pedagogy makes any distinction from "instruction" tenuous at best. So, while that view dominates political debates on education within the U.S., it does not have traction within academic education discourse. Further, that narrow definition provides little substance with which to tether an analysis of the pedagogy of sexual harassment law. The dominant view of pedagogy expressed implicitly and explicitly among education scholars characterizes pedagogy more broadly, not only as the act of teaching (i.e.

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cluded from the determination of the employee's Title VII claim. Such a modification, however, is itself flawed. *See* Lua Kamál Yuille, *Sex in the Sexy Workplace*, 9 Nw. J. L. & Soc. Pol'y. 88 (2013).

"conscious activity by one person designed to enhance learning in another"), but also as a process that encompasses the art, craft, theory, and science of teaching *and* learning. John Dewey, whose work influenced many fields including law and education, defined education, in the broadest sense, as "just a process of leading or bringing up" some sort of behavior, activity, or thinking.[107] It is a "process of forming fundamental disposition, intellectual and emotional, toward nature and fellow-men."[108] When that process has a purposeful outcome, education becomes pedagogy and brings up—shapes, forms, or molds—behavior, activity, or thinking into some form contemplated by that outcome.[109]

Though intuitively applicable to a broad range of educative social and cultural relations, this expanded image of pedagogy-as-art or science was developed specifically within the context of formal schooling. Therefore, it must be elaborated to meaningfully inform an analysis of alternative educative sites, such as law. This elaboration, informed by scholarship exploring the role of schooling in the transmission and production of knowledge, has led to several enriched conceptions of pedagogy that provide a more solid foundation on which to build a model for understanding sexual harassment law's pedagogy.

Henry Giroux characterized such pedagogy as "a configuration of textual, verbal and visual practices that seek to engage the processes through which people understand themselves and the possible ways in which they engage others and their environment."[110] He further explains that pedagogy entails "the production of and complex relationships among knowledge, texts, desire, and identity; it signals how questions of audience, voice, power, and evaluation and assessment actively engage and work to construct particular relations between teachers and students, institutions and society, and classrooms and communities."[111] Elsewhere, Giroux described pedagogy as any "deliberate attempt to influence how and what knowledge and identities are produced within and among particular sets of social rela-

107. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 12 (1916).

108. *Id.* at 383.

109. *Id.* at 12.

110. HENRY A. GIROUX, BORDER CROSSINGS: CULTURAL WORKERS AND THE POLITICS OF EDUCATION 3 (1992). *See also* HENRY A. GIROUX, *Is There a Place for Cultural Studies in Colleges of Education?*, *in* COUNTERNARRATIVES: CULTURAL STUDIES AND CRITICAL PEDAGOGIES IN POSTMODERN SPACES 52 (Henry A. Giroux et al. eds., 1996).

111. EUNSOOK HYUN, TEACHABLE MOMENTS: RE-CONCEPTUALIZING CURRICULA UNDERSTANDINGS 21–22 (2006) (summarizing Giroux's work).

tions."[112] Similarly, Peter McLaren characterizes pedagogy as the process through which teachers and students "negotiate and produce meaning."[113] Notwithstanding his use of terminology associated with traditional schooling, he lists the wide range of sites in which this negotiation takes place, including the law.[114] These constructions capture what is going on in schools (including the important, active role of the learner), as well as a much wider range of educative social relations.

Simplifying these characterizations of pedagogy writ large, if knowledge is understood as a social construct through which meaning is produced and assigned, then pedagogy is the purposeful, dialectical process through which knowledge is created. This rich view of pedagogy is the jumping-off point of the elaboration of legal pedagogy that occupies the remainder of this section.[115]

### *B. Pedagogical Foundations in the Law*

The notion of law, especially sexual harassment law, is rhetorically powerful.[116] And, the pedagogical register for sexual harassment analysis be-

112. Henry A. Giroux & Roger I. Simon, *Schooling, Popular Culture, and a Pedagogy of Possibility*, 170 J. OF EDUC. 9, 12 (1988).

113. PETER MCLAREN, CRITICAL PEDAGOGY AND PREDATORY CULTURE: OPPOSITIONAL POLITICS IN A POSTMODERN ERA 34 (2002).

114. *See id.*

115. This view of pedagogy also undergirds an incipient strand of education research examining fundamental questions posed by "spaces, sites, and languages of education and learning that exist outside of the walls of the institution of schools," or as most commonly denominated, "public pedagogy." William H. Schubert, *Outside Curricula and Public Pedagogy*, *in* HANDBOOK OF PUBLIC PEDAGOGY: EDUCATION AND LEARNING BEYOND SCHOOLING 10 (Jennifer A. Sandlin et al. eds., 2010). Although this Article is addressed primarily to a legal audience, it is also rightly characterized as a contribution to that field and constitutes the first sustained engagement with the public pedagogy of law. For a brief discussion of the role of curriculum studies, see Landon E. Beyer & Michael W. Apple, *Values and Politics in the Curriculum*, *in* THE CURRICULUM: PROBLEMS, POLITICS AND POSSIBILITIES 3–11 (Landon E. Beyer & Michael W. Apple eds., 1998); Henry A. Giroux, et al., *Introduction and Overview to the Curriculum Field*, *in* CURRICULUM & INSTRUCTION (Henry A. Giroux et al. eds., 1981).

116. The rhetoric is regularly used, without examination or citation, to bolster the importance of a claim or critique. *See, e.g.*, Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713, 740 (2007) ("The law is a teacher"); Christopher R. Brauchli, *From the Wool-Sack*, 23 COLO. LAW. 2731, 2731 (1994) ("The law is a teacher that never sleeps."); Robert P. George, *What's Sex Got to Do with It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 84 (2004); Jeffery L. Harrison, *Order, Efficiency and the State: A Commentary*, 82 CORNELL L. REV. 980, 991 (1997) ("if law is a teacher about right and wrong. . . ."); Marie Summerlin Hamm, *Opportuning Virtue: The Binding Ties of Covenant Marriage Examined*, 12 REGENT U. L. REV. 73, 79 (2000) ("Despite our discomfort with the notion, the

ing introduced in these pages has antecedents not only in legal development but also in varied existing legal discourse that directly recognizes and indirectly channels the educative function of law.[117] Under the definitions of pedagogy explored here, whether narrow or rich, sexual harassment law functions in a clearly pedagogical manner. Superficially, it is aimed at molding appropriate workplace behavior and promoting the ideological commitment that it ostensibly embodies. Indeed, as recalled below, one of the principle drivers of siting it within an employment framework (as opposed to criminal or tort law) was to bolster its pedagogical potential.[118]

Without directly engaging the idea of pedagogy, a body of socio-legal studies does provide strong evidence of the educative *impact* of sexual harassment law. However, that work fails to interrogate the processes of which those impacts are products. Prominent "legal mobilization" studies catalogue the factors generally disincentivizing women from actually using sexual harassment law.[119] Legal consciousness scholarship also explores the ways sexual harassment law affects how workers experience sexualized and non-sexualized behavior at work. Anna-Maria Marshall has identified three "frames," or interpretive lenses, women use to understand experiences potentially named sexual harassment, explaining the types of remedial claims naturally associated with each.[120] Marshall also highlights factors (including

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law is a teacher."); Stephen J. Morse, *Excusing and the New Excuses Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 334 (1998) ("The law is a teacher that sets moral and social standards for conduct."); Robert Peters, *It Will Take More than Parental Use of Filtering Software to Protect Children from Internet Pornography*, 31 N.Y.U. REV. L. & SOC. CHANGE 829, 842 (2007) ("Law is a teacher . . . ."); Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 277 (2001) ("The law is a teacher, setting forth clear standards for behavior.").

117. *See* Thomas Aquinas, SUMMA THEOLOGICA pt. II-I, q. 92, art. 1, reply obj. 1 (Fathers of the English Dominican Province trans.) *reprinted in* GREAT BOOKS OF THE WESTERN WORLD 214 (Robert Maynard Hutchins ed., Encyclopædia Britannica, Inc. 1952) ("law is given for the purpose of directing human acts"); THOMAS HOBBES, LEVIATHAN 137 (Oxford Univ. Press 1909) (1651) ("in the well-governing of opinions, consisteth the well-governing of men's actions, in order to their peace and concord").

118. *See* CARRIE N. BAKER, THE WOMEN'S MOVEMENT AGAINST SEXUAL HARASSMENT 45 (2008).

119. *See, e.g.*, Louise F. Fitzgerald, Suzanne Swan, & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117 (1995).

120. Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 665–72 (2003) [hereinafter Marshall, *Injustice Frames*]; *see generally* MARSHALL, *supra* note 19, (expanding the discussion); *see also* CAHILL, *supra* note 47 (using a scalar rather than positional approach).

job-type and social position) that influence reliance on a particular frame.[121] She notes that most women use contradictory frames,[122] which makes it difficult for them to determine what acts constitute sexual harassment, and ultimately colors their reception of sexualized and non-sexualized conduct at work.[123] Empirical studies of the impact of sexual harassment training and policies also illustrate this sort of ambiguity. Even though participants tend to view a broader range of activity as harassing post-training, training and policies show complicated outcomes with respect to both attitudes toward sexual harassment and underlying gender beliefs and have consequences running counter to the policy aims of sexual harassment law.[124]

Examining the mobilization of sexual harassment law in the workplace, and how the law affects and constitutes how individuals and institutions experience sexualized conduct and gender in the workplace, provide powerful evidence of the educative impact of sexual harassment law (writ large). It is an important part of shaping, molding, and forming both intellectual and emotional dispositions toward the concept itself. In other words, it plays a pedagogic role in society. Socio-legal contributions to sexual harassment discourse, however, gloss over a black box in which the specific processes and mechanisms of the pedagogical function of sexual harassment law are enacted but left unexamined. Analysis of law in the pedagogical register opens the black box and begins to grapple with this question.

### *C. Using Curriculum to Study Law*

Pedagogy, as described here, is the purposeful process of education.[125] The study of pedagogy interrogates the intent, substance, and form of educative experiences.[126] Inquiry into the structure of pedagogy, or the "curriculum," is central to understanding the pedagogical process.[127] Curriculum,

121. *See* Marshall, *Injustice Frames*, *supra* note 120, at 673–79.

122. *Id.* at 679–80.

123. *Id.* at 681–84.

124. *See* Justine Eatenson Tinkler, Yan E. Li, & Stefanie Mollborn, *Can Legal Interventions Change Beliefs? The Effect of Exposure to Sexual Harassment Policy on Men's Gender Beliefs*, 70 SOC. PSYCHOL. Q. 480 (2007); Kathleen Beauvais, *Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes*, 12 SIGNS 130 (1986).

125. Chris Watkins and Peter Mortimore, *Pedagogy: What Do We Know?*, *in* UNDERSTANDING PEDAGOGY AND ITS IMPACT ON LEARNING 1–19 (Peter Mortimore ed., 1999) (reviewing definitions and conceptions of pedagogy).

126. Anna Hickey-Moody et al., *Pedagogy Writ Large: Public, Popular and Cultural Pedagogies in Motion*, 51 CRITICAL STUDIES IN EDUC. 227, 232–33 (2010).

127. Schubert, *supra* note 115, at 10. For a brief discussion of the role of curriculum studies, see, e.g., Henry A. Giroux et al., *Introduction and Overview to the Curriculum Field*, *in* CURRICULUM & INSTRUCTION, *supra* note 116, at 1, 1–8 [hereinafter Gi-

as a field of study, has primarily been explored and developed within the context of pedagogy taking place within schools and universities.[128] However, if sexual harassment law can be framed as a purposeful process of education, that process must have a structure, even if implicit, that attends to its purposes, content, organization and evaluative methods, so the analytical tools and categories used to study school curricula are instructive.[129]

This idea is not novel. "Public pedagogy" scholarship has expanded from its origins in studies of the pedagogy of popular culture to examine the pedagogical dimensions of sites as diverse as those with formal or institutional pedagogical aims (e.g. parades, museums, and other "places of memorialization") and to a wide range of sites whose pedagogical function is obscured or implicit (e.g. public spaces; social movements; corporations; art, music and other media; and the human corporeal body). It has been argued that pedagogical regimes are endemic to all social relations, and, at least to some extent, that logic is irresistible.

Of course, the danger of the irresistibility of public pedagogy as a descriptive device is the tendency toward over-application coupled with under-theorization. If every phenomenon is pedagogy, its epistemological utility becomes ephemeral and, regardless of any logical or factual accuracy, public pedagogy loses its value as an analytical tool. Moreover, if the task of pedagogy as an inquiry is to engage in the discourse about "how people come to know," it is an insufficient project to create a list of sites of pedagogy, and it is ideologically dishonest to wield the qualifier as a marker of importance without further justification.

This infirmity can be avoided by returning to conceptions of conventional (i.e. classroom) pedagogies. In schooling, pedagogy presumes the teaching or learning of something by someone, and three core elements animate that interaction: intent, process, and substance. Intentionality asks, "Who calls the shots?" Whose will, power, or agency is expressed by what happens in the classroom? Substance recognizes that the interaction consists of some content to be conveyed or pursued, and constitutes the fulcrum around which the other elements revolve. If substance is the fulcrum, pro-

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roux, *Introduction and Overview*]; Landon E. Beyer & Michael W. Apple, *supra* note 115, at 3–11.

128. WILLIAM H. SCHUBERT, CURRICULUM: PERSPECTIVE, PARADIGM, AND POSSIBILITY 94–103, 107–110 (1986); *cf.* Carlos E. Cortés, *The Societal Curriculum: Implications for Multiethnic Educations*, *in* EDUCATION IN THE 80'S: MULTIETHNIC EDUCATION (James A. Banks ed., 1981) (describing a "societal curriculum" enacted outside of schools).

129. *See* William H. Schubert, *Outside Curriculum*, *in* ENCYCLOPEDIA OF CURRICULUM STUDIES 623–27 (Craig Kridel ed., 2010) (justifying his concept of "outside curricula"); Schubert, *supra* note 115, at 12 (discussing the concept of "outside curriculum").

cess is the lever of the interaction. It is *how* the learners and teachers engage with the substance of pedagogy.

### *D. Mapping the Sexual Harassment Curriculum*

In North American education scholarship, analysis of the pedagogical core has been pursued primarily through inquiry into the curriculum. As described above, pedagogy is a process of knowledge creation; curriculum provides structure to that process. Although images of curriculum are varied and contested, the dominant approaches adopt formulations that approximate Franklin Bobbit's definition: "that series of experiences which children and youth must have by way of obtaining . . . objectives."[130] These characterizations paint an image of curriculum consisting of four elements—objectives, content or subject matter, methods and procedures of implementation, and evaluation—that are planned and guided by the school to produce learning. Thus, the role of curriculum developers is to address (1) what they are hoping to achieve; (2) the ground they intend to cover to achieve it; (3) the kinds of activity and methods they consider most likely and best suited to lead toward the goals; and (4) the mechanics or devices they will use to evaluate what they have done.[131]

Ralph Tyler's simple formulation[132] of this job has dominated administrative, practical, and academic discourses on curriculum since its publication in 1949.[133] Taking curriculum to include the plans for an education program,[134] he outlined four major "tasks" of curriculum development:

> (1) *Objectives*, or the selection and definition of learning objectives;
>
> (2) *Lessons*, or the selection and creation of learning experiences;

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130. FRANKLIN BOBBITT, THE CURRICULUM 42 (1918).

131. A.V. KELLY, THE CURRICULUM: THEORY AND PRACTICE 20–21 (4th ed. 1999); *see also* COLIN J. MARSH, KEY CONCEPTS FOR UNDERSTANDING CURRICULUM 199–203 (3d ed. 2005).

132. A general review and critique of this model and influential variations is beyond the scope of the present discussion. Rather, this article seeks to provide a foundational understanding of its principles to facilitate the critique of the sexual-harassment curriculum that follows.

133. RALPH W. TYLER, BASIC PRINCIPLES OF CURRICULUM AND INSTRUCTION (1949) [hereinafter TYLER, BASIC PRINCIPLES]. *See also* Ralph W. Tyler, *Specific Approaches to Curriculum Development*, *in* STRATEGIES FOR CURRICULUM DEVELOPMENT 17–33 (Jon Schaffarzick & David H. Hampson eds., 1975), *reprinted in* CURRICULUM & INSTRUCTION, *supra* note 115, at 17, 18–19 [hereinafter Tyler, *Specific Approaches*].

134. Tyler defined education program as a system for the achievement of educational ends. Tyler, BASIC PRINCIPLES, *supra* note 133, at 1.

> (3) *Implementation*, or the organization of learning experiences to achieve maximum effect; and
> (4) *Evaluation*, of the curriculum proper (i.e. objectives plus lessons plus implementation) to furnish a basis of continuing revisions and desirable improvements.[135]

The development of sexual harassment law maps onto this path one-to-one.

### 1. Development of Curricular Objectives

Recognizing the centrality of purpose in any systematic course of action, the first stop on Tyler's path is to determine what educational purposes the school should seek to attain. This inquiry addresses the fundamental curricular question "What knowledge is important?" It also identifies the locus of pedagogical intentionality. The "consciously willed goals"[136] that result from setting objectives should be derived from the consideration of information culled from three main sources: society, learners, and experts or specialists.[137]

As a source of curricular objectives, society is shorthand for contemporary life outside of school. This inquiry identifies both what students need to survive in that life and what society needs from students. Viewing education mainly as the process of changing people's behavior—including not only their overt actions but also their thinking, feeling, and "any kind of reaction a human being is capable of"[138]—Tyler prescribed the study of the learner. This study identifies normal and desirable behaviors and reveals both deficiencies keeping learners from demonstrating the prescribed behaviors and needs of students to bring about these behavioral patterns. Attention must be paid to student interests since education requires the active effort of students.[139] Content specialists are consulted to identify basic skills

135. *Id.* at 23.
136. TYLER, BASIC PRINCIPLES, *supra* note 133, at 3.
137. *Id.* at 5–33. For a critical appraisal of objectives, see, for example, Elliot W. Eisner, *Education Objectives—Help or Hindrance*, *in* THE CURRICULUM STUDIES READER (David J. Flinder et al. eds., 3d ed. 2009).
138. William Schubert, *Ralph W. Tyler: An Interview and Antecedent Reflections*, 21 J. OF THOUGHT 7, 12 (1986).
139. Tyler cautions against conflating students' needs with curricular objectives. That is, one must not necessarily determine that the school is the place to meet all student needs. Some needs should be addressed in other sites by other social agencies. TYLER, BASIC PRINCIPLES, *supra* note 133, at 15 ("Another point of confusion in interpreting data about the learner is the failure to distinguish between the needs that are appropriately met by education and needs that are properly met by other social agencies.").

needed in or contributed by their respective fields. A mathematician, for example, might be asked to highlight the functions that can be served by the study of mathematics and to identify particular topics or skills that are necessary to achieve those functions.

Since an impractical array of objectives will likely grow out of the consideration of main sources, objectives must be run through the filters of psychology and philosophy, which address a suggestion's propriety, practicability, and affordability.[140] The psychology filter addresses another foundational curriculum question: "What knowledge is it possible to acquire (or create)?" It helps to identify changes that can actually be expected to result from a learning process (i.e. those characteristics that are rightly qualified as "behavior patterns"), the feasibility of any such change at a given temporal moment (i.e. at particular points, certain changes in behavior cannot be attained), and the conditions requisite for learning the objective.

The philosophical filter responds to a third basic curricular question: "Why is the selected knowledge worthwhile?" It identifies commitments—epistemological, socio-political, economic, and ideological—to screen objectives that are not defensible or valuable from the perspective of that commitment. If, for example, curriculum developers make a philosophical commitment to capitalist democracy, certain values, ideals, and habits (possibly competitiveness, productivity, and individual initiative) will be valued over others and will suggest the elimination of objectives that run counter, or fail to contribute, to those commitments.

Once the requisite sources have been consulted and the resulting objective hypotheses have been screened through the appropriate filters, the final set of objectives must be articulated in a form attentive to the dual functions of the objective— task identifying desirable behavior and specifying the appropriate context for it. That is, the final set of objectives must be articulated in a form conducive to their function as a pedagogical guide. Tyler rejected statements crafted as instructor tasks (e.g. "introduce novels"), topic lists ("American novels, British novels"), and general behavior patterns ("develop appreciation") as inattentive to the dual functions of the objective task: identifying behavior and content. Rather, he required curriculum developers to set forth objectives that indicate both the targeted behavior and the content area to (or context in) which that behavior was to be applied. For example, "develop an appreciation of British and American novels".

The completion of the objective setting task can be summarized in the following simple schematic:

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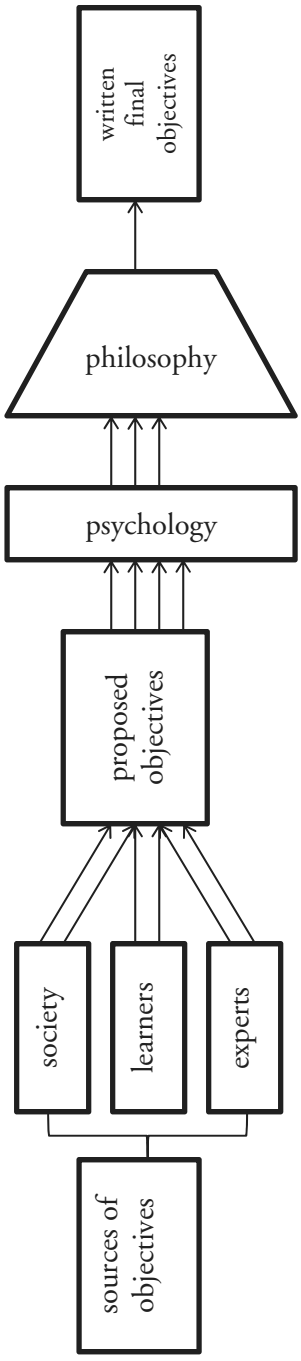
140. *Id.* at 33–43 (employing these filters).




Adapted from Allan C. Ornstein & Francis P. Hunkins, Curriculum Foundations, Principles and Issues (5th ed. 2009).

a) Objective Development in Title VII

The story of the enactment of the Civil Rights Act, generally, and Title VII thereof, specifically, has been told a myriad of times during its near fifty-year history.[141] These accounts reveal that the development of Title VII corresponds to each aspect of Tyler's objective-setting task. First, objectives were hypothesized in various sites under the broad umbrella of eliminating discrimination in a wide array of areas, including private employment.[142] Through several iterations of formal and informal legislative processes, these hypotheses were refined to focus on society's "needs," relying on input from experts and responding to societal interests (evidenced, for example, by the bona fide occupational qualification exceptions to Title VII).[143] The hypotheses were, then, screened by consideration of their feasibility (corresponding to Tyler's psychological insights), as well as the purpose of the law (or the philosophical orientation).[144]

Though immediately characterized as a twenty-third hour joke offered "in a spirit of satire and ironic cajolery"[145] and publicly derided as a "fluke . . . conceived out of wedlock,"[146] sex as a prohibited basis of employment discrimination under Title VII featured meaningfully in this process. It was first hypothesized more than a month before it was formally proposed as a curricular objective of Title VII.[147] And, gender discrimination was subject to several hours of debate that, though reportedly joking in tone, considered

141. *See, e.g.*, Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1312 (2012); Rachel Osterman, *Origins of A Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 412 (2009); Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37, 41–50 (1983); Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 174–76 (1991); GARY ORFIELD, CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 299 (1975); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 234 (1985); Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 458 (1980); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

142. Vaas, *supra* note 141, at 431–33. *See also* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997).

143. Vaas, *supra* note 141, at 438–48.

144. *Id.* at 438–57.

145. *Id.* at 441–42.

146. BARBARA SINCLAIR DECKARD, THE WOMEN'S MOVEMENT: POLITICAL, SOCIOECONOMIC, AND PSYCHOLOGICAL ISSUES 13 (1983) (quoting the first director of the EEOC).

147. Gold, *supra* note 141 at 460–61.

the primary sources for objectives—society, learners, and specialized knowledge—and, for instance, expressly rejected narrowing the sex provisions of Title VII to only to women whose spouses were unemployed.[148]

The end result of this process was a clear statement of the objectives of the Civil Rights Act—to "prevent discrimination" in federally assisted programs, public accommodations, and employment—that complies with the Tyler Rationale by addressing both behavior patterns and content areas to be impacted by the curriculum. The operative language of Title VII corresponds more directly to Tyler's model: "It shall be 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 . . . sex."[149]

b) Sexual Harassment Objective Development

Sexual harassment's path into Title VII is also well-trodden.[150] The analysis is less linear but, when read against the curricular backdrop unfolded above, these histories also correspond directly to the Tyler Rationale. As discussed more fully below, among the principal functions of evaluation in the Tyler Rationale is the improvement of the curriculum.[151] When the evaluation process suggests modifications to or expansions of the curriculum, the objective setting process may be revisited. Sexual harassment as a form of sex discrimination under Title VII was born in an iteration of that process.

In their construction of sexual harassment as a social wrong requiring a social remedy, predominantly feminist activists, filling the role of curriculum developers, selected the objectives. To do this, they relied on input from various sources that correspond to society, learners, and experts.

The first source of inspiration in the development of the particularized sexual harassment curriculum corresponds most closely to the study of society. Stories of women's experiences in the workplace that came to be epitomized by the account of Carmita Wood, who quit her job after enduring several years of unwanted sexualized treatment by her supervisor,[152] were discovered through the practice of feminist consciousness-raising.[153] Feminist organizations, such as Working Women United, provided the space for women in schools, workplaces, and private homes to discuss their lives and

148. *Id.* at 460–61.

149. 42 U.S.C. § 2000e-2(a) (Westlaw through P.L. 114–49).

150. The proceeding analysis will rely primarily on the history of sexual harassment as chronicled by Carrie N. Baker. *See generally* BAKER, *supra* note 118.

151. *See infra* Part II.D.3.

152. BAKER, *supra* note 118, at 27–28.

153. *Id.* at 28–39.

experiences in order to identify barriers to their full equality with men.[154] The stories were tied together by a common theme: "Each one of us had already quit or been fired from a job at least once because we had been made too uncomfortable by the behavior of men."[155] This commonality revealed a societal deficiency: a range of behaviors targeted at or suffered by working women was creating obstacles to their presence, advancement, and success in the workplace.

Sexual harassment did not yet exist as a cognitive category or descriptor of social relations, much less as a form of prohibited discrimination. There were no sexual harassment experts, other than victims, who could be consulted during the objective setting phase of the sexual harassment curriculum. That does not mean that specialized knowledge was not considered. The Alliance Against Sexual Coercion, for example, played an important role in contouring sexual harassment as a curricular objective of civil rights law through its intensive research of the phenomenon and development of ways to address it.[156] From such research, the economic implications of sexualized coercion in the workplace, the power employers wielded over women, and social conditions influencing the prevalence of sexual harassment came to influence the final objective.[157] The Working Women United Institute, which was created specifically to formally study sexual harassment, gathered evidence that shaped the parameters and refinements of the concept that distinguished sexual harassment from other social interactions at work.[158]

In addition, feminists early recognized the law as a stage for the contest. As a result, legal expertise heavily influenced the development of objectives, and activist attorneys were involved in the process from the beginning. Among their contributions was the idea that Title VII might provide a hook to make a legal claim out of the still inchoate idea of sexual harassment.[159]

Fundamental to the development of the sexual harassment curriculum were the stories of unsuccessful challenges to sexualized treatment in the workplace mounted under Title VII in the 1970s.[160] Mapped onto Tyler's Rationale, these sources correspond to the study of "contemporary life" and the curriculum itself, which becomes a source for objective making after the initial elaboration of the curriculum. Initial losses in courts under Title VII

154. *Id.*
155. *Id.* at 29.
156. *Id.* at 41–48.
157. *Id.* at 42–43.
158. *Id.* at 34, 37.
159. *See id.* at 30–31.
160. *See id.* at 15–26 (discussing early sexual harassment cases and other related publicity).

were crucial to particularizing the deficits in learning to which the sexual harassment curriculum would orient itself. These high-profile losses first alerted feminists that the newly-coined concept had no meaningful legal recourse and highlighted the changes in thinking necessary to actualize workplace equality.

Finally, just as the process prominently considered both the needs of society and expert opinion as prescribed by the Tyler Rationale, the needs of the learner featured heavily on sexual harassment's path into Title VII. The feminist activists'—in this framework, the curriculum developers'—study of society morphed into the study of learners as the movement gained momentum and feminists drew on a growing base of contributors to enrich their work. Speak outs and surveys allowed activists to listen to and gain perspective from a wider cross-section of working women.[161] The publicity connected with higher profile activities allowed the nascent concept to reach even broader audiences, as such events prompted media coverage in everything from mainstream feminist and popular women's service magazines to business magazines and national news publications. Media attention gave feminists access to women (and men) across America,[162] expanding the research base.

Such expansion, in turn, led to consideration of sexual harassment from the perspective of blue-collar women and women in traditionally male fields. The experiences of these women highlighted the ways in which the phenomenon was enacted in the spaces they occupied.[163] Like women in Carmita Wood's cohort, these women had quit their jobs because of men's behavior. However, the behavior they decried was marked less by extortion of sexual favors and much more by micro- and macro-aggressions designed to exclude women. Just as earlier speak outs helped unveil what is now called *quid pro quo* sexual harassment, meetings of women in construction, coal mining, and other unionized industries were critical to understanding these patterns of unwanted sexualized, or otherwise antagonistic, adverse, or exclusionary sex-based behavior—now called hostile environment sexual harassment.[164]

The study of learner interest and societal conditions continued as women working on sexual harassment attended speaking engagements, more speak outs, and workshops on sexual harassment for private corporations, unions, government agencies, and other organizations and institu-

161. *See generally*, *id.* at 67–81.

162. *Id.* at 46–47, 82, 101–06.

163. *See id.* at 67–81 (recounting the expansion of the movement against sexual harassment to include blue collar workers, whose paradigmatic experiences differed markedly from the experiences of the earliest cases of sexual harassment).

164. *Id.* at 80.

tions. These activities had an overt goal of "alter[ing] popular consciousness about sexual harassment,"[165] which illustrates how activism itself is a pedagogical endeavor. Moreover, they simultaneously amplified activists' understanding of the phenomenon and began to crystallize a hypothesis for the formalized legal curriculum.

Since the consciousness-raising that served as sources of learner analysis was directed at society as a whole, it gave voice to "malestream" interests. The articulation of these voices shed light on men as curricular targets, provided a filter for the feasibility of feminist claims, and clarified the underlying philosophical position of the curriculum.[166] Malestream concerns, often launched sarcastically and disrespectfully, were couched in evidentiary terms and focused on "affairs gone bad," "he-said-she-said," and false accusation scenarios.[167] Such concerns were dismissed rhetorically, but they were clearly addressed in the high evidentiary standards embodied in the final form of the sexual harassment objective.

Concerns about framing sexual harassment in predominantly legal terms and relying on law exclusively, as well as concerns about how the law should be mobilized, acted as a philosophical filter.[168] Although not shrouded in pedagogical language, the primary role for the new law was not to serve the less controversial legal role of deterrence or punishment, but to be a form of public pedagogy that instructed society's workers about gender equality and, to a lesser extent, appropriate workplace conduct.[169] Moreover, influential activists concluded that civil institutional liability would further the movement's pedagogical motives by leading to policies against harassment and grievance procedures within the workplace. Civil liability also reflected the view of sexual harassment as an occupational hazard with distinctively institutional dimensions better than individual criminal liability, which would cast sexual harassment as isolated, deviant behavior.[170]

These efforts and events led to the reiteration of the objective setting task, again fulfilling all of Tyler's tasks, in the first formal consideration of the sexual harassment curriculum objective in congressional hearings on sexual harassment in 1979.[171] By this time, the objective had been refined through a process that had lasted nearly a decade and was stated most fa-

165. *Id.* at 40 (quoting Letter from Karen Sauvigné to Karin Lippert, *Ms. Magazine* (Aug. 17, 1978) (in the Working Women's Institute Collection).

166. *See id.* at 101–02 (recounting facts relating to the refinement of the sexual harassment concept by activists in the late 1970s).

167. *Id.*

168. *See id.* at 96–97.

169. *Id.* at 45.

170. *See, e.g.*, *id.* at 96–97.

171. *See id.* at 111–18 (chronicling the events leading up to EEOC action).

mously in MacKinnon's book as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[172] Shortly after the hearing, the Equal Employment Opportunity Commission promulgated guidelines making the prohibition of sexual harassment in employment an explicit curricular objective of Title VII:

> Harassment on the basis of sex is a violation . . . of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when [*inter alia*] such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[173]

Federal courts repeatedly accepted that statement,[174] until the Supreme Court gave it its imprimatur in *Meritor Savings Bank v. Vinson*.[175] Like the general objective of Title VII, the framing of the more specific sexual harassment objective is consistent with the Tyler Rationale's requirements. It delineates specific behaviors—unwelcome sexual advances, requests for sexual favors, conduct of a sexual nature—and the context—work.

### 2. Creating Lessons & Implementing Content

Once sexual harassment law had a set of clear objectives, lesson planning and implementation began. That is, strategies for effectively "teaching" that sexual harassment was an unacceptable workplace behavior were developed. This process mirrors the second and third phases of the Tyler Rationale. Reflecting Tyler's belief that his design path is a symbiotic, intermingled process for education planning,[176] the content and form ele-

172. MacKinnon, *supra* note 21, at 1.

173. 29 C.F.R. § 1604.11 (2014).

174. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983) (". . . under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment."); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) ("Sexual harassment erects barriers to participation in the work force of the sort Congress intended to sweep away by the enactment of Title VII.").

175. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing both quid pro quo and hostile environment sexual harassment by favorably citing EEOC guidance) ("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.").

176. Tyler, *Specific Approaches*, *supra* note 133, at 24.

ments of the sexual harassment law curriculum must be mapped onto the Rationale together.

Tyler's second landmark is to select learning experiences. This lesson planning requires curriculum developers to ask what educational experiences can be provided that are likely to attain the purposes set forth in the educational objectives.[177] Education, wherever it takes place, is a dialectical process that is realized through experiences. Stated simply, if nothing happens, nothing happens. Experiences, then, are the pedagogical catalysts for learning. Ultimately, the task for the teacher or curriculum developer is to manipulate the environment to stimulate situations that evoke the learning described by the objectives.[178]

The core of this task is determining the kinds of experiences most likely to elicit the given behavioral change.[179] Tyler's conception implicitly integrates two important aspects: content (i.e. specific information to be conveyed to and knowledge created for the learner) and learning activities (i.e. the means used to pass on the information or create knowledge).[180] The learner's digestion of these two elements through their perception, interest, and previous experience constitutes the learning experience. As Tyler explained, a learning experience is "the interaction between the learner and the external conditions in the environment to which he can react. Learning takes place through the active behavior of the student; it is what *he* does that he learns, not what the teacher does."[181] Because each individual is unique, each individual's learning experiences are unique, so the curriculum developer cannot pre-determine exactly what experience any learner will have.[182] Therefore, the manipulation of the environment through content and activities serves as a proxy for creating (and understanding) learning experiences in planning a curriculum.

Tyler's third landmark, organization, can be seen as a corollary of the second. With learning experiences identified, they must be effectively organized to reinforce and draw on one another.[183] This inquiry is multifaceted. It involves problems of scope, range, and depth of curricular offerings; issues surrounding sequence and ordering; and questions about the relationship among different areas of the curriculum.[184]

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177. TYLER, BASIC PRINCIPLES, *supra* note 133, at 65. *See also* SCHUBERT, *supra* note 128, at 212–23.

178. *See* TYLER, BASIC PRINCIPLES, *supra* note 133, at 64–65.

179. *Id.* at 65.

180. *Id.* at 65–67.

181. *Id* at 63.

182. *Id* at 63–65.

183. *See id.* at 83–86.

184. SCHUBERT, *supra* note 128, at 223.

It is obvious why these points are important to school curricula. To be effective, learning experiences must be logically and efficiently implemented vertically (over time) and reiterated horizontally (across subjects).[185] For example, if one hopes to teach students to use algebraic equations, it is probably more efficient to understand integers before comprehending variables, and it would be nonsensical to begin a lesson on formulas if the students have not first developed facility with basic operations. Concurrent analyses identify at what level or depth to pursue the understanding of algebraic equations.[186] Curriculum developers must also determine how what is learned in algebra relates to and supports learning in other curricular areas.[187]

Guiding principles for making organizational decisions must be adopted in order to systematically develop a curriculum that is attentive to both content and organization.[188] Widely used principles include organization according to the mood or judgment of teachers (i.e. by educator preference), developmental appropriateness, learning hierarchies, and learner interest.[189] As an organizational criterion, educator preference recognizes that teachers are not passive implementers but active decision makers who should be encouraged to present learning experiences based on their assessment of student need.[190] Developmental appropriateness as a principle for organization draws on Jean Piaget's theory of cognitive development, suggesting that learning occurs in stages that must be respected in the presentation of learning experiences.[191] The concept of learning hierarchies posits that learning should proceed from simple to complex and should gradually build general constructs and principles from specific data and concepts.[192] Learner interest posits that when learners are interested in problems, they should study them. Through the study of those problems, learner interest will be stimulated in new problems that should, then, be pursued.[193]

185. *See* TYLER, BASIC PRINCIPLES, *supra* note 133, at 83–86.

186. For example, is it sufficient to have basic facility with polynomials? Should students learn specific formulas or do they need a more general understanding of theorems and proofs?

187. Continuing the algebra example: What algebraic knowledge is necessary for the learning experiences being developed in, say, chemistry or physics?

188. *See* TYLER, BASIC PRINCIPLES, *supra* note 133, at 95–98.

189. SCHUBERT, *supra* note 128 at 237–29.

190. *Id.* at 237.

191. *Id.* at 239.

192. *Id.* at 238–39.

193. *Id.* at 238.

a) Sexual Harassment Law

Sexual harassment law conforms closely to these processes. Consideration of the implementation methods and types of experiences most likely to lead to the achievement of curricular objectives and the organization of those experiences played an important role in the development of the sexual harassment curricular objectives. However, the process of selecting and organizing learning experiences became the focus of sexual harassment discourse in 1980, after the Equal Employment Opportunity Commission (EEOC) first issued guidelines that adopted sexual harassment as an unofficial Title VII curricular objective. This closed a somewhat insular stage in the development of the sexual harassment curriculum. The subsequent tasks have been pursued symbiotically, much in the way that Tyler envisioned his tasks would unfold.

As activists hoped, the EEOC guidelines gave rise to institutional policies (and eventually formal or informal training programs) that expressly set out acceptable and unacceptable conduct within the workplace. Such policies acted as the primary mechanism for direct education about sexual harassment.[194] Accompanying these policies, institutions create formal and informal avenues to address sexual harassment, serving the individual assessment function, which will be discussed in greater detail below. Experience with these avenues is the primary driver of formal sexual harassment disputes that unfold outside the workplace. Consideration of such claims by the EEOC and then, if necessary, by courts both serves as a mechanism for institutional assessment and prompts the elaboration of the curricular content (doctrine) that gives substance to the general sexual harassment objective.[195] That content elaboration, memorialized in case law,[196] is the primary source of data for the macro-evaluation of the curriculum that takes place

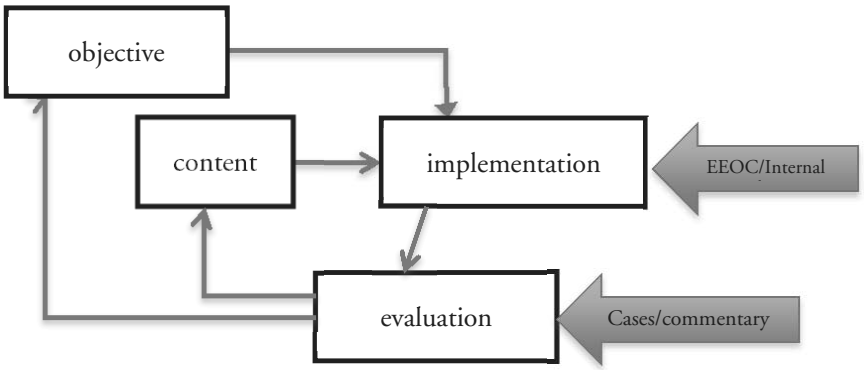
194. For a discussion of the connection between law and internal policy, *see* text and accompanying footnotes *supra* Part I.B.

195. Among the causes for this sequence is the fact that before filing suit a complainant must have filed a claim with the EEOC. *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 5–11 (1996). This, in turn, functionally requires the complainant to have (at a minimum) explored internal dispute resolution mechanisms. *See* EEOC, ENFORCEMENT GUIDANCE NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990). For a normative critique of such obligations, *see* Jay Marhoefer, *The Quality of Mercy is Strained: How the Procedures of Sexual Harassment Litigation Against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Profession*, 78 CHI.-KENT L. REV. 817, 846 (2003).

196. Arbitration and mediation also impact the sexual harassment curriculum through the evaluation process. ARBITRATING SEXUAL HARASSMENT CASES 1-1 (Vern E. Hauck ed., 1995). For a summary of alternative dispute resolution in sexual harassment law, *see* Grossman, *supra* note 50, at 67–68.

chiefly within academic discourse. These two sources, content elaboration and evaluation, led to revised implementation guidelines and policies in the EEOC and workplaces, respectively. These revisions gave rise to new claims, and led to further elaboration of the sexual harassment content, and so forth.

In the sexual harassment context, the iterative, symbiotic process can be roughly visualized by the following schematic:




This schematic reflects the principles by which learning experiences are implicitly organized within the sexual harassment curriculum. Educator preference is reflected in the decisions of the EEOC and workplace decision-makers on how to frame and present curricular content. For example, Shultz describes employers' scrubbing the workplace of all sexuality in the path of productivity by training employees through formal programs, monitoring of interpersonal relationships, grievance procedures, and the forceful and swift execution of high stakes punishment.[197] These are decisions of management. The principles of development appropriateness and learning hierarchies are reflected in the continual expansion of the application of sexual harassment standards to reflect "readiness" for more complex applications of the concept. For example, early sexual harassment training and policies focused on *quid pro quo* harassment,[198] but increasingly focus on more ambiguous conduct and have outpaced expansion of formal sexual harassment doctrine.[199]

The principal method of organization, however, is learner interest. As explained above, this principle provides that content should be explored as the learner expresses interest. It is actualized in the requirement that victims

197. Schultz, *Sanitized*, *supra* note 39, at 2090–131.

198. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 467 (2001).

199. For a brief exposition on the early and current phases of workplace discrimination, *see id.* at 465–79.

of sexual harassment raise particularized claims through internal, and then external, dispute resolution mechanisms, the raising of which constitutes the expression of learner interest. As content is elaborated through this process, interest is generated in the exploration of other aspects of sexual harassment law.

Pushed by these organizational principles, federal courts have elaborated the general objective of sexual harassment under Title VII into a detailed statement of learning experiences contouring the boundaries of permissible and impermissible behavior.[200] The EEOC has refined its guidelines and guidance to give more specific curricular direction,[201] and individual businesses digest this information into micro-level policies and targeted learning activities.[202]

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200. The detailed statement must be distilled from the body of enforceable judicial opinions interpreting Title VII sexual harassment. For example, as part of the curricular process being constructed, here, the Supreme Court has come to define hostile environment sexual harassment to require three well-known elements: (1) the contested behavior was unwelcome, *see* Meritor v. Vinson, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' "); (2) when judged from the perspective of a reasonable person, it was severe and pervasive, *see* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview"); and (3) it was based on sex, *see* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998). Each of those elements has, in turn, been elaborated to address narrow curricular needs and questions. The court in *Burns v. McGregor* explained that behavior is unwelcome within the meaning of Title VII sexual harassment if it is "uninvited and offensive." 989 F.2d 959, 963 (8th Cir. 1993).

201. In the aftermath of several high profile decisions, the EEOC issued policy guidance. *See, e.g.*, EEOC, ENFORCEMENT GUIDANCE NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990) (elaborating the definition of sexual harassment in light of then-recent cases); EEOC, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON *HARRIS V. FORKLIFT SYS., INC.*

202. The Society for Human Resource Management, like many other state and private agencies, provides a template policy that attempts to summarize the law. *Sexual Harassment Policy and Complaint/Investigation Procedure*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, http://www.shrm.org/templatestools/samples/policies/pages/cms_000554.aspx (last visited August 10, 2015). Additional policies and samples can be found in CORPORATE COUNSEL, LEGAL ASPECTS OF EMPLOYEE HANDBOOKS AND POLICIES § 3:2 (2014); CITIBANK, CODE OF CONDUCT 2013, *available at* http://www.citigroup.com/citi/investor/data/codeconduct_en.pdf (last visited August 10, 2015); Our Code of Business Conduct, GAP INC. (2012), http://www.gapinc.com/content/dam/gapincsite/documents/COBC/COBC_english.pdf (last visited August 10, 2015).

### 3. Multi-Scalar Evaluation

The first three landmarks on Tyler's path—objectives, content, and form—can be considered the design of the curriculum proper. Just as important, the curriculum proper must be evaluated. In the pedagogical context, evaluation is the continual process of checking, reforming, and revising the curriculum. For Tyler,

> [t]he process of evaluation is essentially the process of determining to what extent the educational objectives are actually being realized by the program of curriculum and instruction. However, since educational objectives are actually changes in human beings, that is, the objectives aimed at are to produce certain desirable changes in the behavior patterns of the student, then evaluation is the process for determining the degree to which these changes in behavior are actually taking place.[203]

This task requires curriculum developers to ask how to determine whether educational objectives are being attained. Its basic principles concentrate on two multi-scalar procedures, individual assessment, and program improvement.[204]

Individual assessment (grading, judging, measuring learner performance) constitutes a micro-analysis of how or whether the curriculum has been received by specific learners.[205] Simply, it is the way to confirm the individual achievement of educational objectives.[206] The first step in individual assessment is to devise situations in which such mastery can be observed—situations in which a student having a particular skill not only *could* use it but where its use will be evoked. The most accessible and popular evaluative tool is the subject matter examination.[207] If the student was to learn to perform, say, the quadratic equation, a simple test that requires its use will reveal whether the student has mastered the skill.[208] Mastery is mea-

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203. TYLER, BASIC PRINCIPLES, *supra* note 133, at 105–06.
204. *Id.* at 106.
205. *Id.* at 111–12.
206. Assessment is, by itself, an extensive and controversial field of education research and debate. EDUCATIONAL ASSESSMENT, EVALUATION AND ACCOUNTABILITY is an excellent resource exploring contemporary discourse.
207. *See, e.g.*, ALEXANDER W. ASTIN & ANTHONY LISING ANTONIO, ASSESSMENT FOR EXCELLENCE: THE PHILOSOPHY AND PRACTICE OF ASSESSMENT AND EVALUATION IN HIGHER EDUCATION 25 (2d ed., 2012) (referring to testing as the "most primitive" form of assessment and a common one).
208. Lawyers will immediately notice one of the main problems with this particular form of evaluation: causation. Tyler seems to recognize this and he proposes a solution: pre-, post-, and re-evaluation. But this is facially inadequate.

sured by determining terms or units used to appraise the student's record of behavior.[209] In the algebra exam, the terms are the steps that were taught for completing the quadratic equation, and the units are the points assigned to each correct implementation of those steps. So, students with the correct answer who also follow the correct steps get full credit. Those following the appropriate steps, but making an arithmetic error, might receive three-quarter credit, and so forth. Those terms are proxies for summaries of the student's strengths and weaknesses and provide useful material to measure students' progress toward education objectives, and from which to improve the curriculum.[210]

Program improvement entails a macro-analysis, which connects each individual assessment to the broader assessment of the entire structure of the curriculum and with institutional implementation of the curriculum.[211] Assuming the subject matter exam in the example above is graded, traditional schooling wisdom provides that performance should be distributed along a statistical normal or "bell" curve.[212] Most students perform adequately; few students excel; and few students fail.[213] Provided that an adequate evaluative form has been identified, macro-analysis helps identify curricular failures and places for improvement.[214] That is, if most students fail the algebra exam, there is something wrong with the curriculum. More nuanced, if students are passing, but the majority is stumbling on a specific step, the macro-analysis reveals a targeted curricular deficiency within the learning experience or organization, and if students in only one school fail, then a targeted curricular deficiency may have been revealed in the ineffectiveness of that particular educational institution.[215] Macro-analysis also serves as a periodic check on the validity of educational objectives and provides opportunities for stakeholders to contribute to the overall form of the curriculum.[216]

a) Individual & Institutional Assessment in Sexual Harassment Law

As foreshadowed above, evaluation in the sexual harassment curriculum is part of the symbiotic process through which learning objectives are

209. *See, e.g.*, ARTHUR K. ELLIS, RESEARCH ON EDUCATIONAL INNOVATIONS 106–107 (1993) (describing Tylerian mastery).
210. *See* TYLER, BASIC PRINCIPLES, *supra* note 133, at 120–24.
211. *Id.* at 111–24.
212. For a review of the role of the bell curve in education, *see* Lynn Fendler and Irfan Muzaffar, *The History of the Bell Curve: Sorting and the Idea of Normal*, 58 ED. THEORY 63 (2008).
213. *Id.* at 63–64.
214. TYLER, BASIC PRINCIPLES, *supra* note 133, at 120–24.
215. *Id.*
216. *Id.* at 123–24.

defined and organized. Individual assessment is realized, first, in the day-to-day interactions by individuals in the workplace, which periodically require individuals to reflect on the behavior changes sought by the sexual harassment curriculum. Closer assessment takes place when individuals in the workplace use internal mechanisms to charge supervisors or co-workers with sexual harassment.

From a curricular orientation, these micro-level evaluations serve primarily as progress reports. They determine whether specific individuals have adequately received the sexual harassment curricular content and help institutions self-evaluate their implementation of the curriculum.

When disputes are taken to the EEOC or courts, the primary evaluative function becomes assessing institutions and the curriculum as a whole. Institutional assessment takes the form of a determination of employer liability, an analysis that asks whether and how well the institution is implementing the curriculum. This is like an accreditation process. It is through these formal case decisions that the terms and units for evaluating institutional implementation are disseminated more broadly and data is gathered for the macro-level evaluation of the curriculum itself. The media plays a critical role in this process, but curricular evaluation takes place primarily within academic discourse.

b) Curricular Assessment in Sexual Harassment Law

From its recognition as a curricular objective, the sexual harassment paradigm has received intense evaluative attention. Occasionally, these debates have proposed radical departures from the model laid out above. Nonetheless, the conversation, though sounding in several registers, has generally remained squarely within the bounds of the purposes of evaluation described by Tyler: (1) determining to what extent the educational objectives are actually being realized by the program of curriculum and instruction, (2) suggesting modifications and revisions to the program of curriculum so that it more accurately or efficiently pursues educational objectives, and (3) re-evaluating the educational objectives in light of how they are being realized by the curriculum.

It is beyond the scope of the current discussion to provide a detailed overview or analysis of the literature within law, political science, sociology, and other academic fields that perform the evaluative function of the sexual harassment curriculum. However, several overarching themes can be identified and fall squarely within the ambit of the Tyler Rationale's evaluative goal.

The most salient theme has been evidentiary in nature and fits most easily within Tyler's evaluative framework by endorsing the underlying premise while rejecting or tweaking elements of the curriculum. Within this

theme are modifications or rejections of the reasonableness standard and the unwelcomeness inquiry, including proposals for burden shifting and limiting the scope of probative evidence. Suggestions do not resist the idea that sexual harassment is a wrong that can and should be defined by judicial or political actors and enforced or policed by stable legal mechanisms. What they resist is the prevailing definition and, what critics see as, deficiencies in or failures of the enforcement mechanism. A sex/gender theme can also be interpreted as attacking the prevailing curriculum from within.[217] Rejections of the desire-dominant paradigm, as well as sex/gender/sexual orientation binaries, ultimately leave in place the curricular edifice, while interrogating the parochial development of curricular objectives and proposing alternatives and expansions. Finally, analyses concluding that anti-discrimination and employment law are inappropriate sites for sexual harassment law (suggesting, instead, tort, criminal, free speech, bullying, or other substantive legal frameworks) ultimately reject not the curricular model but the framing of the objective.

The preceding sketch does not attempt to capture the richness, complexity, or nuance of the debates surrounding the modification, improvement, and reorientation of the sexual harassment curriculum. Rather, it provides a picture of how the debates function within the confines of Tyler's vision of evaluation.

### *E. Unveiling the "Hidden Curriculum"*

The Tyler Rationale and the notions of curriculum discussed thus far concern the "overt" curriculum.[218] That is, the preceding discussions have been occupied with the aspects of the curriculum that are formally, publicly, and purposefully designated as part of the curriculum. However, it is now generally accepted that schools teach more than what they claim to teach.[219] These implicit, unrecognized, unofficial, and (arguably) unintentional extras are pervasive, systematic, and better executed than their overt counterparts.[220] So, schools have inconsistent records with respect to mathematics

217. *See id.*

218. KELLY, *supra* note 131 at 1–6 (defining the overt curriculum).

219. MICHAEL APPLE, IDEOLOGY AND CURRICULUM 13 (3d ed. 2004) (defining the hidden curriculum as "the tacit teaching to students of norms, values, and dispositions that goes on simply by their living in and coping with the institutional expectations and routines of schools day in and day out").

220. *See* Elizabeth Vallance, *Hiding the Hidden Curriculum: An Interpretation of the Language of Justification in Nineteenth-Century Educational Reform*, *in* CURICULUM THEORY NETWORK (1973–74), *reprinted in* THE HIDDEN CURRICULUM AND MORAL EDUCATION 9, 9 (Henry Giroux & David Purpel eds., 1983); KELLY, *supra* note 131, at 10.

proficiency, but students emerge with well-developed senses of their socio-economic role.[221] By focusing on the messages embedded in the content and objectives of the overt curriculum, as well as its structure and organization and the structure and organization of schooling itself, the study of the so-called "hidden curriculum" has become central to any robust implementation of curricular evaluation.[222] From the latter perspective, the study of the hidden curriculum asks whether the tacit teaching of social, political, and economic norms and expectations complements and supports the ideals taught in the overt curriculum. For the sexual harassment curriculum, the question becomes this: is the equalizing function of sexual harassment law being undermined by contradictory ideologies embedded in its content or methodology?

Just as a rich body of legal, political, and sociological debate evaluates the overt or official sexual harassment curriculum, an equally rich body examines the hidden curriculum. That work has unveiled a contradictory hidden curriculum of sexual harassment law that undercuts its transformative express purposes.[223] For example, scholars have explained how a morality narrative that focuses on women's purported unique sexual sensibilities and privileges a good girl-purity archetypal woman (versus the bad girl-naughty archetype) runs throughout sexual harassment case law. This narrative entrenches a double standard in which real women are the protectors of society's sexual morality and, thus, must be protected at work, but nonconforming women attack that morality and deserve no such protection.[224] A sex narrative in the groundwater of the "desire-dominance" approach posits women as sexually available by default and, thus, maintains an

221. *See, e.g.*, MICHAEL W. APPLE, EDUCATION AND POWER (2d ed. 1995).

222. The preceding statement is so foundational in the contemporary field of curriculum and instruction that it warrants no citation. Evidencing the relevance of the concept, textbooks regularly include extensive discussion of the concept. *See, e.g.,* ALLAN A. GLATTHORN, ET AL., CURRICULUM LEADERSHIP: STRATEGIES FOR DEVELOPMENT AND IMPLEMENTATION 25–31 (4th ed. 2015); KELLY, *supra* note 131 at 10–11; MICHAEL STEPHEN SCHIRO, CURRICULUM THEORY: CONFLICTING VISIONS AND ENDURING CONCERNS 151–199 (2d ed. 2012); *See generally,* KATHLEEN LYNCH, THE HIDDEN CURRICULUM: REPRODUCTION IN EDUCATION, A REAPPRAISAL (1989)(providing in depth exploration of the various ways the hidden curriculum can be identified and problematized); PHILIP JACKSON, LIFE IN CLASSROOMS (1968) (coining the term "hidden curriculum," at 33, and chronicling its importance in understanding education).

223. *See, e.g.,* Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457 (1996)(providing an in depth analysis of the "myths" or lessons perpetuated by legal rules, including relating to sexual harassment, relating to women at work).

224. *See, e.g.*, Schultz, *Reconceptualizing*, *supra* note 17, at 1729–32 (describing the sexual paternalism of the unwelcomeness requirement); Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1149 (1993);

inherently unsafe climate within the workplace where women who do not wish to be sexually available must deliver on the defensive.[225] A capacity narrative views sexual harassment law as entrenching the counter-feminist position of women's underdeveloped, debilitated, or nonexistent agency. In this narrative, which rejects the idea that any self-actualized woman might willingly participate in sexual activity in the workplace, women must be protected from sexual harassment in order to fully exert themselves in the workplace.[226] A hetero-normative gender narrative reveals how sexual harassment law privileges static, traditional (if slightly modified) conceptions of male-female and masculine-feminine by failing to protect, under the prevailing doctrine, women and men who do not conform to traditional exemplars.[227]

There are also structural critiques of the hidden curriculum. Such critiques reveal how the strictures of sexual harassment law[228] that are meant to provide merely a set of standardized and value-neutral strategies to manage cases and treat them equally actually ensure that sexual harassment law, essentially, reproduces hierarchies and iniquities by failing to disrupt the root of gender inequality in the workplace and by allowing anti-discrimination "backlash" to flourish.

The value of seeing the hidden curriculum should not be understated.[229] Indeed, the strength of suggestions offered for improving the overt curriculum lies in their understanding of the hidden curriculum. For example, male normativity—the target of burden shifting and reasonability modifications—is hard to identify unless its hidden curricular function have been explored.[230] Nevertheless, the debates that have produced it fail to suggest departures from the model laid out above. Like evaluation of the overt

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Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 67–68 (2006).

225. *See, e.g.*, Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH J. GENDER & L. 125 (1995).

226. *See, e.g.*, Abrams, *supra* note 36, at 1205–06 (arguing same); Franke, *What's Wrong*, *supra* note 17, at 772 (summarizing the argument that sexual harassment is an instrument of gender exclusion and enforcement in the workplace).

227. Franke, *What's Wrong*, *supra* note 17 at 772 (summarizing the argument that sexual harassment enforces gender norms); Halley, *supra* note 91, at 182 (arguing same).

228. I.e., the imposition of evidentiary burdens, affirmative requirements to report, and other procedural obstacles.

229. *See, e.g.*, APPLE, *supra* note 219, at 12 (emphasizing that "overt and covert knowledge that is taught inexorably molds students into passive beings who are able and eager to fit into an unequal society"); Michael Apple & Nancy King, *What Do Schools Teach? in* HUMANISTIC EDUCATION, *reprinted in* THE HIDDEN CURRICULUM AND MORAL EDUCATION, *supra* note 220, at 82 (explaining that understanding the hidden curriculum helps in understanding the power structures of education).

230. *See* discussion *infra* Part III.B.

curriculum, where they suggest revisions, they do not stray from Tyler's path.

Implicit in Tyler's scientific model of curriculum building is the idea that, if the Rationale is implemented properly and re-iterated as necessary, eventually the curricular aim will be achieved. In other words, Tyler's model promises that eventually sexual harassment—as an endemic social practice—will be stamped out which, in turn, will contribute to the elimination of discrimination in the workplace, which is the overarching curricular aim of Title VII. Despite this promise, sexual harassment remains "a seemingly unending source of controversy"[231] and a seemingly intractable, evasive problem.

It is possible to identify the inadequacies of or inconsistencies in the diverse sexual harassment schemes. Proposals designed to remedy such problems are, invariably, couched in cautious terms that explicitly note their failure to fully account for the various problems evident in sexual harassment doctrine.[232] The "easiest" response lies within Tyler's model. If Tyler's curriculum development process is continually iterated, it will eventually settle on the perfect sexual harassment curriculum: one that satisfactorily addresses same-sex harassment, non-sexualized but gender based harassment, the sexy workplace, and other issues that plague the paradigm either in practice or in theory. An alternative conclusion is that sexual harassment is a foolhardy curricular objective because of the inadequacy or inappropriateness of law as a tool for progressive social change. The discussion that follows provides another explanation that draws on education theory to critique the Tyler Rationale and its underlying pedagogical commitments as the obstacle to finding a satisfactory approach to sexual harassment through a legal curriculum.

With this map of sexual harassment cannon charted onto Tyler's path, it is possible to envision alternatives to both the discouraged intuition that sexual harassment law cannot fully support gender emancipation, and the naïve (or disingenuous) conviction that law should not engage in such pedagogical endeavors. The proposition most clearly supported by the analysis of sexual harassment law in the pedagogical register locates its main deficiency in its implicit "transmission oriented pedagogy," which serves to inhibit rather than promote liberatory social change.

231. Seigel, *supra* note 2, at 26.

232. For a discussion of this phenomenon, *see* Yuille, *supra* note 7, at 107–11.

## III. Liberatory Inadequacy in the Curriculum

As a preliminary matter, analysis in the pedagogical register renders moot concerns about the propriety of using law as a pedagogical tool by illustrating that sexual harassment law, like all law, fundamentally and inescapably serves an educative function. Under even its narrowest version, sexual harassment law seeks to minimize the occurrence of this form of gender discrimination by deterring it through direct (on companies) and indirect (on individuals) financial and other consequences. Revisiting Dewey's framing,[233] such deterrence is definitionally pedagogical—it shapes behavior into the form contemplated by the law.

With that debate tabled, deliberation can center on whether the inevitable pedagogical function of law can or should serve transformative aims or merely support the *status quo*. In evaluating the sexual harassment curriculum, the "should" question may also be tabled since Congress has definitively answered in the affirmative.[234] Whether, and to what extent, any version of sexual harassment curriculum can support such gains remains open, and as sketched above, existing analyses paint a pessimistic picture.[235] That picture, however, rests on the implicit implementation (by the law itself) and acceptance (in the discourse surrounding the law) of Tyler's model.

Given the stated normative aim of the law, it is natural to assume that the form of the sexual harassment curriculum would reflect its emancipatory goals. Theorists have identified the features of an approach that can be considered emancipatory. Such "re-conceptualist" oriented models promote hermeneutical approaches to the curriculum that concentrate on making deliberative judgments upon which actions proceed to transform one's consciousness.[236] Rather than reproducing some pre-determined behavior, activity, or thinking contemplated by educational objectives, fundamental dispositions are generated through a dialectical process that leaves the control of both the production and application of knowledge, and hence behav-

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233. *See* Dewey, *supra* note 107, at 383 (defining education as a "process of forming fundamental dispositions, intellectual and emotional, toward nature and fellow men.").

234. The question remains relevant, of course, to the antecedent discussion of whether there should be a sexual harassment curriculum. The present discussion, however, does not engage that debate. Rather, it seeks to understand and problematize the persistence of sexual harassment and gender inequality despite the implementation of a sexual harassment curriculum.

235. *Supra* Part II.D. For further discussion, *see* Yuille, *supra* note 7, at 107–11.

236. *See, e.g.,* Giroux, *Introduction and Overview*, *supra* note 127; Shirley Grundy, Curriculum: Product or Praxis? 35 (1987).

ior, activity, or thinking, with the learner.[237] Critical pedagogy urges the implementation of this orientation through dialogic or "problem-posing" methodologies, which are associated with a liberatory "humanization" process.[238]

In the sexual harassment context, the first orientation would ostensibly be associated with a broader project of transforming workers' thinking about gender, which would lead to evolving behaviors manifesting progressively fewer instances of sexual harassment. However, the picture of sexual harassment law painted above illustrates how it must be understood as performing pedagogically through a curriculum that comports with Tyler's Rationale, which paradigmatically reflects a positivist or objectivist orientation.

Drawing inspiration from the ideals of scientific management promoted by F.W. Taylor, the Tyler Rationale views curriculum as a technical product.[239] Under this reproductive view, emphasis is placed on the preselection of the guiding or animating principles or goals and upon the production of outcomes that correspond as closely as possible to those principles or goals.[240] Central to Tylerian objectivist curricula is the idea that the goal of curriculum is to determine scientifically, and then, transmit efficiently, knowledge necessary for work, life, civic engagement, etc. in a given society.[241] Thus, sexual harassment law is associated with a regimented, top-down workplace behavioral code aimed at equipping workers with the skills necessary to efficiently function in the evolving, gender integrated workplace in which sexuality and sex discrimination inhibit performance.

As this section will explore, by emphasizing specific, functional knowledge, Tyler's Rationale constitutes a transmission or "banking" model of pedagogy, in which fixed ideas, information, and ways of knowing are passed from teacher to learner.[242] These curricula are highly systematic, preplanned, outcome focused, and quality controlled, so they support a pedagogical model in which learning, at its broadest, is limited to discovering what already exists and transmitting it—there can be no transformation of

237. Giroux, *Introduction and Overview*, *supra* note 127.

238. *See* discussion *infra* Part IV.

239. *See* JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (1972)(developing a theory of how different approaches to knowledge—technical, practical, and emancipatory—serve different ideological demands). Grundy first tied these cognitive interests to the categories of curriculum thought and design, but the connection has since been widely accepted. GRUNDY, *supra* note 236, at 14. Habermasian knowledge categories are also well-known to legal analysis.

240. *See* GRUNDY, *supra* note 236, at 14.

241. GRUNDY *supra* note 236, at 29–30; KELLY *supra* note 131, at 63–64.

242. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 58 (30th Anniversary ed. 2000).

knowledge. Accordingly, such pedagogy is associated with the maintenance of the *status quo*.[243]

Although it unequivocally and powerfully dominates political and practical discourses within curriculum studies, the Tyler Rationale reflects but one orientation toward curriculum and pedagogy. The following discussion explains how that orientation—despite its affinity with Deweyian principles of democratic education, and its attractiveness for progressive educators seeking to maintain education as "the great equalizer,"[244]—is inextricably linked to the maintenance of the *status quo*. Then, it outlines the features of a reconceptualist curricular orientation that supports a diametric pedagogical model foundationally tied to emancipatory aims.

### *A. Curriculum & Transmission*

As charted above, Tyler's positivist curriculum is constructed on four pillars: objectives, content, implementation, and evaluation. The foundations of those pillars are particular conceptions of man, images of learning, and theories of knowledge. These conceptions serve the Habermasian "technical cognitive interest,"[245] which is "a fundamental interest in controlling the environment through rule-following action based upon empirically grounded laws."[246] At the core of this technical interest is (1) a priority on man's basal, instinctual need for order and predictability;[247] (2) an absolutist epistemology in which knowledge is a reified object independent of the knower and detached from contexts, societies, cultures, history and individuals;[248] and (3) a scientific image of learning, in which empirical investigation is capable of revealing that knowledge most necessary for, and those methodologies best suited to, individual development.[249]

This technical animating foundation is reflected in Tyler's emphasis on controlling learning so that, at the end of a given pedagogical process,

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243. *See* discussion *infra* Part IV.

244. Horace Mann, *Tenth Annual Report [to the Massachusetts Board of Education], 1846*, *in* THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 63 (Lawrence A. Cremin ed., Teachers College Press, 1959) ("Education then, beyond all other devices of human origin, is the great equalizer of the conditions of men, the balance-wheel of the social machinery."). Horace Mann was considered the inaugurator of American popular education.

245. Jurgen Habermas outlines three types of knowledge or cognitive interests—technical, practical, and emancipatory—which play different, indispensable roles for human intellectual and existential existence and development. *See* HABERMAS, *supra* note 239, at 47.

246. GRUNDY, *supra* note 236, at 12.

247. *Id.* at 10–12.

248. *Id.* at 29–30; KELLY, *supra* note 131, at 26–28.

249. GRUNDY, *supra* note 236, at 29–30; KELLY, *supra* note 131, at 63–64.

the product (i.e. learner behavior) will conform to the goals expressed in the original objectives. It is also manifest in Tyler's vision of empirical investigations of both "needs," which are intended to lead to the selection of objectives, as well as methods, which influence the design and organization of learning experiences to produce the required results.[250] Similarly, the principles underlying Tyler's evaluative exercise are empiricism and control.[251] Rhetoric uses the language of assessment, accountability, and improvement, but the measure of those concepts is how closely the product of the curriculum matches the objectives, which should be judged empirically.[252] The farther the product from the objective, the less effectively the environment has been controlled.[253]

This outline of the underlying principles of the objectivist curricular model clarifies its inseparability from the transmission model of pedagogy. In that model, a reified notion of knowledge is prepackaged and delivered or transmitted in the "best" way possible to the learner. For Paulo Freire, such "banking" pedagogy makes knowledge a gift in possession of the teacher, who deposits it into students in the same way one deposits money into a bank.[254] Ivan Illich's version could be called FedEx pedagogy. His image portrays the teacher as the deliverer of educational packages to the students.[255] Whatever the imagery, learners are "adaptable, manageable beings"[256]—receptacles, repositories, raw materials—to be molded towards the ends selected by the educator through a pedagogical process that unfolds in two phases. First, the educator "cognizes a cognizable object" and makes a plan for transmitting them it to learners.[257] That is, the teacher selects learning objectives and prepares a lesson. Then, the educator implements that plan through activities and experiences that the educator deems most conducive to transmitting the information.[258] Tyler's model systematizes and structures transmission pedagogy by providing specific steps that should be followed to execute the phases contemplated by that model.

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250. *See* TYLER, BASIC PRINCIPLES, *supra* note 133, at 64 (describing the selection of learning experiences).

251. *See* GRUNDY, *supra* note 236, at 35–38.

252. *See* TYLER, BASIC PRINCIPLES, *supra* note 133, at 123–125.

253. *Id. (*framing evaluation as a process of continually adjusting the curriculum to meet stated objectives*).*

254. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 52–53 (Myra Bergman Ramos trans., Continuum Revised 20th Anniversary ed. 1997).

255. IVAN ILLICH, DESCHOOLING SOCIETY 9 (1971).

256. FREIRE, *supra* note 254, at 72.

257. *Id.*

258. *Id.*

### *B. Transmission & Status Quo*

Linking the objectivist curricular orientation to transmission models of pedagogy does not explain how such pedagogy supports and maintains the *status quo*. That connection is more nuanced, but it can be summarized thusly: freedom is the ability to define one's own aims, to define one's own world. Transmission pedagogy overtly seeks to define the world and the parameters by which one lives in it. This idea is illustrated by reviewing four important critiques of the transmission orientation.

First, by emphasizing scientific methodologies and managerial efficiency, transmission pedagogy maintains a vapid conception of humanity as animalistic and lacking agency.[259] In fact, the linear, step-by-step educative processes that such models value is based on strategies that behavioral psychologists use to condition animals. These methods were first implemented in industrial contexts to limit the human element in manufacturing.[260] The association of human education with animal conditioning and industrialization negates any concern with facilitating actual cognition or understanding in favor of eliciting insentient, trained reaction.

Second, these approaches assume the legitimacy of education as a form of behavior modification that has predetermined outcome goals that do not take into account the individual wishes, desires, or interests of the learners. This disconnect ensures that learners will not connect to the objectives in ways that allow them to apply learning in changing contexts.[261]

Third, though it is purportedly value-neutral,[262] transmission pedagogy implicitly promotes an ideology of conformity and control.[263] A rich body of literature chronicles the various ways this ideology is manifest, but it suffices here to note one. The absolutist epistemology at the center of transmission pedagogy encourages conformity by selecting certain meanings and practices for emphasis, while neglecting, excluding, diluting, or reinterpreting others.[264] Accordingly, certain knowledge and ways of knowing (and, in turn, ways of being) are legitimized. Such selective legitimization not only illegitimatizes other ontologies and epistemologies, but sentences them to not constitute knowledge or being.[265] The only way to know and

259. KELLY, *supra* note 131, at 74–75.
260. *Id.* at 74.
261. *Id.* at 74–75.
262. *See id.* at 65–66.
263. FREIRE, *supra* note 254, at 167 (contrasting dialogue with a detailed account of the core elements of an antidialogic method: conquest, division, manipulation, and cultural invasion); *see also* PAULO FREIRE, EDUCATION FOR CRITICAL CONSCIOUSNESS 34, 41 (Myra Bergman Ramos ed. & trans. 1973); APPLE, *supra* note 221, at 13.
264. APPLE, *supra* note 219, at 6.
265. FREIRE, *supra* note 254, at 15–30.

be is as prescribed by the curriculum.[266] If the argument seems esoteric, it becomes tangible through a very simple example. As any American school child will repeat, there is only one way to signal that one wants to communicate with a teacher. Any act other than raising a hand constitutes naughty, disruptive behavior. In the same way, graffiti does not constitute "art" because the dominant curriculum does not accept it as anything other than vandalism. Such knowledge orthodoxy is solidified through the evaluation model of assessment that openly attaches rank, privilege, and benefit to learners that most closely reproduce curricular objectives.[267]

That failure of value-neutrality is crystallized in a fourth critique: Transmission pedagogy restricts the freedom of both teachers and students. This model of education cannot work without fixed or given objectives, which are naturally viewed as static.

Freire synthesized these critiques into an indictment of transmission pedagogy as supporting the *status quo*.[268] Each of the qualities highlighted by the critiques above contributes to the alienation of the learner from the worldly significance of the knowledge she is receiving.[269] In this model, the learner is excluded from participation in the getting of knowledge first-hand and as it relates to him/her.[270] It is someone else's "knowledge" which he or she is being given.[271] Transmission pedagogy does not engage learners in critical thinking, but requires assimilation of information and passive regurgitation of predetermined educational objectives:

> This relationship involves a narrating Subject (the teacher) and patient, listening objects (the students). The contents, whether values or empirical dimensions of reality, tend in the process of being narrated to become lifeless and petrified . . . [The teacher's] task is to "fill" the students with the contents of his narration—contents which are detached from reality, discon-

266. *Id.*

267. Critiquing the evaluation/assessment orientation of transmission pedagogy and objectives curricula occupies an entire sub-field of education theory. For one in myriad treatments, *see* Wayne Au, *High-Stakes Testing and Curriculum Control: A Qualitative Metasynthesis*, *in* THE CURRICULUM STUDIES READER, *supra* note 137, at 286–300.

268. Freire uses the evocative term "oppression," which he defines primarily as limiting one's capacity to be fully human, to describe that *status quo*. *See* FREIRE, *supra* note 254. Independent of the term's incendiary connotation, the idea that the *status quo* is typically oppressive (i.e., being an unjust exercise of power) is applicable in the sexual harassment context. Freire's more radical argument—that transmission pedagogy is itself oppressive—is beyond the scope of the present discussion.

269. FREIRE, *supra* note 254, at 65.

270. *Id.* at 71.

271. *Id.* at 71–72.

> nected from the totality that engendered them and could give them significance.[272]

In classroom pedagogy this critique is most clearly represented in the use of lecturing and memorization, with little analysis of the importance of what is being memorized. Positive and negative reinforcement through testing and other exercises of the teacher's authority cements the process together. In the sexual harassment paradigm, the same principles are reflected in the orientation toward eliminating sexualized behavior through operant conditioning that shapes behaviors to ends deemed best for society through a filtered effect of financial consequences, without regard to whether the conditioned individual has actually internalized the anti-discrimination principle of Title VII.

Alienation results in learners passively accepting a prescribed version of the world to which they must adapt rather than define.[273] Passive adaptation, in turn, demobilizes learners by conditioning them to acquiesce to the cultural, political, and social norms of dominant groups, who determine the form and contents of the curriculum.[274] This acquiescence inhibits the development of "critical consciousness" that allows the learner to perceive and understand the social, political, and economic realities and, then, act on them to his or her own ends.[275] In the simplest terms, transmission pedagogy defines the world and largely trains people to live in it, rather than change it. That function constitutes its maintenance of the *status quo*.

### *C. Transmission & Status Quo & Sexual Harassment*

Dehumanization and agency-negation in curricular development and implementation has several implications in the sexual harassment curriculum, but most important is one that is clearly illustrated by Schultz's notion of the sanitized workplace. There, the thoughtless, trained reaction is "no sexualized conduct," but the cognition of gender discrimination is omitted and sex segregation remains.[276] The same result is evidenced in socio-legal studies reporting that sexual harassment training programs result in participants' recognition of more conduct as sexual harassment, without positively impacting either their gender views or their perceptions of the moral propriety of such conduct.[277] In the "sexy workplace" (the work environment of

272. *Id.* at 71.
273. *Id.* at 72, 73.
274. *See* APPLE, *supra* note 219, at 6.
275. FREIRE, *supra* note 254, at 78.
276. *See* Schultz, *Sanitized*, *supra* note 39.
277. *See supra* note 124 and accompanying text.

businesses, the essence of whose products or services is sexualized), the implication is even more acute. Workers cannot consistently perform the narrowly understood trained behaviors (say, no sexualized conduct), even if that reproductive failure weighs heavily on them given the expectation of conduct created by increasingly successful deployment of the sexual harassment curriculum. Simultaneously, an unaltered cognitive relationship to sex discrimination means they may not see or be able to address the underlying concern.

The epistemological and ontological power of sexual harassment law is also evident in the sexual harassment curriculum, which maintains that the only conduct that is *quid quo pro* sexual harassment is the conduct the law defines as such. The only conduct that constitutes hostile environment sexual harassment meets the three codified criteria, which can only be proven by meeting very specific evidentiary rules. The elaboration of these rules constitutes the selection of knowledge and ways of knowing that support a way of being. Interpreted this way, it should be clear how this reinforces rather than challenges the status quo. The intended beneficiaries of sexual harassment law, and especially the most vulnerable workers, need the protection of the law precisely because their ways of knowing and being have been ignored, disadvantaged, discounted, or oppressed. For example, the worker in the sexy workplace may know and behave differently.[278] She may participate in a wide range of sexualized conduct at work but, nonetheless, manifest her expectations about conduct she is willing to endure in other consistent ways. But, her non-conforming, non-knowledge will be rejected. That rejection ostensibly serves the legal value of common expectations, but entrenches the malestream epistemologies and ontologies against which the curriculum is pitted.

The value (or reality) of epistemological pluralism is implicit in arguments favoring reasonable woman or reasonable victims' standards in both sexual harassment and rape law, and the danger to liberatory change presented by epistemological and ontological absolutism is the crux of Crenshaw's intersectionality motif and Yoshino's critique of bisexual erasure.[279] Epistemologically, the sexual harassment curriculum does not merely make sexual harassment in these contexts invisible or a wrong without legal redress. It negates its status as a wrong; it makes it not sexual harassment. Ontologically, the result of this epistemological erasure is the invisibility or erasure of the woman, the bisexual, the intersectional person, the non-sexy

278. For an interesting early treatment of the disconnect between women's knowledge and sexual harassment law, *see* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 36 (1990).

279. *See supra* notes 86–90 and accompanying text.

worker in the sexy workplace, and whoever fails to conform to the ontological and epistemological norms of the curriculum. Understood in this way, Marshall's observation about women's ambivalence and confusion in defining conduct as sexual harassment takes on a different meaning.[280] Regardless of the frames through which she may understand her experiences, a woman will have difficulty labeling as sexual harassment those experiences that do not clearly conform to the sanctioned way of knowing, even if she intuits something discriminatory in the conduct.

Traditionally, law rests on the same conclusion. In the sexual harassment context, such fixity necessarily inhibits progressive change. On the front line of legal interpretation—concerns about stare decisis and statutory interpretation aside—courts will be reluctant to view novel manifestations of discrimination as sexual harassment because they are not free to defy the given definitions. On the front line of lived experience, workers will be reluctant to "name, blame, and claim"[281] novel conduct as discrimination because they have learned that only the curricular definition of discrimination counts. This has been the experience of sexual harassment law in action, and it is a powerful explanation of the intractability of the problem itself.

Of course, the fact that sexual harassment law is meant to disrupt the *status quo* challenges the assertion that it perpetuates it. However, understanding that the maintenance of the *status quo* is as much about the form of the curriculum as it is about its express content, makes clear how it is possible for the transformative aims of the sexual harassment curriculum to be undermined by its conventional pedagogical methodologies.[282]

Here again, Freire's reasoning is useful.[283] He explains that the reproduction of the deficiencies of transmission pedagogy will, ultimately, stymie foundational, systemic transformation. The face and contours of the domi-

280. *See* Marshall, *Injustice Frames*, *supra* note 120 (describing the ways it can be difficult for women to determine what acts constitute sexual harassment based on the "frames women use to understand their lived experience).

281. William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . .*, 15 L. & SOC'Y REV. 631 (1981) (providing a framework by which experiences are or are not perceived as injurious and do or do not become grievances and then, disputes).

282. Among the catalysts for the development of alternatives to objectives curricula was the recognition that progressive education reform, which aimed to rectify educational inequality but utilized many conventional curricular forms and pedagogical models, had failed to reduce the so-called achievement gap. *See* APPLE, *supra* note 219, at 16.

283. For a useful exposition of the critique inherent in Freire's banking analogy, *see* Megan Laverty, *The Role of Freire's "Banking" Analogy in the Educational Imaginary*, in PIONEERS IN EDUCATION: ESSAYS IN HONOR OF PAULO FREIRE 7 (Michael F. Shaughnessy et al. eds., 2008).

nant group may be modified but the iniquitous system will be qualitatively indistinct.[284] For the school curriculum, this means that equality will not be achieved by merely lecturing about equality. The use of lecture itself must be reevaluated. In the sexual harassment curriculum, addressing recognized content deficits will be insufficient, unless the curricular form also promotes the anti-discrimination principles meant to be embodied in that content. In order to engender "valid" transformation,[285] both the content and the mechanisms must change.

Limited mobilization of this insight is the albatross around the neck of the sexual harassment curriculum. In creating the legal curriculum, the very structure of feminist legal thought was conditioned by understandings of what it means to be law.[286] In many ways, the great success of the anti-sexual harassment movement was its escape from the substantive limitations that legal conditioning imposed. Feminists shattered the *status quo* of (at least the overt) content of the law. The structural aspects of the *status quo*, however, remained intact. Sexual harassment law was bootstrapped onto Title VII. That law, though innovative in its application context, was conventional in its form.

## IV. Dialogical Methods or Liberatory Possibilities for the Legal Curriculum

Unveiling sexual harassment law's curricular form opens the space to attack the structural aspects of the *status quo*. Crucial to such an attack is an idea rhetorically faithful, but practically anathema, to legal transformation in the United States:

> [N]ot even the best-intentioned leadership can bestow independence as a gift. The liberation of the oppressed is a liberation of women and men, not things. Accordingly, while no one liberates himself by his own efforts alone, neither is he liberated by others . . . The correct method for a revolutionary leadership to employ in the task of liberation is, therefore, not "libertarian propaganda." Nor can the leadership merely "implant" in the oppressed a belief in freedom . . . *The correct method lies in dialogue.* The conviction of the oppressed that they must fight for their

284. Freire, *supra* note 242, at 78.

285. *Id.* at 161–62, 183.

286. The author recognizes the fact that the nature of law constitutes a fundamental question within legal discourse. Those discussions are beyond the scope of this article.

> liberation is not a gift bestowed by the revolutionary leadership, but the result of their own *conscientização*. . . .[287]

Rejecting Tyler's Rationale and the banking model of education, it supports critical education theorists' view of curriculum not only as the structure of pedagogy through which learning experiences are planned and organized and objectives selected, but also, and more importantly, as a form of praxis, or the integration of inquiry, theory, and action. Heavily influenced by the work of John Dewey, critical pedagogy posits that education should equip learners with the ability to solve social problems and should promote their growth, or humanization, where humanization entails, *inter alia*, freedom.[288]

To actualize this theory, critical pedagogues promote educational models that entail the creation of knowledge through dialogue in which the learner and educator are "critical co-investigators."[289] Underlying this approach to pedagogy is a constructivist philosophy that views learning not as the process by which behavior is changed, but instead as an active process in which learners construct their own understanding and knowledge of the world through action and reflection in conversation and negotiation with educators. Critical to this model is the idea that education should not involve one person acting *on* another, but rather people working *with* each other. This occurs through "true dialogue," not debate, in which the world is named through both lived experience and theory, and explores common patterns among the participants as an act of creation and re-creation of knowledge in order to generate action. In the path of liberation, this educational model allows learners to explore the problems they face in their community, and then find solutions through gathering data from their peers, analyzing the data, and then taking informed action.[290] Against this backdrop, emancipatory social change is an ongoing process, not a product to be pursued in the curriculum.

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287. FREIRE, *supra* note 254 at 66–67 (emphasis added).

288. *See, e.g.,* Lynda Stone, *Reconstructing Dewey's Critical Philosophy: Toward a Literary Pragmatist Criticism*, *in* CRITICAL THEORIES IN EDUCATION: CHANGING TERRAINS OF KNOWLEDGE AND POLITICS 209, 209 (Thomas S. Popkewitz & Lynn Fendler eds., Routledge 1999) ("Critical education research in a U.S. context often incorporates a philosophy of education indebted to John Dewey."). For a robust introduction to the field of critical pedagogy, *see* THE ROUTLEDGE INTERNATIONAL HANDBOOK OF CRITICAL EDUCATION (Michael W. Apple, Wayne Au, & Luis Armando Gandin eds., 2009).

289. FREIRE, *supra* note 242, at 67–68 ("The students—no longer docile listeners—are now critical co-investigators in dialogue with the teacher.").

290. *See generally,* FREIRE, *supra* note 242 *passim*.

In contrast, the banking model of education, with its imposed passivity, is fundamental to the maintenance of oppression and inequality. Even when it is directed at emancipatory aims, it will result in incomplete, unsatisfactory, and often re-oppressive outcome. Applied to the sexual harassment curricular map sketched above, so long as the curriculum corresponds to the Tyler Rationale, it will not achieve the aim of decreasing sexual harassment (and, in turn, gender discrimination) in the workplace. Instead, specific behaviors may be reduced or, even eliminated, but the technology of sexual harassment (and, in turn, gender discrimination) will evolve and remain intact.

Freire gives two complementary explanations for this seemingly perverse outcome. First, the imposed passivity inherent in banking modes of education conditions learners to the status quo, which favors those in power.[291] Drawing implicitly and explicitly on Gramscian notions of hegemony,[292] even as the oppressed, here women and gender performance minorities, seek to shake the yoke of their oppressors. They reproduce oppressive forms: "Their ideal is to be men [read: human]; but for them to be men is to be oppressors."[293]

Having adopted the guidelines of the oppressor and adapted to the structure of domination in which they were immersed, even while recognizing the dangers of co-optation, feminists in the anti-sexual harassment movement eventually conformed their demands and strategies to existing structures that were the source of, or at least supported, the discrimination against which they were fighting. Second, the anti-sexual harassment movement began in a dialogic process corresponding to the problem-posing model of education. Once curricular objectives crystallized, movement leaders focused their strategy on the implementation and actualization of legal victories, which curtailed the dialogic process by returning the discourse to a banking model in which leaders began thinking *for* women instead of with them. Indeed, this behavior is the core of the intra-feminist debate. This course of events is not surprising, as revolutionary leaders growing out of oppressed classes bring with them the marker of their origins within oppressed consciousness.[294] Like the oppressor they believe that they must be the instrument of transformation.

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291. *See supra* Part III.B.

292. In his Prison Notebooks, Antonio Gramsci set out a rich conception of hegemony, or the dominance of one group or social class over another, that relied heavily on the idea that physical force is complemented and, even, supplanted by the power of ideas (values, morals, commitments).

293. FREIRE, *supra* note 254, at 45.

294. *Id.* at 46.

Freire called his dialogic pedagogy of praxis "problem-posing education."[295] As the ideological and epistemological foundations of the Tyler Rationale serve the Habermasian technical interest, Freire's problem-posing education serves Habermas' emancipatory interest,[296] which is concerned with the ability of individuals and groups to autonomously and responsibly take control of their own lives through authentic, critical insights into the social construction of human society.[297] That interest is rooted in conceptions of man, images of learning, and theories of knowledge diametric to the foundations of the technical interest. At the center, man is an autonomous subject. That perspective is concretized by an evolutionary-constructivist epistemology, in which knowledge is an ever-changing product of meaning negotiation, and a socio-cultural view of learning, in which learning is an interactive, dialectical cultural process.

Faithful to its anti-absolutist epistemology, there is no prescribed model, methodology, or rationale for designing curricula to structure such pedagogy.[298] Freire, however, does highlight several ways the critical educational praxis contrasts with an objectivist model: generative themes, praxis, and dialogue.

(1) *Generative Themes*. Tylerian content is determined by objectives. Freirean content is based on "generative themes," or those compelling topics at the intersection of the existing knowledge and personal experience of learners with the larger society and globalized world that are "saturated with affect, emotion and meaning because they engage the fears, anxieties, hopes and dreams of both teachers and students."[299]

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295. *Id.* at 40.

296. Freire's problem-posing is not the only pedagogy orientation to serve the emancipatory interest. For example, bell hooks' "engaged pedagogy"/transgressive education concept places a priority on the attention to emotion and feeling in the experience. NAMULUNDAH FLORENCE, BELL HOOKS' ENGAGED PEDAGOGY: A TRANSGRESSIVE EDUCATION FOR CRITICAL CONSCIOUSNESS (1998); BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM (1994). Robert Simon advocates a "pedagogy of possibility," or of the "not yet but could be if we engage in the simultaneous struggle to change both our circumstances and ourselves." Roger I Simon, *Empowerment as a Pedagogy of Possibility*, *in* BECOMING POLITICAL 150 (Patrick Shannon ed., 1992); ROGER I SIMON, TEACHING AGAINST THE GRAIN: TEXTS FOR A PEDAGOGY OF POSSIBILITY (1992).

297. FREIRE, *supra* note 254, at 34, 41.

298. This lack of concrete models constitutes one of the most consistent critiques of Freire from both supporters and detractors. *See*, *e.g.*, David Nasaw, *Reconsidering Freire*, 17 LIBERATION (1974) ("The fault with Freire's theorizing is that he . . . fails to offer a means by which categorical 'oughts' can be translated into daily practice. . . .").

299. FREIRE, *supra* note 254, at 100–10.

(2) *Praxis*. The capstone of the Tyler Rationale is evaluation through institutional and individual assessment. Problem-posing pedagogy substitutes praxis. In its more pedestrian connotation, praxis is the synthesis of practice and theory.[300] Here, however, the concept takes on a more robust meaning as "reflection and action upon the world in order to transform it."[301] As an instrument of pedagogical assessment, praxis contemplates "continually looking over [one's own] shoulders at how [one's] actions are affecting the world,"[302] to see one's power to transform it and create a more just society. The role of the teacher is to help the learner critically evaluate herself, including seeing whether her praxis may itself contribute to her own or another's oppression.

(3) *Dialogue*. On the foundation of generative themes and praxis, dialogue is "the pivotal pedagogical process"[303] of problem-posing education. This contrasts with Tylerian environmental manipulation through rigidly organized lessons. Moreover, Freirean dialogue has a distinct meaning: It is "the encounter between [humans], mediated by the world, in order to name the world."[304] It is "a moment where human beings meet to reflect on their reality as they make and remake it . . . through dialogue, reflecting together on what we know and don't know, we can act critically to transform reality."[305] It is "the sealing together of the teacher and the students in the joint act of knowing and re-knowing the object of study. Then, instead of transferring the knowledge statically, as a fixed possession of the teacher, dialogue demands a dynamic approximation towards the object."[306] These formulations channel Habermas' "ideal speech situations" and entail, in practice, some process of teachers and students actively pursuing learning through egalitarian, open-ended discussion and debate of socio-political realities.[307] This evolutionary process does not eschew structure, purpose, di-

300. WEBSTER'S THIRD INTERNATIONAL DICTIONARY (2002).

301. FREIRE, *supra* note 254, at 51.

302. JACK MEZIROW, TRANSFORMATIVE LEARNING THEORY 18 (1996).

303. PETER ROBERTS, EDUCATION, LITERACY, AND HUMANIZATION: EXPLORING THE WORK OF PAULO FREIRE 54 (2000).

304. FREIRE, *supra* note 254, at 88.

305. PAULO FREIRE & IRA SHOR, A PEDAGOGY FOR LIBERATION: DIALOGUES ON TRANSFORMING EDUCATION (1986).

306. *Id.*

307. It is important to distinguish the dialogic ideal pursued by Freire and other critical pedagogues from the Socratic dialogue familiar to legal audiences. The form of the traditional Socratic method bears an affinity to emancipatory dialogue. However, it retains power imbalance in which the teacher is always right. The Socrates-figure ends the dialogue knowing approximately what he knew at the outset, and indeed had a plan to guide the student to that knowledge through his questioning. This is a fundamental feature of transmission pedagogy that creates a foundational chasm between the dialogue advanced by critical pedagogues.

rection, or rigor.[308] Though the teacher no longer authoritatively delivers pre-packaged information, she does structure and direct the learning process through the exploration of the generative themes and the encouragement of praxis.[309]

The features of problem-posing education in the form described here were, arguably, the leitmotif of the early consciousness-raising side of the anti-sexual harassment movement.[310] Reconsider the description of the objective setting task described above. Activists did not seek to speak for women, but allowed women to speak for themselves and to problematize their social and economic circumstances for themselves by exploring a salient generative theme of their workplace experience. Those women, who turned into activists, acted to transform their world based on the praxis-based knowledge they created through their consciousness-raising activities. That is the essence of problem-posing education. However, as they reached consensus about sexual harassment as a form of workplace discrimination, it appears that dialogue stopped. The exigencies of the politico-legal process required sexual harassment to have empirically containable boundaries in order to secure meaningful legal recourse. Accordingly, consciousness-raising critical pedagogical forms gave way to transmission pedagogies, which enabled feminist activists to advance a stable framing of sexual harassment that fit the strictures of legally redressable phenomena. The subsequent steps in the design of the sexual harassment curriculum remained faithful to the latter model.

Notwithstanding its incredible formative significance,[311] MacKinnon's tome may be the strongest evidence of this framing of the movement. Indeed, among her legal legacies is outlining the first version of what would become the sexual harassment curriculum organized around a description of the practice as a fixed concept that the law could and should view as discrimination.[312] Unwittingly, by acquiescing to the dominant pedagogical

308. *See* ROBERTS, *supra* note 303; FREIRE & SHOR, *supra* note 305, at 102.

309. FREIRE, *supra* note 254, at 96.

310. A complementary interpretation of this stage in the feminist movement as reflecting feminist critical pedagogical forms is also possible. *See generally*, JANET M. CONWAY, PRAXIS AND POLITICS, KNOWLEDGE PRODUCTION IN SOCIAL MOVEMENTS 21–38 (2006) (juxtaposing Freirean and feminist strategies). However, since such models' fundamental opposition to transmission pedagogies result in the rejection of the same features of Tyler's model and transmission pedagogy, the preceding observations suffice for the present discussion.

311. Including for the present author.

312. This observation is distinct from the critique of MacKinnon as essentializing women's experience, against which she has thoroughly (if not necessarily satisfactorily to her critics) defended herself. Here, the point is that MacKinnon took the praxis-based knowledge that had been produced by the feminist movement (and codified in Lin Farley's book; *see* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL

orientation of modern American politico-legal processes, feminist activists contributed to a sexual harassment curricular edifice that would face intrinsic limits on its ability to combat the discrimination against which it was pitted. This is, by no means, an indictment of the important work of the feminist movement's anti-sexual harassment activists and scholars. Rather, it is an illustration of the value of analysis in the pedagogical register.

## CONCLUSION

This Article began with pessimistic pronouncements about the lesson of sexual harassment law and discourse. Instead of ushering in liberation for women in the workplace, sexual harassment law teaches them to accept continued, if muted, discrimination. This plays a tune of law as an intrinsically inferior tool of social transformation and tells its purported beneficiaries that they—at least as far as the law is concerned—must be satisfied with something less than full equality in the workplace. That melody resonates with just that type of demographic that was critical to the transgressive pedagogical moment out of which the sexual harassment curriculum was forged.[313]

Replaying that tune in the pedagogical register exposed the limitation of that powerful but legally, epistemologically, and ontologically disempowering idea. Analyzing sexual harassment law in the pedagogical register indicated that the problem was not law *per se* but the pedagogical form that law, almost invariably, takes. Revisiting that pedagogical form makes it possible to consider new strategies for law.

The preceding sections of this Article aspire to be something more than an intellectually stimulating novelty exercise. They lay the groundwork for, and then lead to, a rather ambitious prescription: To fully realize the transformative ideal of sexual harassment law, the foundations of its legal curriculum must be liberated from the tethers of objectivism and rebuilt upon the principles of problem-posing, dialogical education. Intellectually the task has been completed in the preceding pages. But, that prescription leaves open a research agenda: What might a problem-posing, dialogic method for law look like? And, how might it advance the anti-discrimination aim of Title VII?

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HARASSMENT OF WOMEN ON THE JOB (1978)) and built a curriculum based on it. That is a paradigmatically Tylerian approach.

313. *See* Bridget J. Crawford, *Towards a Third Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 160 (2007) (arguing that for women today, "the law's limited ability to affect social change is obvious").

Utilizing the pedagogical register for legal analysis charges the debate that continues to occupy sexual harassment's scholarly and political space and broadens the horizon of legal possibilities. The claims made throughout this Article are significant not only for sexual harassment law but for law more generally, the legal system, and its approach to fundamental rights. The task of Title VII, like all civil rights law, is to transform (not reflect) the underlying belief systems and behaviors of society. Once law is seen as a curriculum, it is possible to find a way for law to be more than the mere means to achieve some fixed end. It can be the transformation to which it aspires. ♣