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SEXUAL HARASSMENT 2.0

MARY ANNE FRANKS*

ABSTRACT

Sexual harassment is a complex and evolving practice. The rise of sexual discrimination in cyberspace is only one of the most recent and most striking examples of the phenomenon's increasing complexity. Sexual harassment law, however, has not kept pace with this evolution. Discrimination law has not been adequately "updated" to address new and amplified practices of sex discrimination. Its two principal limitations are (1) it treats only sexual harassment that occurs in certain protected settings (e.g. the workplace or school) as actionable and (2) it assumes that both the activity and the resulting harm of sexual harassment occur in the same protected setting. Thus, it is unable to address any harassment that occurs completely or partially outside of traditionally protected settings. By

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* Associate Professor of Law, University of Miami School of Law. I am grateful to Daniel Abebe, Adam Badawi, Douglas Baird, Mary Anne Case, Danielle Citron, Jens Damman, Mark Egerman, Michael Froomkin, Aziz Huq, Brian Leiter, Saul Levmore, Catharine MacKinnon, Richard McAdams, Adam Muchmore, Martha Nussbaum, Paul Ohm, Eric Posner, Jeff Rachlinksi, Laura Rosenbury, Arden Rowell, Adam Samaha, Lior Strahilevitz, Madhavi Sunder, Robin West, participants in the Regulation of Family, Sex, and Gender Workshop at the University of Chicago Law School, and participants in the Cyber Civil Rights Symposium at the University of Denver Law School for helpful discussion and feedback on previous versions. I thank Natalie Prager for research assistance.

contrast, this Article proposes a “multiple-setting” conception of sexual harassment that both moves beyond traditionally protected settings and explicitly acknowledges that sexual harassment in one setting can produce harms in another. In order to address multiple-setting harassment, a third-party liability regime similar to that of traditional sexual harassment law should be introduced into non-traditional contexts. In the particular case of online harassment, liability should attach to website operators. This regime will create an incentive for website operators to adopt preemptive, self-regulatory measures against online sexual harassment, much as employers have done in the offline setting.

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I. INTRODUCTION

Sexual harassment is a complex and evolving practice. The rise of sexual harassment in cyberspace is only one of the most recent and most striking examples of the phenomenon's increasing complexity. Sexual harassment law, however, has not kept pace with this evolution. Sex discrimination law has not been adequately "updated" to address new and amplified practices of sex discrimination. Its two principal limitations are (1) it treats only sexual harassment that occurs in certain protected settings (for example, the workplace or school) as actionable and (2) it assumes that both the activity and the resulting harm of sexual harassment occur in the same protected setting. Thus, it is unable to address any harassment that occurs completely or partially outside of traditionally protected settings.¹ By contrast, this Article proposes a "multiple-setting" conception of sexual harassment that both moves beyond traditionally protected settings and explicitly acknowledges that sexual harassment in one setting can produce harms in another.² In order to address multiple-setting harassment, a third-party liability regime similar to that of traditional sexual harassment law should be introduced into non-traditional contexts. In the particular case of online harassment, liability should attach to website operators.³ This regime will create an incentive for website operators to adopt preemptive, self-regulatory measures against online sexual harassment, much as employers have done in the offline setting.

While cyber harassment has received a lot of attention in recent years, the majority of this attention focuses on tort or criminal approaches to the problem. Cyber harassment is most commonly characterized under theories of defamation, threats, stalking, bullying, or invasion of privacy.⁴ What has received far less attention is the dis-

1. *See infra* Part II.

2. *See infra* Part III.

3. *See infra* Part IV.B.

4. *See, e.g.*, THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION (Saul Levmore & Martha C. Nussbaum eds., 2011); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 11 (2007); Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41, 41 (2007), <http://www.yalelawjournal.org/images/pdfs/581.pdf> (arguing that the government should curtail cyberbullying, such as Internet defamation and harassment, by holding Internet service providers liable in some circumstances); Brittan Heller, *Of Legal Rights and Moral Wrongs: A Case Study of Internet Defamation*, 19 YALE J.L. & FEMINISM 279, 279-80 (2007) (describing the effects of online defamation and harassment and the corresponding legal issues); Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 999-1000 (defining the terms "cyberstalking" and "cyberbullying"); David A. Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110

crimatory—especially sex-discriminatory—impact of cyber harassment.⁵ This is a regrettable omission given the degree to which cyber harassment is disproportionately targeted at women and girls, the fact that this harassment is so often sexualized, and the serious effects this harassment has on women’s participation in social life.⁶ In a previous work, I explored how online harassment undermines the progressive social potential of cyberspace.⁷ In this Article, I specifically address how the Internet has expanded and amplified the practice of sexual harassment.

Online harassment has various and wide-ranging harms: targets have committed suicide, lost jobs, dropped out of school, withdrawn from social activities, and decreased their participation in employment, educational, and recreational (including online) activities.⁸ The aggregate result of sex-based online harassment is to (re)make women into a marginalized class, using sexual objectification and gender stereotyping to make women feel unwelcome, subordinated, or altogether excluded from socially meaningful activities.⁹

PENN ST. L. REV. 667, 667–68 (2006) (defining cyber targeting and discussing potential legal causes of action under defamation and privacy laws).

5. There are important exceptions. Some scholars have recently observed that the harm of cyber harassment cannot be adequately captured by traditional tort and criminal law. Danielle Citron, in particular, has argued that an anti-discrimination agenda is a necessary component of the fight against cyber harassment. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 89–95 (2009) [hereinafter Citron, *Cyber Civil Rights*] (discussing how Title VII and the application of civil rights doctrine to internet harassment can help deter online mobs); see also Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 404–14 (2009) [hereinafter Citron, *Law’s Expressive Value*] (characterizing cyberspace harassment as gender harassment and making the case for law’s expressive value in recognizing a cyber civil rights agenda). Ann Bartow also addresses cyberspace harassment as sexual harassment in *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 391–92 (2009) (criticizing the new “business model” of for-profit companies specializing in the rehabilitation of online reputations). For more information on why certain forms of online harassment should be considered discrimination, see Mary Anne Franks, *The Banality of Cyber Discrimination, or, the Eternal Recurrence of September*, 87 DENV. U. L. REV. ONLINE 5, 6–9 (2010) (explaining that “[t]here is little that is new or radical about the content of cyber harassment”).

6. See Citron, *Law’s Expressive Value*, *supra* note 5, at 396–97 (explaining how “online abuse inflicts significant economic, emotional, and physical harm on women in much the same way that workplace sexual harassment does”). I focus in this Article on sex discrimination because so much cyber harassment in the public light is aimed at women. It is not my intention to single out women as a protected group to the exclusion of other historically marginalized groups. I maintain that the arguments I make for the application of sexual harassment law to cyberspace hold true for anti-discrimination law more generally.

7. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 251–52 (2011).

8. Citron, *Law’s Expressive Value*, *supra* note 5, at 384–87.

9. See *infra* Part IV.A.

While the growing phenomenon of sexual harassment in cyberspace produces harm that is equal to or more severe than sexual harassment that occurs in traditionally protected spaces, there is as yet no clear legal conceptualization of or remedy for this harassment as a form of sex discrimination. Traditional sexual harassment law marks certain settings as protected: the workplaces under Title VII, schools in Title IX, and, to a less settled extent, homes (via the Fair Housing Act) and prisons (via the Eighth Amendment).¹⁰ Current law tacitly requires that both the harassing behavior and the effects of that behavior occur in the same protected setting. To be sure, courts have sometimes been expansive in their conception of protected settings, especially recently, recognizing that the “workplace” is not limited to physical location, but rather tracks the relationships that make up the employment setting. However, even the most expansive view of protected settings leaves much online harassment outside the purview of sexual harassment law.

The fact that sexual harassment doctrine has developed around a restrictive list of single, protected settings also means that it does not provide a remedy for harassment that occurs in one setting and creates effects in another. Thus, if a woman is harassed at her place of employment by a co-worker, supervisor, or even a visitor in a way that significantly interferes with her ability to function there, she has a cognizable claim; if she is harassed by an anonymous stranger on an Internet message board and it produces the same effects, she does not.¹¹ This single-setting conception of sexual harassment is particularly ill-suited for the realities of the Internet age, where harassment occurring in virtual, unregulated settings can have severe effects in traditionally protected employment and educational settings.¹²

The multiple-setting conception of sexual harassment advocated by this Article recognizes that the action and the effect of sexual harassment can be split, an increasingly common reality in the Internet age. Sexual harassment law (and discrimination law more broadly) accordingly should be constructed around a two-pronged inquiry: (1) Is the harm that resulted from the harassing activity serious and discriminatory? (2) If so, is there an entity that can exert effective control over the harassing activity?¹³

Applying this inquiry to the example of online sexual harassment, this Article argues that the answer to both questions is yes. The

10. *See infra* Part II.B.

11. *See infra* Part III.B.

12. *See infra* Part IV.A.

13. *See infra* Part III.B.

discriminatory harm of cyber harassment can be very great, and website operators are entities that can exert effective control over the harassing activity.¹⁴ Thus, traditional sexual harassment law's third-party liability regime should be introduced into the online context.¹⁵ This will create an incentive for website operators to adopt preemptive, self-regulatory measures against sexual harassment, much as employers have done in the offline setting. This approach differs from other proposed solutions to the problem of cyber harassment by addressing sexual harassment as a distinct claim, thus capturing its particular expressive harm, and emphasizing *ex ante* incentives on website operators to prevent or internally resolve harassment, much as workplace harassment law encourages employers to do. This latter feature lessens the need for intrusive litigation or invasive tracking practices that could compromise privacy and online anonymity.

The implementation of this approach would, at a minimum, require a change in both the language of current federal sex discrimination law and a change in Section 230 of the Communications Decency Act ("CDA").¹⁶ Currently, the statutory language and the doctrinal development of Title VII and Title IX are limited to the actions of employers and school administrations. To encompass cyber harassment, either the language of the statutes could be amended to reflect the multiple-setting approach to sex discrimination, or a new general federal statute on discrimination could replace the various piecemeal protections of the current laws.

Section 230 of the CDA presents another obstacle. The section provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"¹⁷ and this has been held to immunize web hosts and other Internet entities from liability for the unlawful activities of third parties.¹⁸ The most direct way to remove the obstacle of Section 230 for sexual harassment cases would be to revise it to include express language on compliance with federal discrimination law.¹⁹ This amendment would ideally include a subsection that explains how website operators, as agents of effective control over websites and message boards, can be held liable for sex-

14. *See infra* Part III.B.

15. *See infra* Part IV.B.

16. *See infra* Part IV.C.

17. 47 U.S.C. § 230(c)(1) (2006).

18. *See infra* Part IV.C.

19. Reforming CDA § 230 would be required for most proposals regulating cyber harassment, not only the one advanced here.

ual harassment that produces effects in settings protected under current sexual harassment doctrine.²⁰

In Part II, I describe the evolution of “classical” sexual harassment doctrine, observing that even in its most recent, expansive form, this doctrine is ultimately constrained by an outdated, single-setting conception of harassment. Part III explains the multiple-setting theory of sexual harassment and why this theory is necessary to respond to increasingly complex practices of sexual harassment. This Part also details how the seeming vagueness of the two-prong inquiry into harm and control can be usefully populated with the definitions and theories developed in classical sexual harassment doctrine. Part IV applies the multiple-setting approach to cyber sexual harassment, outlining what kinds of abuses would fall under its purview and offering specifics for how the remedy could be implemented. This Part also details the advantages of the multiple-setting theory of sexual harassment and its likely effects. I explain how existing proposals for addressing cyber harassment fail to capture the particular harm of cyber sexual harassment, and/or suffer from conceptual and practical flaws. Finally, I address several objections to using the multiple-setting sexual harassment approach to respond to online harassment.

II. A SINGLE-SETTING THEORY: THE EVOLUTION OF “CLASSICAL” SEXUAL HARASSMENT DOCTRINE

Sexual harassment is a complex, controversial, and continually evolving area of law. In this Part, I attempt to outline the more settled aspects of established sexual harassment doctrine—what I will refer to as “classical” sexual harassment doctrine—highlighting the implicit single-setting theory underlying it. I then offer some observations about both the value and the limitations of established sexual harassment doctrine.

Classical sexual harassment doctrine can be seen as developing along two axes, spatial and relational. The spatial dimension is the “where” of sexual harassment, that is, the protected space in which individuals have a right not to be sexually harassed. The relational dimension is the “who” of sexual harassment, that is, whose behavior it properly addresses. The paradigmatic sexual harassment scenario involves a specific space—the workplace—and a specific relationship—superior-subordinate.²¹ Since the first Title VII cases, sexual

20. *See infra* Part IV.C.

21. *See infra* Part II.A.

harassment doctrine has expanded considerably along both the spatial and the relational axes.²²

In classical sexual harassment cases, the analysis is ultimately concerned with one “setting” at a time. The question of whose behavior can be addressed by sexual harassment regulation is determined by the role harassing actors play in that same setting. Established sexual harassment cases address only situations in which the harassing activity and the harassing effects occur in the same setting, and only impose liability on a limited class of agents, namely those who can exert effective control over the protecting setting.

There has never been a general right not to be sexually harassed. Women are sexually harassed everywhere—in the street, at home, in parks, in school, and at work. Yet, with the exception of impractical and ineffective misdemeanor laws against general harassment in public spaces, before Title VII, women had no legal protection from the harassment they experienced on the basis of gender in their daily lives.²³ This is one reason why the recognition of sexual harassment at work as sex discrimination was so groundbreaking: it meant that there was at least one setting in which it was not acceptable to sexually harass women. At the same time, the fact that the approach to such a widespread practice of discrimination had to be so carefully cabined to one particular setting is telling. When the only way to bring a sexual harassment claim was under Title VII, there was no remedy and no responsibility for sexual harassment occurring outside the employment setting. Sexual harassment law is not only limited to protected settings, but also limited to a small number of responsible agents, namely those exerting control of those settings.²⁴ The question of liability has thus always been inextricably tied to the setting of sexual harassment. In turn, liability has attached to the agent of effective control over the protected setting.

22. It now also includes additional spaces—the school, home, and prison—and includes additional relationships as well—peer relationships (co-workers, fellow students) and, in some cases, other third parties (for example, customers in a restaurant). *See infra* Part II.B.

23. *See* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 700–01 (1997) (describing the difficulties early sexual harassment plaintiffs experienced in proving their cases and the engrained national understanding of appropriate sexual behavior at the workplace).

24. Steven M. Warshawsky, *Ellerth and Faragher: Towards Strict Employer Liability Under Title VII for Supervisory Sexual Harassment*, 2 U. PA. J. LAB. & EMP. L. 303, 305 (1999).

A. *The Paradigm Scenario: Sexual Harassment in the Workplace*

The workplace was the first answer to the “where” question of sexual harassment. Title VII of the Civil Rights Act makes it illegal for any employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁵ Thanks in large part to scholars such as Catharine MacKinnon, the sexual harassment in the workplace that women experienced for decades began to be viewed as illegal sex discrimination in the 1970s.²⁶ The 1976 case of *Williams v. Saxbe* was the first federal district court case recognizing sexual harassment as sex discrimination,²⁷ followed by the first federal Court of Appeals recognition the following year in *Barnes v. Costle*.²⁸ Just as importantly, Title VII established the Equal Employment Opportunity Commission (“EEOC”) to enforce the statutory provisions against discrimination,²⁹ and in 1980 the EEOC issued its first guidelines on sexual harassment.³⁰

The answer to the “who” question of sexual harassment requires the distinction between two forms of sexual harassment: quid pro quo harassment and hostile environment harassment. When a superior demands sexual favors in return for obtaining or avoiding some specific employment or educational condition from a subordinate, it is considered quid pro quo sexual harassment.³¹ Hostile environment harassment, however, can involve either superiors or peers and is defined as “[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . 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.”³²

Importantly, liability for sexual harassment attaches to employers, not to individual harassers. Employers can be liable for harass-

25. 42 U.S.C. § 2000e-2(a)(1) (2006).

26. See Thomas I. Emerson, *Foreword* to CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, at vii–viii (1979) (recognizing that the work of MacKinnon contributed to the changing view of sexual discrimination toward women).

27. 413 F. Supp. 654, 657 (D.D.C. 1976).

28. 561 F.2d 983, 994–95 (D.C. Cir. 1977).

29. 42 U.S.C. § 2000e-4(a).

30. LIZA H. GOLD, *SEXUAL HARASSMENT: PSYCHIATRIC ASSESSMENT IN EMPLOYMENT LITIGATION* 20 (2004).

31. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998) (distinguishing quid pro quo harassment, which involves threats related to employment status, from hostile work environment claims).

32. 29 C.F.R. § 1604.11(a) (1985).

ment committed not only by employees but third parties over which the employer is found to have control, such as customers in a restaurant.³³ In two cases from 1998, *Faragher v. City of Boca Raton*³⁴ and *Burlington Industries, Inc. v. Ellerth*,³⁵ the Court laid out the basic liability regime for sexual harassment. The type of harassment at issue largely determines how liability will attach to employers in sexual harassment cases. Employers can be directly liable for quid pro quo harassment even if the employer has published policies against harassment and management was unaware of the harassment.³⁶ For harassment that does not result in a tangible loss of employment benefits, however, employers can avoid liability by demonstrating that they took reasonable care to prevent and correct harassment and that the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities.³⁷ With regard to hostile environment sexual harassment, EEOC guidelines state that employers are liable when they have actual knowledge of the harassment and fail to act promptly and effectively.³⁸

B. Additional Protected Settings: Schools, Homes, and Prisons

Workplace sexual harassment has served as the model for addressing sexual harassment in other settings. In their analyses of sexual harassment in schools, homes, and prisons, courts have turned to Title VII for guidance regarding the standards for harm and liability, with ambiguous results.

After the workplace, the next “protected setting” to come under the purview of sexual harassment law was the school. Sexual harassment in educational institutions receiving federal funds was first prohibited under Title IX of the Education Amendments of 1972.³⁹ Title IX states, “No person in the United States shall, on the basis of sex, be

33. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073 (10th Cir. 1998); 29 C.F.R. § 1604.11(e) (1985).

34. 524 U.S. 775 (1998).

35. 524 U.S. 742 (1998).

36. *See id.* at 748–49 (explaining that the employee who engaged in the harassment never informed his supervisors about the conduct even though the employee knew the company had a policy against sexual harassment); *id.* at 766–67 (Thomas, J., dissenting) (explaining that the majority’s “rule applies even if the employer has a policy against sexual harassment, the employee knows about that policy, and the employee never informs anyone in a position of authority about the supervisor’s conduct”).

37. *Faragher*, 524 U.S. at 807.

38. 29 C.F.R. § 1604.11(d) (1985).

39. Pub. L. No. 92-318, § 901, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. § 1681(a) (2000)).

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁴⁰ Like Title VII, Title IX makes no specific mention of sexual harassment. The Supreme Court made clear in *Davis v. Monroe County Board of Education*, however, that sexual harassment “that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities” is sex discrimination in violation of Title IX.⁴¹ Conduct that has been found to constitute a hostile environment includes unwelcome sexual advances,⁴² inquiries about students’ sex lives,⁴³ vulgar sexual remarks,⁴⁴ and unwelcome rubbing or touching.⁴⁵

The Supreme Court has relied substantially on its analysis of sexual harassment under Title VII to assess sexual harassment claims under Title IX. In *Franklin v. Gwinnett County Public Schools*, for example, the Court analogized the teacher-student relationship to the employer-employee relationship in Title VII cases involving quid pro quo harassment.⁴⁶ The Court also applied the “severe and pervasive” standard to Title IX cases, although only in cases of student-on-student harassment.⁴⁷ There are, however, some important differences between Title VII and Title IX case law. Unlike Title VII, Title IX provides for an administrative remedy—namely, taking federal funds away from an institution that does not comply with Title IX—but did not explicitly authorize a private right of action.⁴⁸ In 1979, however, the Court recognized an individual’s right to sue for sexual harassment in *Cannon v. University of Chicago*,⁴⁹ and further clarified in *Franklin* that the plaintiff could seek monetary damages.⁵⁰

School districts, like employers, can be held liable for harassment, although the standard of liability for school districts differs from the standard set out for employers. In *Gebser v. Lago Vista Independent School District*, the Court held that school officials had to be

40. 20 U.S.C. § 1681(a).

41. 526 U.S. 629, 651 (1999).

42. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988).

43. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63, 65 (1992).

44. *Davis*, 526 U.S. at 633, 653–54.

45. *Id.*

46. *Franklin*, 503 U.S. at 75.

47. *Davis*, 526 U.S. at 652.

48. 20 U.S.C. § 1682 (2000).

49. 441 U.S. 677, 688–89 (1979).

50. 503 U.S. at 76.

given actual notice—not merely constructive notice—to incur liability for sexual harassment.⁵¹ As the Court expressed in *Davis*, school officials may be liable if they are “deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority.”⁵²

Courts have started to recognize sexual harassment claims in additional settings, including the home⁵³ and prison.⁵⁴ In the home setting, landlords who have made unwelcome sexual advances to tenants have been found liable for sexual harassment.⁵⁵ In the prison setting, courts have found that prisoners have a limited right against sexual harassment by prison guards.⁵⁶ As with school harassment, courts have relied heavily on standards gleaned from workplace harassment cases to address harassment in these settings, a phenomenon that has been noted and much criticized in existing literature.⁵⁷

51. 524 U.S. 274, 285 (1998).

52. *Davis*, 526 U.S. at 647. For a critical view of this standard, see Sandra J. Perry & Tanya M. Marcum, *Liability for School Sexual Harassment Under Title IX: How the Courts Are Failing Our Children*, 30 U. LA VERNE L. REV. 3, 5 (2008).

53. See Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351, 351 (2000) (“Yet another strand of sexual harassment is infecting women’s lives and has begun to be treated in our courts: sexual harassment in the home.”). I am grateful to Lee Fennell for pointing me to the literature on sexual harassment in the housing context. See, e.g., Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 17 (1998) (analyzing sexual harassment in the home as “an invasion of [the] quintessentially private space”); Jill Maxwell, *Sexual Harassment at Home: Altering the Terms, Conditions and Privileges of Rental Housing for Section 8 Recipients*, 21 WIS. WOMEN’S L.J. 223 (2006); Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771.

54. See Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Workplace Settings*, 83 S. CAL. L. REV. 1, 6–8 (2009) (discussing the prevalence of relatively new sexual harassment claims by prisoners under the Eighth Amendment and the problems created by applying a Title VII standard to these claims).

55. See, e.g., *Quigley v. Winter*, 598 F.3d 938, 946 (8th Cir. 2010) (explaining that “claim[s] for hostile housing environment created by sexual harassment” are actionable under the Fair Housing Act).

56. See, e.g., *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997) (explaining that a prisoner’s sexual harassment protections come from the Eighth Amendment’s cruel and unusual punishment standard); *Adkins v. Rodriguez*, 59 F.3d 1034, 1036–37 (10th Cir. 1995) (explaining that claims are “exclusively” bound by the Eighth Amendment standard); see also Rich, *supra* note 54, at 6 (recognizing that the “standards used in Eighth Amendment analysis . . . provide far weaker sexual harassment protections for prisoners than their Title VII analogues make available to workers.”).

57. See Rich, *supra* note 54, at 36, 51–52 (explaining that these standards are encumbered by “the residue of their workplace origins and, consequently, cause federal courts to import entirely inappropriate workplace-specific assumptions . . . into the prison cases”); Lindemyer, *supra* note 53, at 352 (recognizing that applying workplace sexual harassment

C. *An Expanding Conception of “Setting”*

More recently, courts have begun to adopt a more expansive conception of workplace and school harassment that includes, to a limited degree, harassment in virtual spaces.⁵⁸ These cases are important and encouraging because they recognize, to a limited degree, that the act of harassment can occur in a different setting from where its effects are felt.

In *Blakey v. Continental Airlines, Inc.*, the Supreme Court of New Jersey held that an airline could be liable for sexual harassment that occurred on an electronic bulletin board used by the airline’s pilots.⁵⁹ The court held that “the fact that the electronic bulletin board may be located outside of the workplace . . . does not mean that an employer may have no duty to correct off-site harassment by co-employees. *Conduct that takes place outside of the workplace has a tendency to permeate the workplace.*”⁶⁰ The court analogized the bulletin board to a pilots’ lounge or bar where pilots might regularly go after work.⁶¹ The court’s inquiry tracked the setting in which the harm of the harassment was felt, not where the act of harassment physically took place.⁶²

Though there are currently few cases dealing specifically with school liability for virtual sexual harassment, the Supreme Court of Pennsylvania held that a student’s website containing derogatory and threatening comments about his school’s principal and teachers had a sufficient “nexus” to the school to be considered on-campus

standards to sexual harassment in the home “has resulted in a gross misfit of legal standards”).

58. To my knowledge, courts have not yet made similar inclusions of the virtual in home and prison sexual harassment cases. The expanded notion of the workplace also includes non-virtual spaces, such as bars and telephone calls. *See, e.g.,* McGuinn-Rowe v. Foster’s Daily Democrat, No. 94623-SD, 1997 WL 669965, at *3 (D.N.H. July 10, 1997) (noting that the employer’s “alleged sexual assault of plaintiff at the bar also contributed to the hostile environment plaintiff experienced at work, even though this particular incident occurred outside the workplace setting.”); *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007, 1013 (N.J. 1998) (recognizing, although the harassing phone calls to the victim’s home took place outside of the workplace, “such conduct nevertheless would have arisen out of the employment relationship”).

59. 751 A.2d 538, 543 (N.J. 2008).

60. *Id.* at 549 (emphasis added).

61. *Id.* at 548–50.

62. *See id.* at 556 (recognizing that the location of the effects of the harassment is crucial within the liability analysis). It is reasonably well established that supervisor-subordinate harassment is actionable regardless of where the harassment takes place; off-site peer-to-peer harassment is less settled.

speech.⁶³ The court focused on two features of the speech to make this determination: one, that the school had served as a physical access point to the website, in that both the student and the targeted staff had accessed the website at the school on numerous occasions; and two, that the intended audience of the site was fellow students and school staff.⁶⁴

One optimistic interpretation of these cases is that courts recognize that workplaces and schools, especially in a world increasingly entangled with the Internet, are not mere physical locations. As Jack Balkin puts it, they are “set[s] of social relations of power and privilege, which may or may not have a distinct geographical nexus.”⁶⁵ A theory of sexual harassment that acknowledges the relational dimension of workplaces and schools makes a great deal of intuitive sense. To put it simply, a sexual harassment inquiry should have an expansive view of the “where” of sexual harassment based on the “who” of the harassment and where the effects of the harassment are felt. Harassment need not take place in the physical space of the office or the campus to be actionable.⁶⁶ Balkin gives this example: “If a male supervisor makes an obscene phone call from his home to a female subordinate in a hotel room, this unwelcome behavior can and should contribute to a hostile work environment, even though both supervisor and subordinate are miles away from the office.”⁶⁷

This developing approach provides an intuitively sound way to deal with what could be called “intermediate” sexual harassment cases—that is, cases where the harassing act occurs “off-site” but produces effects in a protected setting and is committed by individuals with some relationship to the protected setting. In other words, the inquiry tracks the *effects* of sexual harassment on the workplace or the school, not the physical location of the harassing act. The sex discrimination provisions of Title VII and Title IX are aimed at the harm of unjustified, sex-based interference with a woman’s ability to work or learn, and thus *not* treating online harassment by supervisors or

63. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865–66 (Pa. 2002). See generally Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705 (2012).

64. *Bethlehem Area Sch. Dist.*, 807 A.2d at 865.

65. J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2313 (1999). Balkin refers here to workplaces, but the same is true of schools.

66. See *id.* (“Geographical proximity may be relevant to our judgments of the unreasonableness of a practice and the discomfort produced by it, but it is hardly necessary to achieve sex discrimination.”).

67. *Id.*

peers as sexual harassment allows (if not incentivizes) harassers to make a virtual end run around these laws.⁶⁸

These cases, however, are limited in the sense that the relational “hook” still derives from relationships within the protected setting—that is, they only capture situations in which harassers are co-workers or fellow students.⁶⁹ What courts have yet to do is also recognize sexual harassment in cases where the harassment is not only committed outside of the protected setting, but committed by people with no known ties to the protected setting.

D. Virtues of Classical Sexual Harassment Doctrine

Classical sexual harassment doctrine, forged in the workplace setting, has been criticized on many grounds. Scholars have attacked the “severe or pervasive” standard, the “reasonable person” standard, and the knowledge requirements for liability.⁷⁰ There is much debate over how the harm of sexual harassment should be articulated, whether as an offense to gender equality, to dignity, or to the freedom to reject or subvert gender stereotypes.⁷¹ The wisdom of using standards from the workplace setting to address sexual harassment in different institutional settings has also been criticized.⁷² This Article itself argues that classical sexual harassment doctrine relies on an outdated conception of the single-setting nature of sexual harassment.

These are all legitimate concerns and questions that highlight the imperfections in current remedies for sexual harassment. In spite of such problems, however, there is no doubt that sexual harassment doctrine has dramatically changed the landscape of workplaces and, to a lesser extent, schools and other protected settings. One way of describing this shift is to say that, broadly speaking, institutional and social default settings have moved from the expectation and tolerance of sexual harassment to the disapproval and sanction of it. This is not

68. See MACKINNON, *supra* note 26, at 74 (recognizing that the failure to investigate sexual harassment claims gives “tacit support” and even encourages the behavior).

69. See, e.g., 20 U.S.C. § 1681 (1986) (defining the prohibited conduct as relating to an educational program or activity); 29 C.F.R. § 1604.11 (1999) (narrowly defining the prohibited conduct as relating to employment or the workplace).

70. See, e.g., Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 448–50 (1997) (examining the problems associated with applying these standards).

71. See *infra* note 97.

72. See Lindemyer, *supra* note 53, at 379–91 (discussing the difficulty of applying legal standards for sexual harassment that have been formed in the employment context to sexual harassment that occurs in the home); see also Rich, *supra* note 54, at 49–52 (discussing the difficulty of applying such standards to sexual harassment that occurs in prisons).

to claim that sexual harassment is a thing of the past, or that individual sexual harassment suits are no longer necessary. But it is clear that sexual harassment laws have had a tremendous effect in pushing employers and school administrations to take preventative measures against harassment.⁷³

For this Article's purposes, the most important aspect of classical sexual harassment doctrine is its theory of third-party liability. Rather than regulating harassers themselves, sexual harassment law regulates agents of effective control. According to case law and EEOC guidelines, employers can be held liable for sexual harassment committed by employees if they had actual or constructive knowledge of the harassment and failed to take "immediate and appropriate corrective action."⁷⁴ Employers can also be held liable for the acts of non-employees "where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."⁷⁵ With regard to sexual harassment in schools, school districts can be held liable for sexual harassment if they demonstrate "deliberate indifference" to the behavior, a higher standard than the "actual or constructive knowledge" standard used in Title VII cases.⁷⁶

From an administrability and public policy perspective, there are three characteristics of these institutions that justify holding them liable for sexual harassment: (1) the institution's superior access to information about the nature and prevalence of the harassing behavior; (2) the institution's ability to control the behavior of the harassers; and (3) the public policy benefits of incentivizing institutions to develop and enforce policies that prevent sexual harassment from occurring in the first place. The first characteristic is important be-

73. See, e.g., ANDREW J. RUZICHO & LOUIS A. JACOBS, EMPLOYMENT PRACTICES MANUAL § 6:32 (Supp. 2011) (providing detailed model policies and recommendations, based on a review of statutes and cases, which employers may implement to try to avoid liability for sexual harassment claims).

74. 29 C.F.R. § 1604.11(d) (1985); see, e.g., *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 761–62 (8th Cir. 2003) (finding an employer liable for harassment of an employee by co-workers when the employer knew of the harassment and failed to take corrective action).

75. 29 C.F.R. § 1604.11(e); see, e.g., *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074–75 (10th Cir. 1998) (finding the restaurant liable for customers' harassment of waitress when the manager had notice of the conduct and failed to respond); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854–55 (1st Cir. 1998) (finding employer liable for high-level client's harassment of employee); *Crist v. Focus Homes, Inc.*, 122 F.3d 1007, 1008 (8th Cir. 1997) (finding that the operator of a residential program for individuals with developmental disabilities could be held liable for residents' harassment of caregivers).

76. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

cause, for example, while a sexually explicit comment from a single employee may not make for a hostile environment, the sexually explicit commentary of several employees directed at one target very well might.⁷⁷ The employer or the school district has the greatest access to important information regarding the pervasiveness of sexually harassing behavior. One employee may think that his sexual comment is harmless fun; his employer is in the best position to let him know that his comment may contribute to a hostile environment from the perspective of the person targeted.

The second and third characteristics are important because the prospect of liability for sexual harassment aligns the interests of employers and school administration officials with that of potential victims. In order to avoid liability, employers and school administration officials are required to implement policies and procedures that both discourage harassment from occurring in the first place and deal with it effectively when it does occur.⁷⁸ It is now standard for workplaces and schools to have sexual harassment policies that detail prohibited behavior and internal procedures for addressing complaints.⁷⁹ As is clear from these policies, sexual harassment doctrine has had significant effects on institutional ex ante incentives to prevent harassment.

III. THE MULTIPLE-SETTING THEORY OF SEXUAL HARASSMENT

A. *The Complexity of Sexual Harassment Practices*

We can think of sexual harassment cases as falling into three categories: easy, intermediate, and hard. The easy cases are those covered straightforwardly by classical sexual harassment doctrine. The action and the effects of the harassment occur in the same protected

77. See Bernstein, *supra* note 70, at 499–500 (noting that “[f]leeting hostility or abusiveness does not affect the work environment enough for courts to find liability” but opining that the probability of harassment increases with the number of inappropriate interactions).

78. See 29 C.F.R. § 1604.11(f) (“Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.”); see also DEPT. OF ED., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 19 (2001) (“Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex.”).

79. This includes schools and universities that do not receive federal funds.

setting.⁸⁰ The intermediate cases involve off-site harassing action but with targets and harassers strongly connected to the protected setting.⁸¹ In both of these categories, liability attaches to the agent of effective control over the protected space (for example, employers in the workplace; administration officials in schools; landlords in housing; wardens in prisons). The hard cases are of two types. In the first, the harassing activity takes place in an unprotected setting but produces effects in protected settings. Unlike in intermediate cases, the harassers in such cases have no known connection to the protected setting.⁸² In the second type of hard case, both the harassing activity and its harmful effects occur in unprotected settings. In this Article, I am primarily concerned with the first type of hard case both because online harassment so often fits this category and because these cases require a less dramatic revision of current sexual harassment doctrine.

Online harassment is one particularly prevalent form of multiple-setting harassment. Imagine a scenario in which *Y*, an employee at a law firm, wishes to sexually harass his co-worker, *X*. His firm has a sexual harassment policy that prohibits unwelcome, graphic, and obscene comments in the office. If he were to repeatedly make sexual comments to *X*, he could be disciplined for sexual harassment or even fired. If his harassment were severe and pervasive, and the firm failed to intervene, the firm would be liable for sexual harassment. If, however, *Y* were to go to an online anonymous message board and harass *X*, an interpretation of Title VII as reaching only conduct that occurs within the physical workplace would leave *X* without a remedy.⁸³ We would have the very same harm with the very same effect (if not worse) committed by the very same person, with no possibility of legal response. The same is true for women who are harassed on their way

80. *See supra* Part II.A.

81. *See supra* Part II.B–C.

82. I say “known” here because it will often be the case—as it is in much online harassment—that the harasser’s identity is unknown.

83. Jurisdictions vary as to whether they consider Title VII claims to extend to conduct outside of the workplace. *Compare* *Sprague v. Thorn Am., Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997) (dismissing employee’s Title VII sexual harassment claim for failure to present evidence sufficient to demonstrate a hostile work environment, in part because the most egregious instance of harassment “occurred at a private club, not in the workplace”), *with* *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409–10 (1st Cir. 2002) (finding that the lower court did not err in considering evidence of supervisor’s sexual harassing conduct toward the plaintiff employee that occurred outside of the workplace in concluding that a hostile work environment existed). *See also* *Reed v. Airtran Airways*, 531 F. Supp. 2d 660, 670 n.17 (D. Md. 2008) (“[C]ircuits are split on whether incidents that occur outside of the office contribute to a hostile work environment.”).

to work, for example, on the subway or in a private park. These women may feel so intimidated, abused, insecure, or unsafe on their route that the harassment affects their performance at work (or even prevents them from going to work). Yet, under Title VII, they would not be able to bring a sexual harassment claim against the transportation authority or the park service because they do not actually work in the subway or park.

B. Two-Pronged Inquiry

A strict single-setting conception of sexual harassment precludes a discrimination remedy for these situations. The multiple-setting theory of sexual harassment, by contrast, recognizes that there can be more than one relevant setting in a sexual harassment inquiry. One is the setting in which the harassment occurs, and the other is the setting in which the harmful effects are felt. Even if the first setting has no relationship to the second and is not itself a traditionally protected setting, it should be a proper object of legal intervention if the harm is serious enough and an agent of effective control can be identified in it. In other words, the multiple-setting theory of sexual harassment involves a two-pronged inquiry: (1) Is the harm resulting from the harassing activity serious and discriminatory? (2) If so, is there a clearly identifiable entity that can exert effective control over the harassing activity?

While this two-pronged inquiry might sound rather broad, there is no need to reinvent the wheel in order to apply it. Workable definitions of subjective concepts, such as “hostile environment” and “unwelcome conduct,” are objective measurements of harm, and assessments of effective control have all been painstakingly mapped out in existing sexual harassment case law and EEOC guidelines.⁸⁴ We should make good use of the wealth of theory and application that has already been formed in classical sexual harassment doctrine in applying this two-pronged theory to multiple-setting cases.

Sexual harassment, defined generally as unwelcome sexual or sex-based conduct, has been shown to have long-lasting and severe effects on its victims no matter where it occurs.⁸⁵ One message of sex-

84. See *supra* Part II.A.

85. See, e.g., Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 524–27 (1993) (describing the widespread harmful effect of sexual harassment in public places: “Unlike men, women passing through public areas are subject to ‘markers of passage’ that imply either that women are acting out of role simply by their presence in public or that a part of their role is in fact to be open to the public. . . . [B]y turning women into objects of public attention when they are in public, ha-

ual harassment—perhaps the loudest message—is that women deserve to be treated not as subjects, but as objects—whether sexual, servile, or generally inferior. Sexual harassment signals to women that they are either not welcome in a given space and/or that they will only be tolerated in that space under certain conditions of humiliation and sexualization.⁸⁶

The standards for demonstrating sexual harassment are quite high. Sexual harassment law is not intended, as the Supreme Court has noted, to be a “civility code.”⁸⁷ To make out a prima facie case of hostile environment sexual harassment, a plaintiff must show that (1) she is a member of a protected class; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment; and (5) her employer knew or should have known about the harassment and failed to stop it.⁸⁸ The conduct that courts have sometimes found to qualify as creating a hostile environment includes unwelcome sexual innuendoes, sexual propositions, statements of women’s inferiority (for example, calling a female employee a “dumb ass woman”),⁸⁹ unwanted sexual touching, lewd remarks about women’s body parts,⁹⁰ pervasive presence of sexually oriented materials, and sexually demeaning comments and jokes.⁹¹

In *Meritor Savings Bank v. Vinson*, the Supreme Court held that hostile environment sexual harassment must be “severe or pervasive” in order to be actionable under Title VII.⁹² To determine whether the harassment constitutes hostile environment sexual harassment, the Court considered “the totality of [the] circumstances.”⁹³ In so holding, the Court stated that it is not necessary for the harassment to have had any economic effect to be actionable.⁹⁴ In *Harris v. Forklift*

rassers drive home the message that women belong only in the world of the private.” (footnotes omitted).

86. *Id.*

87. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

88. *Henson v. City of Dundee*, 682 F.2d 897, 903–05 (11th Cir. 1982).

89. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19, 23 (1993).

90. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 808 (1998).

91. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1490–91 (M.D. Fla. 1991). *But see* *Greene v. A. Duie Pyle, Inc.*, 371 F. Supp. 2d 759, 761, 763 (D. Md. 2005) (holding that keeping copies of *Penthouse* and *Playboy* magazines in the bathroom, among other allegations, did “not describe the requisite severity or pervasiveness necessary to create a hostile work environment”), *aff’d per curiam*, 170 F. App’x 853 (4th Cir. 2006).

92. 477 U.S. 57, 67 (1986).

93. *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

94. *Id.* at 67–68.

Systems, Inc., the Court later held that psychological injury is also not necessary to prove a hostile environment.⁹⁵ The Court then clarified, in the same-sex harassment case of *Oncale v. Sundowner Offshore Services, Inc.*, that sexual harassment need not be motivated by sexual desire—any discriminatory treatment based on sex can qualify as sexual harassment.⁹⁶

The harm of sexual harassment has been articulated in many ways. A few prominent characterizations include sexual harassment as gender inequality, as an offense to dignity, and as a means of enforcing gender stereotypes.⁹⁷ For the purposes of this Article, I do not take a position on which perspective is most accurate or useful; rather, I take it as a given that all of these articulations are legitimate and provide numerous reasons to take the harm of sexual harassment seriously.

Applying the two-pronged inquiry into harm and control is not a vague or unpredictable enterprise, but can be populated with the definitions, standards, and theory of classical harassment doctrine. Additional support for emphasizing the question of harm and of control is found by considering that harm (including the harms of captivity) and control have played key roles in the development of classical sexual harassment doctrine. Given that sexual harassment is a general social harm that can occur anywhere, it is significant that sexual harassment law has developed primarily to address harassment in the workplace and educational settings.⁹⁸ Why these particular settings are afforded the protections of sexual harassment law can be usefully explained by three main features: (1) employment and education are intimately linked to the goals of gender equality; (2) such settings are characterized by captivity, which exacerbates the harm of harassment; and (3) such settings are responsive to administrative control.

First, the harm of sexual harassment in employment and educational environments is particularly grave. Employment and education

95. 510 U.S. 17, 22 (1993).

96. 523 U.S. 75, 80–81 (1998).

97. See, e.g., Bernstein, *supra* note 70, at 508–09 (arguing that sexual harassment should be thought of as a “dignitary harm”); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 60 (1995) (discussing sexual harassment as a response to deviations from traditional gender expectations); Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 762–63, 772 (1997) (describing the wrong of sexual harassment as the policing of gender norms); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998) (emphasizing hostile environment sexual harassment as a form of economic gender inequality).

98. Sexual harassment jurisprudence, however, is expanding to include other spaces, such as the home and the prison. See *supra* Part II.B.

are two realms in which sex discrimination's public effects are felt most acutely. The workplace and the school are two important public sites in women's struggle to achieve equality with men. By seizing educational opportunities and breaking into professions previously accessible only to men, women materially alter the status quo that privileges men over women. An increasing number of women in the workplace means an increasing number of women earn their own money and are thus not economically dependent on men. Economic independence is essential to individual liberty, as is the opportunity to add to one's identity through one's work.⁹⁹ An education is one of the most important ways in which any individual discovers and develops her skills, passions, and talents; it also serves as an important stepping-stone to job opportunity. In short, work and school are two of the most public, expressive sites vital to the attainment of gender equality.

The harm of sexual harassment in the workplace and school is exacerbated by the "captivity" of these settings. Early scholarship on sexual harassment contrasted sexual harassment in the workplace with sexual harassment in the street, observing that women "cannot simply walk away" from harassment in the workplace.¹⁰⁰ While the assumption that women can merely "walk away" from street harassment is overly simplistic and downplays the harm of street harassment,¹⁰¹ there is some merit to the argument that women are captive in the workplace and in school in a way that they are not in other places. Victims cannot "opt out" of the harassment without leaving their place of employment or study.¹⁰²

The third feature, responsiveness to control, provides a more practical justification for the differing treatment of workplace or school harassment and street harassment. In both workplaces and schools, there is a clearly identifiable "agent of effective control" to whom liability can be justifiably and usefully attached. Employers can control the behavior of their employees and others who enter the

99. See, e.g., Schultz, *supra* note 97, at 1756 ("[W]ork not only bestows a livelihood and sense of community, but also provides the basis for full citizenship, and even for personal identity. Like it or not, we are what we do." (footnote omitted)).

100. David B. Oppenheimer, *Workplace Harassment and the First Amendment: A Reply to Professor Volokh*, 17 BERKELEY J. EMP. & LAB. L. 321, 323 (1996).

101. See Bowman, *supra* note 85, at 580 ("[W]omen do not frequently talk about street harassment, not even with one another [T]he experience of street harassment is so common that it often seems to be an inevitable part of life.").

102. For more on the concept of "captive audiences," see Balkin, *supra* note 65, at 2306-18.

workplace;¹⁰³ school administration officials can do the same with students and staff.¹⁰⁴ While street harassment can be as traumatic and harmful as harassment in the workplace or school,¹⁰⁵ there is no clearly identifiable agent of effective control over the behavior of those on the street to whom liability can attach. Moreover, street harassers are difficult to apprehend because their actions may be fleeting. A victim of street harassment may not know who is harassing her, and indeed may not even be able to identify the harasser later.¹⁰⁶ She will have difficulty providing evidence that she was harassed, as street harassment is often ephemeral. These problems do not attend workplace and school harassment, rendering these environments more responsive to control.

IV. CASE STUDY: CYBER SEXUAL HARASSMENT

This Part applies the multiple-setting theory of harassment to address certain forms of online discrimination. First, I identify and define the kind of online abuse that qualifies as sexual harassment by way of several recent examples.¹⁰⁷ Second, I illustrate specifically how the two-prong inquiry would be applied to online sexual harassment and the benefits of this approach as compared to tort and criminal approaches.¹⁰⁸ Third, I suggest the statutory changes required to address sexual harassment online.¹⁰⁹ Fourth, I discuss the advantages of providing a remedy for cyber sexual harassment victims.¹¹⁰ Finally, I address several objections to the multiple-setting theory.¹¹¹

103. See, e.g., *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 761–62 (8th Cir. 2003) (finding an employer liable for harassment of an employee by co-workers when the employer knew of the harassment and failed to take corrective action).

104. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646–47 (1999) (holding the school board liable for money damages because the school retained substantial control over a student who sexually harassed another); *Baynard v. Malone*, 268 F.3d 228, 242–43 (4th Cir. 2001) (recognizing that school boards exercise control over teachers through the school principal).

105. See *Bowman*, *supra* note 85, at 535–40 (explaining that street harassment is a physical and psychological invasion of a woman’s privacy that causes women to feel disempowered, ashamed, and fearful of rape or attack).

106. See *id.* at 523 (noting that street “harassers are unacquainted with their targets”).

107. See *infra* Part IV.A.

108. See *infra* Part IV.B.

109. See *infra* Part IV.C.

110. See *infra* Part IV.D.

111. See *infra* Part IV.E.

A. *What Does Cyber Sexual Harassment Look Like?*

Online abuse has existed as long as the Internet itself has existed. The anonymity of cyberspace seems to bring out the tendencies to mockery and malice in users who might never dare to be anything but perfectly civil in encounters with others offline.¹¹² The best strategy of dealing with much of the insulting, juvenile behavior that occurs in cyberspace is sometimes simply to ignore it. However, when users attack (1) individuals belonging to historically subordinated groups; (2) personally and by name; (3) with graphic, vicious, and public abuse that interferes with these individuals' livelihood or education, this is not mere juvenile behavior but rather a form of discrimination.¹¹³

One high-profile case of cyber harassment involved the message board AutoAdmit.com, a forum where individuals could share information about top law schools, law school admissions, firms, clerkships, and generally how to succeed in law school.¹¹⁴ In March 2005, law professor Brian Leiter wrote about the site on his blog, *Leiter Reports*, calling attention to the rampant racism and sexism of AutoAdmit posters.¹¹⁵ In March 2007, the *Washington Post* ran a story about the numerous racist, sexist, and obscene posts on the site, highlighting the particularly vicious attacks on female law students.¹¹⁶ These posts included entire message threads devoted to "ranking" these students' bodies, discussing their alleged sexual activities, and expressing what users would like to do with them sexually—all in graphic and often violent detail.¹¹⁷ The women in question were often targeted by name, while the users posted under pseudonyms.¹¹⁸ In some cases, users posted personal information of their targets, including email addresses, instant messenger screen names, and the email addresses of their professors and former employers, and they encouraged site

112. Citron, *Cyber Civil Rights*, *supra* note 5, at 83.

113. *Id.* at 80–81 (concluding that when online harassers "select victims for abuse based on their race, ethnicity, gender, or religion, they perpetuate invidious discrimination" because, like "offline" harassment, such abuse "deprive[s] vulnerable individuals of their equal right to participate in economic, political, and social life").

114. Ellen Nakashima, *Harsh Words Die Hard on the Web; Law Students Feel Lasting Effects of Capricious Remarks*, WASH. POST, Mar. 7, 2007, at A1 [hereinafter Nakashima, *Harsh Words*].

115. Brian Leiter, *Penn Law Student, Anthony Ciolli, Admits to Running Prelaw Discussion Board Awash in Racist, Anti-Semitic, Sexist Abuse*, LEITER REP.: A PHIL. BLOG (Mar. 11, 2005, 6:12 PM), http://leiterreports.typepad.com/blog/2005/03/penn_law_studen.html.

116. Nakashima, *Harsh Words*, *supra* note 114.

117. David Margolick, *Slimed Online*, PORTFOLIO.COM (Feb. 11, 2009), <http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying/index.html>.

118. Citron, *Cyber Civil Rights*, *supra* note 5, at 71–72.

members to email their insults directly.¹¹⁹ Several of the women targeted knew nothing about the site until friends informed them or until they discovered the threads on Google searches.¹²⁰ Some of the women attacked on the site contacted the site's administrators and requested the offensive threads be removed.¹²¹ Instead of replying directly to the women, one administrator lashed back in an AutoAdmit post, saying, "Do not contact me . . . to delete a thread."¹²² He warned that if he kept receiving similar requests, he would "post them all on the message board for everyone to see."¹²³ In response to criticism for this response, the AutoAdmit administrators cited First Amendment ideals and asserted that the complaining women invited the attention they received by posting photographs on social networking sites such as Facebook and MySpace. In some cases, the administrators posted the women's complaints on the site, leading to message threads calling the women "bitches" and threats to punish them with rape, stalking, or other abuse.

Kathy Sierra, a software developer and the first woman to deliver a keynote speech at a conference on the Linux operating system, authors a popular blog called *Creating Passionate Users*.¹²⁴ At about the same time as the AutoAdmit controversy broke, Sierra began receiving death threats in the comments section of her blog.¹²⁵ One commenter wrote about slitting her throat and ejaculating; another posted a digitally altered photo of Sierra with a noose around her neck.¹²⁶ On another site, a user posted a manipulated photo that appeared to show Sierra with panties across her face, struggling to breathe. The picture was captioned: "I dream of Kathy Sierra . . . head first."¹²⁷ Sierra canceled several speaking engagements and suspended her blog in the wake of the threatening posts.¹²⁸

119. *Id.* at 73.

120. Nakashima, *Harsh Words*, *supra* note 114.

121. Margolick, *supra* note 117.

122. *Id.*

123. *Id.*

124. Ellen Nakashima, *Sexual Threats Stifle Some Female Bloggers*, WASH. POST, Apr. 30, 2007, at A1 [hereinafter Nakashima, *Sexual Threats*].

125. *Id.*

126. *Id.*

127. Victoria Murphy Barret, *Anonymity & the Net*, FORBES, Oct. 15, 2007, at 74, available at <http://www.forbes.com/forbes/2007/1015/074.html>.

128. *Blog Death Threats Spark Debate*, BBC NEWS (Mar. 27, 2007, 11:20 GMT), <http://news.bbc.co.uk/2/hi/technology/6499095.stm>.

Chelsea Gorman, a freshman at Vanderbilt University, was raped on her way to campus one evening.¹²⁹ Gorman left school for that semester, struggling with panic attacks and self-blame.¹³⁰ When she returned to school in the fall, she had only told her family and a few friends about the rape. In March 2008, a friend at another college called to tell her that someone had posted about her rape on a gossip site called JuicyCampus.com. On the Vanderbilt University page of the site, there was a post titled “Chelsea Gorman Deserved It.”¹³¹ The post not only announced the rape, but went on to read: “[W]hat could she expect walking around there alone. [E]veryone thinks she's so sweet but she got what she deserved. [W]ish I had been the homeless guy that f***** her.”¹³² The post became the talk of Vanderbilt's campus—both the virtual one on JuicyCampus, and the real one Gorman had to face every day.¹³³

On January 9, 1994, a University of Michigan student named Abraham Jacob Alkhabaz, who uses the name Jake Baker, submitted a story about raping, torturing, and murdering a fellow student to the alt.sex.stories Usenet news group.¹³⁴ Baker used the fellow student's real name in the story. Once notified of the story, the University of Michigan police searched Baker's computer and found a second similar story on his hard drive, using the same student's name and her accurate residential address, along with email correspondence with a man named Arthur Gonda. This correspondence included details of plans for the two men to meet so that they could carry out the real-life rape, torture, and murder that they fantasized about.¹³⁵ Judge Avern Cohn dismissed the case, ruling that there was no evidence Baker actually intended to act out his fantasies.¹³⁶

129. *20/20: Campus Gossip; Student's Horrific Ordeal* (ABC News television broadcast May 16, 2008) (transcript on file with *Maryland Law Review*).

130. Eamon McNiff & Ann Varney, *College Gossip Crackdown: Chelsea Gorman Speaks Out*, ABC NEWS (May 14, 2008), <http://abcnews.go.com/2020/Story?id=4849927&page=1>.

131. *Id.*

132. *Id.*

133. *Id.*

134. *United States v. Alkhabaz*, 104 F.3d 1492, 1493 (6th Cir. 1997).

135. *Id.* at 1498.

136. *United States v. Baker*, 890 F. Supp. 1375, 1388–90 (E.D. Mich. 1995), *aff'd* 104 F.3d 1492 (6th Cir. 1997). For commentary on the implications of the *Baker* case, see Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1335–37 (2005); Robert Kurman Kelner, Note, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287, 307–13 (1998); David C. Potter, *The Jake Baker Case: True Threats and New Technology*, 79 B.U. L. REV. 779, 794–800 (1999).

Sites that thrive on gossip and insults, like AutoAdmit and the now-defunct JuicyCampus,¹³⁷ direct much of their negative attention to women and girls, many of whom have no connection to their attackers nor are users of the sites in question.¹³⁸ The comments sections of many online newspapers,¹³⁹ blogs,¹⁴⁰ and video hosting sites¹⁴¹ are rife with obscene, sexist abuse. Social networking sites such as Facebook and MySpace have become highly effective outlets for vengeful men to attack ex-girlfriends, and an extraordinary number of sites are exclusively devoted to “revenge porn,” defined by the Urban Dictionary as “[h]omemade porn uploaded by ex girlfriend or (usually) ex boyfriend after particularly vicious breakup as a means of humiliating the ex or just for own amusement.”¹⁴² The effects on the victims of cyber sexual harassment include suicide, eating disorders, decreased motivation to work or study, and a host of psychological problems.¹⁴³

B. Harm and Control in Cyber Sexual Harassment

As discussed above, the multiple-setting approach to sexual harassment involves a two-pronged inquiry: (1) Is the harm that resulted from the harassing activity serious and discriminatory? (2) If so, is there an entity that can exert effective control over the harassing activity?

One could object that the harm caused by cyber harassment is by default less serious than that caused by workplace or school harassment because victims are not “captive” in the way they would be at

137. JuicyCampus folded in 2009, only to be replaced by another college campus gossip site. Nora Sorena Casey, *Juicy Campus Folds Citing Lack of Funds, Makes Way for New Gossip Site*, CHI. MAROON (Feb. 10, 2009), <http://www.chicagomaroon.com/2009/2/10/juicy-campus-folds-citing-lack-of-funds-makes-way-for-new-student-gossip-site>.

138. Citron, *Cyber Civil Rights*, *supra* note 5, at 65–66.

139. See Howard Kurtz, *Online, Churls Gone Vile*, WASH. POST, Mar. 26, 2007, at C1 (noting that “[t]he Washington Post’s Web site has been grappling with a surge in offensive and incendiary comments” and that the newspaper “does not have the resources to screen . . . comments in advance”).

140. See Citron, *Cyber Civil Rights*, *supra* note 5, at 76–78 (describing how female bloggers, particularly those of color, frequently receive abusive and sexually violent comments on their blogs).

141. See Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 387–89 (2009) (describing a string of obscene comments left on a YouTube video trailer for a documentary about a rock and roll camp for girls between the ages of eight and eighteen).

142. *Revenge Porn Definition*, URBANDICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=revenge%20porn> (last visited Dec. 28, 2011).

143. Azy Barak, *Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUTER REV. 77, 84–85 (2005).

work or in school.¹⁴⁴ In all but a few rare cases, an individual does not “need” to enter or participate in virtual spaces in the way that she “needs” to have a job or go to school. Sexual harassment law does not create a right to feel comfortable in every setting, and so perhaps the best way to deal with cyber harassment (so the argument goes) is the same as often suggested for dealing with offensive material on TV or in books and magazines: just don’t look at it.¹⁴⁵

The analogy is inapt, however, because the cyber harassment addressed by this Article targets specific individuals and does so in ways that produce widespread, potentially unlimited, effects. Because cyberspace is now intertwined with most people’s daily lives, a victim who simply chooses not to look at the cyber harassment against her does little or nothing to diminish its harmful impact. We could even speak of cyber harassment as producing a kind of *virtual captivity*. One has few options to effectively avoid or exit cyber harassment.¹⁴⁶ The effects of cyberspace harassment can manifest anywhere, to anyone, and at any time. Particularly if the online attack is indexable by a major search engine like Google, it is accessible to almost anyone (the target’s co-workers, fellow students, clients, children) almost anywhere (at her place of work, her school, her home, her doctor’s office).¹⁴⁷

Thus, targeted sexual harassment of women in cyberspace may not only produce all of the effects that “real-life” harassment does,¹⁴⁸ but also has the potential to be even more pernicious and long-lasting than “real-life” harassment. Three features of cyberspace exacerbate the impact of harassment: anonymity, amplification, and permanence.

(1) Anonymity: the increased opportunity for harassers to attack their targets anonymously, making it difficult if not impossible for the targets to engage in self-help or legal remedies;

(2) Amplification: the capacity for harassers to quickly find a wide audience for their harassment, including users who will join in the harassment;

144. Cf. Balkin, *supra* note 65, at 2310–12 (explaining how the First Amendment “captive audience” doctrine may apply to sexual harassment cases in the workplace).

145. See, e.g., Ann Althouse, *Let’s Talk About AutoAdmit*, ALTHOUSE (Mar. 16, 2007, 6:36 AM), <http://althouse.blogspot.com/2007/03/lets-talk-about-autoadmit.html>.

146. See, e.g., Margolick, *supra* note 117 (explaining that website moderators often refuse to delete any offensive material or comments).

147. See, e.g., Nakashima, *Harsh Words*, *supra* note 114 (describing the myriad ways and places individuals can access online information).

148. See Barak, *supra* note 143, at 84–85 (describing the real life harms produced by offline sexual harassment).

(3) Permanence: online attacks, which often include personal information about their targets, such as home addresses and telephone numbers, are very difficult to erase.¹⁴⁹

At the same time, cyber sexual harassment is in theory far more responsive to control than much real-life harassment. Some of the very features of cyberspace that magnify the harm of harassment—for instance, permanence—also make such harassment easier to regulate. Much cyber sexual harassment is in some way recorded, and much is also date- and time-stamped; thus, the evidentiary problems that often plague real-life harassment claims are lessened.¹⁵⁰ Secondly, there is a clearly identifiable agent of effective control over sites where harassing activity takes place. Website operators have effective control over their sites and those who enter them, at least in theory.¹⁵¹ They can control the behavior of users on their sites at least as effectively as employers and school administrators can control individuals in their respective environments.

Let us use AutoAdmit as an example to illustrate this. Say that *C* is a law student who has just been hired at a Biglaw firm for her 2L summer. After her first few weeks she notices that she never gets to work on the important cases being handed to the rest of the summer associates, relegated instead to making copies and doing simple research. One day she overhears an associate making reference to the “racy stuff about *C*” on a site called AutoAdmit and how he couldn’t imagine telling an important client that *C* is working on his case. *C* has never heard of AutoAdmit; she looks it up and discovers that there are several message threads about her, including allegations that she has multiple STDs, is promiscuous, and entered herself into a law student beauty contest. Some posters have written things like “follow *C* into the firm showers and snap a pic!” and “I can’t wait until *C* starts back at ___ Law School—I’ll be waiting in the bushes!” *C* finds it difficult to concentrate on her job; she begins missing work because she does not want to face the associates, all of whom she thinks have probably read the posts. She decides to quit halfway through the summer, and because of this does not receive an offer of permanent employment from the firm. When school resumes, *C* hears students

149. For a more detailed discussion of these features, see Franks, *supra* note 7, at 255–56.

150. See Margolick, *supra* note 117 (noting that the identity of many, although not all, of the authors of offensive comments were discovered through prior posts and information given by Internet providers under subpoena).

151. See Leiter, *supra* note 115 (highlighting a comment from an administrator of a “more grown-up prelaw site” that describes how he or she keeps obscene comments off the website).

talking about the posts in class. She is also anxious about the posts that suggest someone at the law school might be stalking her. C misses several classes during the term, and starts to contemplate leaving law school altogether.

C has experienced the effects of sexual harassment in both her workplace and her school. Her harassers may or may not include co-workers and fellow students. But who should be held liable?

The recommendation of this Article is that we should hold liable the agent with effective control over the setting of the harassment—in this case, the website operators.¹⁵² Like employers and school administrators in straightforward cases of Title VII and Title IX sexual harassment, website operators have the most information about the harassment. They know how prevalent and vicious it is and whether certain targets are being harassed by multiple users, and they also may have identifying information about the users. Secondly, they have control over the users of their site. Much as employers can fire employees at will, or restrict employees' behavior, or eject abusive customers, website operators can warn or ban users who post harassing messages. Finally, from a public policy perspective, it is best that website operators put policies into place that discourage harassment from occurring in the first place. Especially given the permanence of online expression, it is better to prevent the harm from occurring than to try to mitigate it after the fact.¹⁵³

Let us walk through how this would work. First, let us consider how “real space” employers and educational institutions deal with sexual harassment and see how this could translate into how website operators deal with sexual harassment. In real space, employers and educational institutions generally set out sexual harassment policies that put employees on notice about what will be considered impermissible conduct. This is not necessarily an easy task; employers and educational institutions must walk a fine line to make a sexual harassment policy that properly deters unwelcome and harmful speech and actions while not imposing a “civility code” that strips the workplace of all flirtation, jokes, or banter.¹⁵⁴ A well-written policy in

152. For more on why my suggestion is that liability should attach to website operators and not Internet service providers or search engines, see Part IV.E.2.

153. See, e.g., 29 C.F.R. § 1604.11(f) (1985) (“Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions . . . , and developing methods to sensitize all concerned.”).

154. See Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employer's Paradox to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 *FORDHAM L. REV.* 1517, 1521

itself reduces the incidence of harassing conduct and provides a guide for evaluating and addressing the harassing behavior that does occur. Consider the sexual harassment policy of the University of Chicago (particularly useful in that the University is both an employer and an educational institution) as an example:

Sexual harassment encompasses a range of conduct, such as unwanted touching or persistent unwelcome comments, e-mails, or pictures of an insulting or degrading sexual nature, which may constitute unlawful harassment, depending upon the specific circumstances and context in which the conduct occurs. For example, sexual advances, requests for sexual favors, or sexually-directed remarks or behavior constitute sexual harassment when (i) submission to or rejection of such conduct is made, explicitly or implicitly, a basis for an academic or employment decision, or a term or condition of either; or (ii) such conduct directed against an individual persists despite its rejection.¹⁵⁵

The University of Chicago policy also makes clear that simply because an individual might perceive certain behavior as harassing, it will not be considered as such unless there is objective reason to do so. This is in line with what courts have considered to be the correct perspective from which to evaluate harassing conduct, namely, a reasonable person standard.¹⁵⁶

A person's subjective belief that behavior is offensive, intimidating, or hostile does not by itself make that behavior unlawful harassment. The behavior must also be objectively unreasonable.¹⁵⁷ Expression occurring in an academic, educational, or research setting is considered as a special case and is broadly protected by academic

(1999) ("Employers are thus subjected to a double-edged sword: potential liability to the victim of the harassment if they fail to take prompt and appropriate corrective action, and the potential liability to the 'angry man victim' if they take such action.").

155. Univ. of Chi., *Policy on Unlawful Discrimination and Harassment 2* (Adopted by the Council of the University Senate, February 28, 2006) [hereinafter Univ. Chi. Policy], available at hrservices.uchicago.edu/fpg/policies/docs/UnlawfulDiscrimHarassPolicy2006.pdf.

156. As Miranda McGowan has pointed out, this standard, along with the "severe or pervasive" standard that the courts have set out for sexual harassment, should reassure free-speech critics of sexual harassment law that Title VII does not encourage the purging of mildly offensive, infrequent comments from the workplace. Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT. 391, 434-35 (2002).

157. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998).

freedom.¹⁵⁸ The University of Chicago's sexual harassment policy offers some insight: "Such expression will not constitute unlawful harassment unless . . . it is targeted at a specific person or persons, is abusive, and serves no bona fide academic purpose."¹⁵⁹

The policy also explains the procedures for dealing with sexual harassment. An individual may discuss the harassment with a "faculty member, dean, or supervisor" and ask that person to informally approach the alleged harasser.¹⁶⁰ If this does not resolve the issue or if the individual prefers, she can contact a Complaint Advisor to discuss options for addressing the harassment. The individual can then decide to pursue mediation, an informal investigation, or a formal investigation into the harassment.¹⁶¹ These channels may produce a variety of results, depending on the circumstances surrounding the harassment. The University can assess the seriousness of the complaint by considering the substance of the harassing behavior; any previous complaints from others of sexual harassment by the person in question; and any particular mitigating or exacerbating circumstances. On that basis, the University can make an informed decision about what action to take—to do nothing, issue a warning, order leave without pay, or termination among other options.¹⁶²

A similar process could be adopted by website operators. If website operators were held liable for sexual harassment, they too would have an incentive to try to make sure the users of their sites do not engage in sexual harassment.¹⁶³ They could accomplish this in the first instance the same way that employers and educational institutions do: by adopting sexual harassment policies that give notice about impermissible behavior to the users of their space. Creating such policies is admittedly a slightly more complex project in the cyberspace setting because website policies, unlike real space policies, must address multiple-setting harassment. Thus, while website operators could borrow much of the language used in workplace or educational institution sexual harassment policies, they would have to

158. See, e.g., *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996) (finding that a community college's sexual harassment policy was unconstitutionally applied to an English professor, who argued that the policy violated his academic freedom).

159. Univ. Chi. Policy, *supra* note 155, at 1.

160. *Id.* at 2.

161. *Id.* at 3.

162. *Id.* at 4.

163. Cf. Melanie Hochberg, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. REV. 235, 275-76 (1999) ("By holding schools liable for failing to take remedial action in response to peer sexual harassment, the judicial system can provide an incentive for schools to adopt anti-harassment policies.").

create language to express the link between behavior on the website and effects on targeted individuals' work or school experiences. This clause could be added to standard clauses explaining the limited scope of the policy. The University of Chicago policy quoted above made clear that only behavior that is "objectively unreasonable" would be considered harassment;¹⁶⁴ website operators could add that only behavior that a reasonable person would consider likely to have a negative impact on the targeted person's employment or educational life would be considered harassment. Moreover, given the potentially vast amounts of information posted to a given website, website operators should be held liable only for harassment of which they have actual, and not merely constructive, knowledge, following Title IX's "deliberate indifference" standard rather than Title VII's more demanding standard.

C. Statutory Changes Required for Implementation

The implementation of this approach would, at a minimum, require a change in both the language of current federal sex discrimination law and a change in Section 230 of the CDA.¹⁶⁵ Although "hostile environments" can plausibly be created in workplaces by actions not under employers' control, Title VII is written exclusively in terms of employer responsibilities.¹⁶⁶ The language of Title IX is not similarly restricted to the responsibilities of school administrations, but the doctrine has developed in a similar fashion to Title VII—that is, with the tacit assumption that only harm within the school administration's control can be characterized as sex discrimination.¹⁶⁷ The statutes would have to be amended to explicitly reflect the multiple-setting conception of sex discrimination. Given the various limitations of the single-setting approach, however, there is good reason to consider creating a new federal statute on discrimination.¹⁶⁸

Section 230 of the CDA presents a further obstacle to adopting the multiple-setting approach specific to cyber harassment, one that underscores the need for a civil rights remedy for online discrimination. This section states that "[n]o provider or user of an interactive

164. Univ. Chi. Policy, *supra* note 155, at 2.

165. 47 U.S.C. § 230 (2006).

166. *See* 29 C.F.R. § 1604.11(d) & (e) (1985).

167. *See* *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645 (1999) (finding that a funding recipient must have substantial control over both the harasser and the context in which the harassment occurred in order to be found liable under Title IX).

168. I address what this statute should look like in another work. *See* Mary Anne Franks, *No More Safe Spaces: A New Standard for Discrimination Law* (on file with author).

computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁶⁹ This has effectively “immunized” web hosts and other Internet entities from liability for the unlawful activities of third parties.¹⁷⁰ Given that online harassers are often anonymous, this means that victims of online harassment in many cases can bring no cause of action at all because there is no party to hold accountable.¹⁷¹

The “immunity” provided to online entities is not, however, absolute. Section 230 explicitly makes exceptions for federal criminal law and intellectual property law.¹⁷² The most direct way to remove the obstacle of CDA Section 230 for sexual harassment cases would be to revise it to include express language on compliance with federal discrimination law.¹⁷³ This amendment would ideally include a subsection that explains how website operators, as agents of effective control over websites and message boards, can be held liable for sexual harassment that produces effects in settings protected under current sexual harassment doctrine.

D. Advantages of a Cyber Sexual Harassment Remedy

In addition to providing a much-needed remedy for a serious harm, regulating cyber sexual harassment the way suggested here has the benefits of relatively low implementation costs, relatively low liberty costs, and the potential for great deterrent effect—in short, this remedy has the virtue of efficiency.

1. Efficiency

Instituting and enforcing a sexual harassment complaints process on websites is easier than it is in real-space workplaces and educational institutions. First, many websites already have a moderation policy

169. 47 U.S.C. § 230(c)(1) (2006).

170. *See* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”).

171. *See* *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (holding that allowing registered users to post comments under multiple screen names did not make the website operator liable under Section 230).

172. 42 U.S.C. § 230(e)(1)–(2) (2006).

173. Reform of CDA Section 230 would be required for most proposals for regulating cyber harassment, not only the one advanced here. *See* KrisAnn Norby-Jahner, “*Minor*” *Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability*, 32 *HAMLIN L. REV.* 207, 243 (2009) (advocating for statutory clarifications of Section 230 so that Internet service providers can be held liable for creating an online hostile environment).

that includes warnings and sanctions for users who violate the policy.¹⁷⁴ For these websites, all that would be required to comply with a multiple-setting theory would be an explicit statement regarding sexual harassment in the moderation policy, and heightened attention to allegations of sexually harassing posts. Secondly, a great deal of Internet communication is recorded in some way, often in written form.¹⁷⁵ In real-space workplace or school harassment, disagreements can arise over what someone actually said or did. It is thus always possible in real-space harassment that innocent people will be accused of sexual harassment. On websites, there often is no dispute as to whether the allegedly harassing behavior took place, as the posts are in written form (and usually date- and time-stamped). Many moderators do not let users delete or edit their own posts, so it would be difficult for harassers to cover their tracks.

There are also lower liberty costs to regulating online harassing behavior than offline harassing behavior. If an innocent person is accused of sexual harassment in a real-space environment, and the employer or educational institution takes punitive action, the results can be devastating. The worst that can happen to an alleged harasser on any given website is that his privileges of participating on that website will be restricted or taken away. This is a far lower liberty cost than that associated with firing an employee or expelling a student. In this sense, regulating online sexual harassment has the benefit of more closely tying the sanction to the offending behavior than is possible in the offline world. There are also lower privacy risks with this approach than, for example, in a traceability approach. Website operators would not necessarily need to rely on tracking IP addresses or other identifying information. All a moderator needs to know is the harasser's username, which is already available.¹⁷⁶

As noted above, perhaps the greatest victory of sexual harassment law is the *ex ante* effects it has on institutional behavior. This is important for many reasons, not least because of the paradox of *ex post* remedies. Many victims of cyber harassment have been made unwillingly into objects of sexualized attention. Remedies such as defama-

174. See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1126 (2005) (discussing how Internet service providers like America Online can shut down message boards when members violate the terms of service).

175. See Donald P. Harris et al., *Sexual Harassment: Limiting the Affirmative Defense in the Digital Workplace*, 39 U. MICH. J.L. REFORM 73, 93–94 (2005) (acknowledging that companies employ monitoring technology from which one can audit online transactions to monitor sexual harassment in the workplace).

176. There is, of course, the problem of multiple monikers—that a banned user can simply re-register under a new pseudonym. See *infra* Part IV.E.4.

tion suits or criminal charges for threats require the victim to draw even more attention to this non-consensual sexual objectification. Filing a defamation or privacy suit often means magnifying a victim's feelings of humiliation and exposure. This means that many victims will be deterred from taking legal action against their harassers, and that those who do will suffer greatly for it.¹⁷⁷ Moreover, for those harassers whose intent is to sexually humiliate victims in as public a manner as possible, the threat of litigation will not serve as a deterrent, and may even be welcomed by the harasser.

The AutoAdmit lawsuit provided one illustration of the negative outcomes of current litigation strategies. A poster who called himself AK47 and who made several graphic and sexually explicit claims about the two female plaintiffs wrote a letter to the women, pleading to be dropped from the suit.¹⁷⁸ While apologizing for his conduct, however, "he threatened to seek help online to corroborate all of the awful things said about the two women in order to defend himself."¹⁷⁹ Given that truth is an affirmative defense to defamation,¹⁸⁰ using defamation law to combat harassment can produce perverse incentives in would-be harassers; one can well imagine harassers actively seeking out "proof" of their claims, such as medical records or confidential sources. Whatever the outcome of such attempts, the reputational and emotional harm to victims could well be magnified.¹⁸¹

Moreover, individuals who do appeal to web hosts are vulnerable to increased harassment. The AutoAdmit case is illustrative also of this point. As discussed above, the owners of the site actually posted to the message board some of the emails that women sent them re-

177. See J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 345-46 (1995) ("The harassment victim may feel both embarrassment concerning the events and fear that a complaint will lead to retaliation against her.").

178. Sam Baynard, "AK47" Files Motion to Quash in AutoAdmit Case, CITIZEN MEDIA L. PROJECT (Feb. 28, 2008, 10:59 AM), <http://www.citmedialaw.org/blog/2008/ak47-files-motion-quash-autoadmit-case>.

179. Margolick, *supra* note 117.

180. See, e.g., *Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir. 1981) (describing the common law affirmative defense of truth to a defamation claim).

181. The recent Liskula Cohen case offers yet another illustration. Her outed harasser, Rosemary Port, claims that Cohen "defamed herself" by bringing the suit. "Before her suit, there were probably two hits on my Web site: One from me looking at it, and one from her looking at it That was before it became a spectacle." Laura Schreffler & Rich Schapiro, *Model Liskula Cohen Still Not Getting Apology from Blogger Rosemary Port*, N.Y. DAILY NEWS (Aug. 26, 2009) http://articles.nydailynews.com/2009-08-26/gossip/17930132_1_anonymous-blogger-liskula-cohen-apology (internal quotation marks omitted). While Port's blaming of Cohen is self-serving and misses the point, it certainly seems to be true that the suit brought Port's site much more publicity.

questing the removal of defamatory or threatening posts, which spurred users to attack them with even more vehemence.¹⁸²

The institutional liability aspect of sexual harassment law means that agents of effective control have incentives to set their environmental defaults to non-harassment. It is to be hoped that the same will be true of cyber sexual harassment. If website operators are vulnerable to liability for sexual harassment, they will likely adopt policies very similar to those already seen in workplaces and schools, with similar deterring effects. One of the reasons cyberspace harassment is so widespread has to do with the seemingly costless nature of such behavior.¹⁸³ If a website user knows he will not suffer any negative consequences from harassing someone (including being identified as the harasser—a possibility much easier to avoid in cyberspace than in real life), there is very little to stop him from doing it. If, however, there is a policy in place on the website that includes the penalties for harassment—probably deletion of harassing posts and banning users—a would-be cyber harasser would at least have to recalculate the costs and benefits of harassing. If his harassing post is simply going to be deleted, and he may be prevented from posting again on that site, he may very well conclude that it simply is not worth it to harass. If one assumes, as seems reasonable, that some substantial number of cyberspace harassers are opportunistic rather than pathological, imposing costs to online harassment should get rid of much of that behavior.

The harassment that does occur could be dealt with by some combination of direct observation and a reporting system for complaints, just as it is in real space. If a website operator moderates the site herself and sees a harassing post, she can warn the poster directly and/or ban him if he has posted harassing messages before. If she does not moderate the site herself, or if there is so much activity on the site that monitoring all posts is not possible or practical, the website operator can establish a complaints policy that would enable individuals to alert the owners about harassing posts. The website operator or her designated moderator(s) could then make the assessment that employers do: consider the nature of the allegedly harassing post; whether there have been other complaints about the user in question; any particular features of the setting or “space” that would mitigate for or against the behavior in question. The website operator could

182. See Margolick, *supra* note 117.

183. See Norby-Jahner, *supra* note 173, at 220 (“The dehumanization of the online peer relationship eliminates physical and social cues of the victim’s reaction to the harassment, and the harassers do not have to face the consequences of their behavior.”).

then decide whether the appropriate response is to do nothing, resolve the issue informally, issue warnings, delete postings, or ban the user in question.

For these reasons, it can be hoped that cyberspace sexual harassment policies and procedures would be even more effective at resolving sexual harassment non-litigiously than real-space procedures. A cyber sexual harassment remedy that involves liability for website operators thus imposes very low burdens on both website operators and good-faith website users, while preventing harassers from using websites as launching pads for sexual harassment with effects on victims' work or school experiences.

2. *The Importance of a Discrimination Remedy for Cyber Sexual Harassment*

One might argue that while cyber sexual harassment is a serious problem in need of legal response, tort and criminal approaches are preferable to an anti-discrimination remedy. It is certainly true that much cyber harassment is legally cognizable as defamation, invasion of privacy, and threats.¹⁸⁴ There are several reasons, however, that these remedies are not fully adequate to address cyber sexual harassment. First, a significant amount of online harassment does not fit easily into any of these categories, and much of what does fit is better or more completely understood as sexual harassment. Second, as discussed above, these remedies require victims to publicly draw attention to the harassing conduct, which, in the case of sexualized harassment, can harm the victim more than the harassment itself. Along these lines, such remedies can produce perverse ex ante incentives; that is, if a harasser's intent is to sexually humiliate his victim in the most public way possible, he will not be deterred by and may even welcome the possibility of litigation. Third, these remedies often rely heavily on the ability to identify individual harassers, which risks undermining significant liberty interests in online anonymity and, in any event, cannot be perfectly, or even near-perfectly, achieved.

While much cyber harassment does indeed take the form of defamation, invasions of privacy, and threats, a great deal of it does not. Cyber harassers are often a legally savvy bunch; many of the AutoAdmit harassers, for example, were lawyers or law students.¹⁸⁵ Further, it

184. Citron, *Cyber Civil Rights*, *supra* note 5, at 86–89.

185. One such harasser posted on AutoAdmit: "We're lawyers and lawyers-in-training, dude. Of course we follow the law, not morals." Nakashima, *Harsh Words*, *supra* note 114 (internal quotation marks omitted).

is not difficult for harassers to circumvent legal prohibitions on threats or defamatory language by formulating sexual and/or violent comments in the form of opinions. For example, the AutoAdmit poster who wrote “that women named [the plaintiff in the AutoAdmit suit] should be raped,” defended his remark by maintaining that it was “a suggestion, not a threat.”¹⁸⁶ Statements made with defamatory intent can be carefully phrased to avoid being identified as such. Instead of posting, “I have it on good authority that [X] has rape fantasies”¹⁸⁷ (possibly defamatory), a harasser can write, “I think [X] would like to be raped” (not necessarily defamatory).

In general, there are two large-scale problems with tort or criminal responses: one is largely practical, and the other is largely symbolic. The first involves placing too much emphasis on the individual identity of the perpetrator, and the second involves placing too much emphasis on the individual identity of the victim.

a. Anonymity and Immunity: Navigating Between the Scylla of Net Architecture and the Charybdis of CDA Section 230

Tort and criminal remedies for cyber harassment necessarily rely on the identification of harassers and/or treating content providers as publishers. However, the combination of what could be called the “architectural anonymity” of the Internet and the immunity provided by CDA Section 230 presents several obstacles to these remedies. The anonymity—or, more precisely, pseudonymity—provided by the Internet’s architecture, combined with Internet service provider (“ISP”) immunity provided by CDA Section 230, proves to be a disheartening combination for those seeking legal redress for cyber harassment.¹⁸⁸ Since most harassers use pseudonyms, it is very difficult for a victim to identify the harasser on her own, thus making it difficult for her to

186. Margolick, *supra* note 117. Note that it is possible that some of these types of comments can be pursued under the “true threats” doctrine. See *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc) (“A true threat, that is one ‘where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment [*sic*].” (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990))).

187. Message thread title on *AutoAdmit.com*, http://www.autoadmit.com/thread.php?thread_id=613270&forum_id=2&PHPSESSID=e0c219ffde39e0cc844a7db6ae3fdc7c. The author of this Article has chosen to edit out the names of the individual women targeted by these cyber harassers.

188. See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120–25 (9th Cir. 2003) (finding that CDA Section 230 provided an Internet matchmaking website with statutory immunity from tort liability for the posting of defamatory material); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–34 (4th Cir. 1997) (holding AOL to be statutorily immune from suit under Section 230 for defamatory comments posted by a third party).

sue or report him. While a victim can ask a content provider to reveal the name of a harasser, it is not yet settled whether content providers are obligated to release it or might in fact be prevented from releasing it. In a recent case, a woman pursuing a defamation suit against an anonymous blogger successfully forced Google, who provided the web log service, to reveal the name of the harasser.¹⁸⁹ The fate of this case is unclear; the outed blogger is currently suing Google for \$15 million, alleging that Google “breached its fiduciary duty to protect her expectation of anonymity when it complied with the court order.”¹⁹⁰

Even if content providers can be legally forced to reveal a user’s identity, they may not, in many cases, be able to do so. Many web hosts do not keep track of their site visitors’ IP addresses, or at least claim not to.¹⁹¹ Even those that do record IP addresses do not store them indefinitely; by the time a subpoena is issued, the relevant information may no longer exist.¹⁹²

In response to the pseudonymity issue, one could argue that website operators should be required to implement some minimally invasive traceability procedures. However, there are two problems with this. One is an ethical concern about protecting legitimate and valuable online anonymity; the other is a practical concern about the increasing use of anonymizing software. In opposition to the first point, however, Daniel Solove has argued that requiring some record to be kept of IP addresses does not necessarily strip away anonymity, but simply ensures traceability.¹⁹³ Traceability preserves the ability to speak anonymously, while providing a way for users’ real identities to be linked to their pseudonyms if there is a compelling reason for doing so.¹⁹⁴

189. *Cohen v. Google*, 887 N.Y.S.2d. 424, 429–30 (N.Y. Sup. Ct. 2009).

190. Bobbie Johnson, *Outed ‘Skank’ Blogger to Sue Google for \$15m*, THE GUARDIAN ONLINE (Aug. 24, 2009, 12:19 PM), <http://www.guardian.co.uk/technology/2009/aug/24/blogging-google> (internal quotation marks omitted).

191. See Citron, *Cyber Civil Rights*, *supra* note 5, at 118 (“Consider the AutoAdmit case, where the plaintiffs have been unable to identify most of their attackers because AutoAdmit does not log visitors’ IP addresses.”). In some cases, web hosts actively avoid gathering any identifying information about their users. This is precisely what the owners of AutoAdmit did, or claimed to do. See Sam Bayard, *Plaintiffs Seek Information to Unmask Pseudonymous Defendants in AutoAdmit Case*, CITIZEN MEDIA L. PROJECT (Jan. 28, 2008), <http://www.citmedialaw.org/blog/2008/plaintiffs-seek-information-unmask-pseudonymous-defendants-autoadmit-case>.

192. See Citron, *Cyber Civil Rights*, *supra* note 5, at 118 (noting that ISPs routinely delete data every sixty days).

193. SOLOVE, *supra* note 4, at 146–47.

194. *Id.*

On the second point, even if the content provider does have the information, and produces it in a timely fashion, a victim may still face insuperable challenges in identifying the harasser. Anonymizing software such as Tor and Privoxy can prevent the discovery of a user's true IP address, ensuring that a careful harasser might never be identified.¹⁹⁵ While using anonymizing software may not yet have become *de rigueur* for Internet users (the software can be cumbersome and costly) technological advances are making anonymizing techniques increasingly accessible.

Thus, remedies that depend on identification of online harassers are not likely to succeed. This makes criminal law approaches particularly unworkable in the online harassment context. In tort, of course, there is still another option if pursuing the individual tortfeasor is impractical or impossible: vicarious liability. This option, however, is currently barred by Section 230 of the CDA.¹⁹⁶ Section 230 has been interpreted by some courts to completely immunize ISPs from liability for torts committed by users of their services.¹⁹⁷ This creates an obvious obstacle for victims of defamation and invasions of privacy,¹⁹⁸ as they can neither sue the ISP nor expect that the ISP will assist them in obtaining identifying information about harassers.

Recent case law, however, suggests that immunity does not apply if the entity in question is an "Information Content Provider" or an "Internet Content Facilitator" rather than an ISP.¹⁹⁹ The distinctions can be somewhat difficult to draw, but broadly speaking, if an entity helps create content, or if it edits content so that it can be more easily indexed by search engines, it is not acting solely as an ISP and is not

195. Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, 1465–66.

196. 47 USC § 230(c)(1) (2006) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

197. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418–20 (5th Cir. 2008); Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669–71 (7th Cir. 2008); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 984–86 (10th Cir. 2000); Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44, 50–51 (D.D.C. 1998).

198. CDA Section 230 does not provide immunity for either federal criminal liability or intellectual property claims.

199. *Compare* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162–63, 1164 (9th Cir. 2008) (en banc) (holding that hosting an online questionnaire could make a website liable under CDA Section 230 as a content provider because the website "created the questions and choice of answers"), *with* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that an online questionnaire was not enough to disregard immunity because "no profile has any content until a user actively creates it" and "the selection of the content was left exclusively to the user").

immunized from liability.²⁰⁰ This is not yet a settled area of law, however, and it remains unclear just what actions and conditions an Internet entity can take without being exposed to liability.

In any event, none of the various calls for changes to CDA Section 230 (including the changes suggested by this Article) would resolve the architectural anonymity issue. That issue may very well prove practically unsolvable, or at least unsolvable without seriously undermining users' liberty interests in privacy and anonymity.

b. Sexual Harassment Is a Group, not Merely an Individual, Harm

Even those instances of cyber harassment that could be challenged on the grounds of defamation, invasion of privacy, or threats should be characterized additionally as sexual harassment. Such a categorization adequately expresses the discriminatory impact of the harm. This does not mean that the theory of sexual harassment must be used exclusively in sexualized harassment cases, but rather to emphasize the importance of making this legal and conceptual category available to harassment victims.

On the one hand, tort and criminal law emphasize, with a few exceptions, the importance of injury done to individuals. Anti-discrimination law, on the other hand, emphasizes the importance of publicly correcting prejudice and violence against historically subordinated groups. When a woman is discriminated against because of her gender, she is not only being harmed as an individual, but also as the member of a group. Anti-discrimination law is charged with the responsibility to make clear society's condemnation of prejudice in general as well as to address individual injury. It serves an important and unique expressive function in a progressive society.

E. Objections

I address four objections in this section. The first is a concern about the effects of sexual harassment law on free speech generally, and in cyberspace particularly. The second objection is to my choice of website operators for liability, as opposed to ISPs or search engines. The third objection is a concern about efficacy; namely, is a legal response the best way to deal with the problem of cyberspace sexual harassment? The fourth objection is somewhat related to the second,

200. See *Roommates.com*, 521 F.3d at 1162–63 (“[A]s to content that [a website] creates itself, or is ‘responsible, in whole or in part’ for creating or developing, the website is also a content provider.”).

but considers that the prevalence and intensity of cyberspace sexual harassment might itself actually be driven in part by sexual harassment law and policy in the workplace and in schools.

The first objection—concern about the effects of cyber sexual harassment law on free speech—is perhaps the most important and complex. Because this is the case, I only sketch some of its main features here and leave a fuller discussion of it to another article.²⁰¹ The other three objections I will address in more detail.

1. *Sexual Harassment Law's Effects on Free Speech*

Some scholars believe that hostile environment sexual harassment law chills free speech.²⁰² At its foundation, this objection maintains that at least some forms of speech regulated by sexual harassment law are constitutionally protected speech. Eugene Volokh's concern, for example, seems to be that some of the kinds of speech and conduct found to constitute a hostile environment are not only innocuous, but are often forms of valuable expression.²⁰³ Volokh is also concerned that employers will implement sweepingly restrictive speech codes in order to avoid liability for hostile environment sexual harassment.²⁰⁴ Some scholars have argued that Volokh's concern on both counts is greatly exaggerated.²⁰⁵ Others have simply maintained that harassing speech is not constitutionally protected speech, and, as such, restricting it does not violate the First Amendment.²⁰⁶

One very basic point to make here is that to some extent, the expansion of sexual harassment law I am suggesting does not really change the terms of the free speech debate over sexual harassment.

201. See Franks, *supra* note 168.

202. See David E. Bernstein, *Hostile Environment Law and the Threat to Freedom of Expression in the Workplace*, 30 OHIO N.U. L. REV. 1 (2004) (examining the effects of hostile environment law on free speech in the workplace); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (noting the extent to which the widely adopted broad definition of hostile environment law is inconsistent with the traditional jurisprudence of the First Amendment); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (discussing the types of free speech that are restricted by hostile environment workplace harassment law).

203. Volokh, *supra* note 202, at 628–29.

204. *Id.* at 637–39.

205. See, e.g., McGowan, *supra* note 156, at 431–36 (arguing, among other things, that sexual harassment law produces no more uncertainty or over-regulation than dignitary torts).

206. See, e.g., Jennie Randall, *"Don't You Say That!": Injunctions Against Speech Found to Violate Title VII Are Not Prior Restraints*, 3 U. PA. J. CONST. L. 990, 991 (2001) (arguing "that an injunction against speech found to violate Title VII of the 1964 Civil Rights Act is not a prior restraint" on free speech).

If one believes that sexual harassment law constitutes censorship of constitutionally protected speech in the workplace or school, one would presumably also believe that restricting it in cyberspace is unconstitutional. Likewise, if one does not believe that harassing speech is constitutionally protected, any concerns one might have about expanding Title VII and Title IX liability to website operators would presumably not be driven by First Amendment concerns. That is, a person who is convinced that sexually harassing speech could sometimes be constitutionally protected will not support my suggestion of expanded Title VII and Title IX liability, and no one who is convinced that sexually harassing speech is not constitutionally protected should object to the recommendations of this Article on First Amendment grounds.²⁰⁷

Some might believe, however, that sexually harassing speech is not constitutionally protected in workplaces and in schools, and to a limited extent in homes and prisons, but is protected everywhere else. Those in this group might thus object to the application of sexual harassment law to online environments, even though they support their application to the workplace and the school. Miranda McGowan might fall into this group; while largely refuting Volokh's claims about the danger of employers implementing impermissibly restrictive sexual harassment policies, McGowan also maintains that public spaces and workplaces intended to foster expressive discourse should (and will) be more protective of First Amendment concerns.²⁰⁸ McGowan places considerable weight on the specific features of the workplace to justify the restrictions on speech that sexual harassment law entails.²⁰⁹ One could argue that websites do not share these specific features, and in fact are often explicitly committed to "public discourse."

207. For more on the debate over sexual harassment and the First Amendment, see 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 (1996); Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1; Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment from Expression*, 23 REV. LITIG. 349 (2004); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377.

208. See McGowan, *supra* note 156, at 425–26 (noting that museums are the kind of institutions that are intended to foster free expression and that such forums have "significantly stronger First Amendment defense[s] than a [typical workplace]").

209. Among those features are the often face-to-face nature of employment relations, the economic aspect of employment, and the "instrumental" purpose of workplace speech. *Id.* at 424–25.

One could also argue, somewhat along the same lines, that employers and school officials owe a duty of care to their employees and students that website operators simply do not owe to their users. These are important considerations. As I argue above,²¹⁰ however, if one believes that sexual harassment law legitimately restricts the speech in workplaces and schools because they are particularly significant and public sites of potential gender inequality, then exempting cyberspace sexual harassment that accomplishes the same harms undermines the goals of sexual harassment law. Regarding the question of duty of care, one could analogize websites to public accommodations such as restaurants and hotels to suggest that while the duty of care may not exactly track that which exists between employer and employees, or school officials and students, the relationship between website operators and users is also not one of complete indifference.

2. *Why Website Operators?*

In this Article, I argue that liability for cyber sexual harassment should attach to website operators and not to either search engines or ISPs. The reasons for this require some explanation. On the question of search engines, it is clear that much of the damage caused by cyber harassment is facilitated by Google's indexing. The fact that harassment would lose much of its impact if it never showed up in Google searches makes Google a very tempting candidate for liability. Steven Horowitz, for example, has suggested that the government adopt a notice-and-takedown regulatory scheme (similar to that adopted by the Digital Millennium Copyright Act of 1998 ("DMCA"))²¹¹ for defamatory posts indexed by search engines.²¹² Under this scheme, defamed individuals can notify Google of defamatory threads, while posters can counter-notify if they are willing to give up their anonymity and can offer evidence that the alleged defamatory content is actually true.²¹³ If a search engine like Google consistently removed defamatory threads, according to Horowitz, this would force message boards that want to be indexed by Google to clean up their act.²¹⁴

This is a very tempting solution, but the DMCA's scheme has problems that would likely undermine a similar approach in the cyber

210. *See supra* Part III.

211. 17 U.S.C. § 512 (2000).

212. Steven J. Horowitz, *Defusing a Google Bomb*, 117 YALE L.J. POCKET PART 36 (2007), <http://thepocketpart.org/2007/09/08/horowitz.html>

213. *Id.* at 38.

214. *Id.* at 38–39.

harassment setting. Several scholars have argued that the DMCA's notice-and-takedown regime results in overdeterrence: for reasons of expediency and administrability, instead of checking each notice carefully, Google is more likely to simply take down any material about which it gets complaints.²¹⁵ The same could very likely happen with putatively defamatory threads. Google is unlikely to be able to carefully review each notice, and might very well simply delete any allegedly defamatory thread, resulting in a potentially regrettable loss of content.²¹⁶

As for ISPs, given that CDA Section 230 grants them immunity for torts committed by users of their services, they do not seem to be likely candidates for sexual harassment liability. There are two deeper problems with ISP liability, however. The common definition of an ISP is a company that provides services such as Internet access, email hosting, and web site development. Thus, it is clear that companies such as AOL, Comcast, and Verizon are ISPs. Such companies provide massive amounts of diverse web services to vast numbers of consumers. It is difficult to see how such companies would be able to exert "effective control" over individual message boards or web sites; they are simply too far removed from these environments. Additionally, there are definitional problems: if the definition of an ISP is any entity that provides an Internet service, is an individual who shares his WiFi service with others an ISP? What about a bed and breakfast that offers its guests a computer for Internet access? What about a law school with Internet-enabled public computers?²¹⁷ If a person were to use any of the above to harass his victim, it would not be clear who—or what—should count as an ISP.

3. *Law's Efficacy and Social Norms*

A very different sort of objection has to do with the question of the law's ability to have real effects on certain forms of behavior. Given the pervasiveness of cyberspace sexual harassment, the burdens of litigation, and the inability of many targets of harassment to find the resources, time, or legal guidance to bring the law to bear on their

215. See, e.g., Charles W. Hazelwood, Jr., *Fair Use and the Takedown/Put Back Provisions of the Digital Millennium Copyright Act*, 50 IDEA 307, 315 (2010).

216. Cf. Joshua Urist, *Who's Feeling Lucky? Skewed Incentives, Lack of Transparency, and Manipulation of Google Search Results Under the DMCA*, 1 BROOK. J. CORP. FIN. & COM. L. 209, 227–28 (2006) (arguing that "flawed or disingenuous complaints will still result in the removal of content").

217. I thank Mark Egerman for bringing this point about ISPs to my attention.

situation,²¹⁸ we should perhaps not be very sanguine about the efficacy of legal remedies for sexual harassment in general, and even less so for cyberspace harassment. What are the chances that new legal remedies for cyberspace sexual harassment will improve the status quo?

As explained above, even if very few cases of cyberspace sexual harassment ever get all the way to court (and a few high-profile cases might be enough to make an impact), the policies and practices of website operators in response to liability will likely deter or resolve a great deal of harassing behavior, as has been the case with real-life sexual harassment.

This is not to say, however, that legal responses are the only or best way to address sexual harassment. Changing social norms in other, non-legal ways could result in more immediate and in some cases more effective deterrence of harassing conduct.²¹⁹ The “Hollaback” sites²²⁰ (and now applications²²¹) are a vivid example of such “grassroots” efforts to expose, critique, and stigmatize real-life sexual harassment. Victims of street harassment, whose experiences range from being groped on subways, enduring graphic sexual threats, or having men expose themselves in front of them, are encouraged to take cell phone pictures of the conduct and upload them to the sites, along with the date, time, and location of the harassment and any narrative they wish to provide.²²² Because the sites are state- and sometimes even city-specific (there is a HollabackNYC, a HollabackBoston, and a HollabackChicago), the photographs and narratives provide site visitors with useful information about locations of frequent harassment and sometimes even the identities of harassers. The sites also provide a forum for victims of harassment to commiserate and share strategies about combating sexual harassment, along with resources and links for consciousness-raising and assistance.

Hollaback and other sites seem to produce fairly immediate social effects. Many people who visit the site leave messages that express their newfound awareness of street sexual harassment, or the comfort they have found in realizing that they are not alone, or how the expe-

218. Bartow, *supra* note 5, at 412.

219. See Citron, *Law’s Expressive Value*, *supra* note 5, at 377 (explaining that like “workplace sexual harassment and domestic violence, changing the norms of acceptable conduct may be the most potent force in regulating behavior in cyberspace”).

220. HOLLABACK!, <http://www.ihollaback.org> (last visited Jan. 24, 2012).

221. See *iPhone and Droid Apps*, HOLLABACK!, <http://www.ihollaback.org/resources/iphone-and-droid-apps> (last visited Jan. 24, 2012) (providing free downloadable apps for smartphones).

222. *Share Your Story*, HOLLABACK!, <http://www.ihollaback.org/share/> (last visited Jan. 2, 2012).

riences of other victims have helped them realize that the harassment is not their fault. While it is perhaps unlikely that harassers are visiting the site and consequently changing their behavior, it seems clear that Hollaback and sites like it are changing the way victims perceive themselves and the problem of harassment, which is in itself a way of changing social norms about acceptable behavior.

There is no particular reason why providing a legal remedy for cyberspace sexual harassment should undermine non-legal, social challenges to bad conduct. Rather, creating a legal remedy for cyberspace sexual harassment merely offers an *additional* tool for changing harmful social norms and behavior, one that may reach situations that do not respond as well to non-legal challenges as the examples given in this section.

4. *Invading Harassers' Paradise: Creating New Harms?*

If the previous objection expressed concern that legal remedies for sexual harassment might be ineffectual, the final objection I address here in some sense raises the opposite concern, that the legal remedies might be *too* effective. That is, one theory about why sexual harassment in cyberspace is so prevalent and savage is that, thanks in large part to sexual harassment law, cyberspace is one of the increasingly few places where one can still engage in that kind of behavior without negative consequences. Not only that, but cyberspace enables harassers to easily find likeminded individuals—some websites have become havens for individuals whose only seeming connection is their shared desire to abuse women with impunity.²²³ If it is true that real-space sexual harassment law has in a sense helped create the problem of cyberspace harassment, should we be concerned about what will happen when that law's reach is extended to cyberspace?

There is no way to know for certain what the effects of legally regulating cyberspace sexual harassment will be. Some theorists have suggested that advancements in law or policy that benefit women and/or challenge traditional male privileges inevitably produce backlash effects.²²⁴ Few would argue that this fact should discourage such advancements, and indeed that would seem like a very bad reason to do so, but it is nonetheless worthwhile to reflect upon potential backlash effects in order to better address them when they occur.

223. AutoAdmit and the now-defunct JuicyCampus are candidates for this distinction.

224. See, e.g., SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 64 (1991) ("Under this backlash, like its predecessors, an often ludicrous over-reaction to women's modest progress has prevailed.").

One possibility is that harassers will simply find other, as-yet-legal ways to accomplish their goals. In much the same way that employees or students may have moved their harassment online and out of workplaces and schools, and thus out of the reach of current law, harassers will look for ways to make an end-run around a law that regulates cyberspace sexual harassment. Harassers who frequently get banned for their harassing posts may simply take on an endless series of monikers so that they can revisit the site under different names.²²⁵ If the website operators do not track IP addresses, or if the harasser is using anonymizing software, there would be little that could be done against this. This would, however, also exact a cost from the harasser, who would not be able to build up affiliations or enjoy the benefits of a well-known moniker if forced to change it repeatedly.

Harassers might also move their activities off websites and into more private channels, such as email. This too would exact a cost from the harasser; first, it would deprive him of whatever benefits he might associate with harassing someone in a public forum, and secondly, there are other remedies available to individuals who wish to prevent a certain person from contacting them directly (for example, deleting emails or blocking messages from certain senders).

There is also the possibility that harassers may become more than “just” harassers if denied outlets for their expression. If the harasser in question is more than just an opportunistic or “casual” harasser, and is committed to harming his target, he may escalate his behavior if he finds he cannot harm her through usual channels. It is tragically common knowledge that in the domestic violence setting, abusers often escalate their behavior when denied access to their victims.²²⁶ If some harassers are in fact abusers, or if they exhibit the same tendency to violence as abusers, they may similarly ratchet up the level of violence from words to actions when frustrated in the former.

These concerns are significant. There is no solid empirical data, however, that suggests online harassers are likely to escalate to physical violence when prevented from expressing their sentiments verbally. If such evidence exists, it would certainly need to be factored into the discussion of legal remedies for sexual harassment. But in any

225. Citron, *Cyber Civil Rights*, *supra* note 5, at 104.

226. See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991) (“At the moment of separation or attempted separation—for many women, the first encounter with the authority of law—the batterer’s quest for control often becomes most acutely violent and potentially lethal.” (footnote omitted)); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1483 (1996) (“It is no accident that the violence frequently escalates after the woman leaves.”).

case, one must take seriously the proposition that the social message of gender equality—communicated, among other ways, through the intolerance of sexually harassing behavior—is necessary to interrupt the mindset that produces violence against women in the first place.

V. CONCLUSION

The overarching goal of sex discrimination law is the achievement of gender equality in society. In order to genuinely move toward this goal in the networked age, we must update our theory of sexual harassment. We must recognize that all harassment that produces significant sex-discriminatory effects, regardless of where it originates, is sexual harassment, and that those with control over harassing environments can and should be held responsible for those effects. Such a conception will provide real remedies and conceptual clarity to a problem that is only increasing in both occurrence and impact.