Mediation Ideology: Navigating Space From Myth to Reality in Sexual Harassment Dispute Resolution

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MEDIATION IDEOLOGY:
NAVIGATING SPACE FROM MYTH TO REALITY IN SEXUAL HARASSMENT DISPUTE RESOLUTION

SUSAN K. HIPPENSTEEL, PH.D., J.D.*

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INTRODUCTION

“The victim who is able to articulate the situation of the victim has ceased to be a victim; he, or she, has become a threat.”

—James Baldwin

“A struggle for rights can be both a vehicle for politics and an affirmation of who we are and what we seek.”

—Elizabeth M. Schneider

The increase in public attention toward sexual harassment in the wake of the 1991 U.S. Senate hearings that resulted in the appointment of Clarence Thomas to the U.S. Supreme Court produced dramatic shifts in public attitudes toward victims, perpetrators, and the larger phenomenon of sexual harassment itself. The idea that sexual harassment is injurious to women rather than a normal or inevitable part of working life had been clearly articulated and refined by feminist theorists and activists, but while the term sexual harassment had been coined nearly two decades earlier and the problem had been studied extensively by social scientists since the early 1980s, the general public had remained skeptical that the problem of sexual harassment was a serious one.

For the most part, prior to the Thomas hearings, the legal


3. See Judith K. Bowker, Believability: Narratives and Relational Messages in the Strategies of Anita Hill and Clarence Thomas, in THE LYING OF LANGUAGE: GENDER, POLITICS AND POWER IN THE HILL-THOMAS HEARINGS 149, 162-64 (Sandra L. Ragan et al. eds., 1996) (detailing a survey conducted five months after the hearings that showed less than one-fourth (twenty-two percent) of survey participants were inclined to believe that Clarence Thomas sexually harassed Anita Hill while he was her supervisor at the EEOC. This figure suggests a dramatic reversal from the sixty-plus percent figures reported during and immediately following the hearings); see also Nina Totenberg, Preface to THE COMPLETE TRANSCRIPTS OF THE CLARENCE THOMAS-ANITA HILL HEARINGS: OCTOBER 11, 12, 13, 1991, 7 (Anita Miller, ed., Academy Chi. Pub.) (1994) (describing the heated conversations, book deals, and political campaigns that the hearings launched).

4. See, e.g., Schneider, supra note 2, at 643 (citing the role played by educational and training programs, such as the Working Women’s Institute, and the important work of feminist litigators and activists).

5. See Anita F. Hill, Thomas v. Clinton, in DEBATING SEXUAL CORRECTNESS: PORNOGRAPHY, SEXUAL HARASSMENT, DATE RAPE, AND THE POLITICS OF SEXUAL EQUALITY 122, 123-24 (Adelle M. Stan ed., 1995) (comparing her own experience in the Thomas confirmation hearings with the experience of Paula Jones confronting President Clinton); see also, Margaret S. Stockdale, What We Know and Need to Learn, in SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 3, 7 (Margaret Stockdale, ed., 1996) (providing a succinct overview of research on sexual harassment experiences and outcomes from the 1980s to mid 1990s).
community had treated sexual harassment as an anomaly affecting working women in the U.S. that provided opportunities for occasionally lucrative litigation. Post-Thomas hearings, attitudes within the legal community toward sexual harassment changed.

Alternative dispute resolution (ADR) of employment discrimination claims had begun to emerge as a field of legal practice and scholarship in the early 1980s. Following success in applying ADR to collective bargaining and organized labor disputes, ADR advocates promoted mediation and arbitration as alternatives to litigation for employers seeking less costly methods for resolving the growing number of employee claims of workplace discrimination and sexual harassment. Proponents suggest that the phenomenal growth of ADR into a full-fledged industry has been linked to widespread consumer satisfaction, citing lower cost, speed, and efficiency, and flexibility of solutions, as well as disputants expanded sense of control over the ADR process and outcome. Opponents suggest that employers rely on these fast, inexpensive strategies because ADR

6. See Carrie Menkel-Meadow, From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context, 54 J. LEGAL EDUC. 7, 7 (2004) (highlighting the progression of ADR from merely a method to resolve legal disputes to a broader field based on the study of human conflict).

7. See Michael J. Yelnosky, Title VII, Mediation, and Collective Action, 1999 U. ILL. L. REV. 583, 585 (1999) (analyzing the evolution and application of mediation in Title VII cases as linked to employee dissatisfaction with the limited options for systemic change available through traditional a litigation framework); see also Mori Irvine, Mediation: Is it Appropriate for Sexual Harassment Grievances?, 9 OHIO ST. J. ON DISP. RESOL. 27, 32-36 (1993) (examining the process of grievance mediation and noting that problems may arise when there is a marked imbalance of power between the parties).

8. Michael Z. Green, Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence, 48 HOW. L.J 937, 964-68 (2005) (cautioning that ADR should only be used in situations where both employer and employee have the possibility to benefit from arbitration); Jonathan R. Harkavy, Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes, 34 WAKE FOREST L. REV. 135, 156 (1999); Linda Stamato, Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum, 10 MEDIATION Q. 167, 168 (1992).

9. See JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS: LAW, LANGUAGE AND POWER 39 (1998) (explaining that disputants view mediation positively because they feel that they have more control over that process than over litigation).

10. See Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1548 (1991) (explaining that emotions and relationships are worked into mediation, allowing parties to come to a solution that is workable for their particular interests).

processes are “coercive mechanism[s] of pacification.” They work because the law provides no meaningful incentives for more than a showing of “good faith” that the employer make some effort to prevent or remedy illegal conduct, even if the effort is totally ineffective.

In this paper, I suggest a different sociopolitical reason for the dramatic rise in popularity of ADR generally, and mediation specifically, for sexual harassment complaints. I suggest that the sudden and dramatic shift in public awareness and attitudes toward sexual harassment and the sharp increase in sexual harassment complaint reporting following the Thomas hearings created a unique climate of anxiety among employers and the legal community. In response to this anxiety, re-privatizing sexual harassment became a key goal not only for employers, but for many civil rights advocates as well. More specifically, the legal profession’s failure to understand the psychology of sexual harassment combined with renewed political backlash against sexual harassment victims provided the ADR industry a unique opportunity to move into the sexual harassment arena. This opportunity arose despite ample evidence that ADR generally, and mediation specifically, do not meet the remedy and resolution needs of victims and may undermine important advances made by those seeking to curtail sexual harassment on the job.

Part II of this article briefly frames the historical backdrop through which discussing sexual harassment became part of mainstream U.S. culture. In this section, I discuss the rights dilemma faced by feminists and other legal advocates seeking to represent sexual harassment claimants within institutions (legal and otherwise) that frequently fail to provide the structural framework necessary for meaningful resolution and corrective action of sexual harassment claims to take place. I further outline and briefly explore the tensions between the need for individual resolutions and a political framework that effectively incorporates the personal and collective harm that results from sexual harassment in the workplace. This section ends with questions regarding the interpretive frameworks attorneys and others working in and around law rely upon when working with

12. See Laura Nader, Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology, 9 OHIO ST. J. ON DISP. RESOL 1, 1 (1993) (theorizing that the often unequal footing between legal professionals and the average citizen can result in a control relationship over the less powerful party).

sexual harassment claimants.

Part III explores five resolution themes that emerged as scholars and others responded to the sharp rise in sexual harassment complaint reporting during the early 1990s. I examine the influence of these five themes on the shift from a rights-based approach to resolving workplace discrimination that preceded the shift in sexual harassment complaint reporting\(^{14}\) and the relational approach to sexual harassment complaint resolution that followed. I examine the degree to which these resolution themes actually serve claimants’ interests and question whether they are, instead, serving to re-privatize sexual harassment. I also suggest that these resolution themes, as promoted by mediation proponents, are unsupported by empirical or other data and are little more than myths. As such, they serve to promote the polite fiction that sexual harassment is a personal, private insult to working women rather than as a form of invidious discrimination.

Part IV goes back to the question of why sexual harassment seems to have created such a high level of anxiety among those from across the political spectrum. This seems to suggest that neither the civil rights community or existing frameworks for understanding and resolving discrimination complaints were equipped to understand or address the sexual harassment complaints brought forth in the months immediately following the Thomas confirmation hearings and that mediation emerged as a preferred approach to addressing sexual harassment as a result.

Part V concludes with a call for more and better research exploring the legal profession’s understanding of sexual harassment and reliance on mediation as a mechanism for resolving sexual harassment complaints.

I. THE “POLITICAL” IS PERSONAL...AGAIN

“The process by which a society resolves conflict is closely related to its social structure. Implicit in this choice is a message about what is respectable to do or want or say....In the adversary system, it is acceptable to want to win.” —Trina Grillo\(^{15}\)

\(^{14}\) Id. at 6-7 (citing EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES AND EEOC AND FEPAS COMBINED: FY 1992-2001, at http://www.eeoc.gov/stats/harass.html (last modified Feb 6, 2003) (noting that while levels of sexual harassment in the workplace appear to be consistent with those reported two decades ago, both administrative charges and numbers of lawsuits filed have continued to rise both in absolute numbers and in terms of the percentage of total complaints processed by the EEOC).

\(^{15}\) Grillo, supra note 10, at 1607.
A. Articulating the Claim of Sexual Harassment

At the time of the Thomas hearings, many working women who had entered the workforce in the 1950s and 1960s viewed sexual harassment as simply part of life that must be tolerated. Some believed heightened attention given to the issue as a result of the Thomas hearings would harm rather than help women seeking entry into an arena still largely controlled by men. However, some felt the coming together of black and white women on the issue of sexual harassment was a hopeful sign that the women’s movement could serve as a catalyst for change.

Legal theorist Kimberle Crenshaw noted the unique opportunity for expanded understandings of gender/race intersections and the complex ways power relationships, both public and private, were being publicly recast as a result of the hearings. Marked changes in attitudes towards a woman’s right to work in an environment free from sexual harassment contributed to the heated public debates that followed the subpoenaed testimony of Anita Hill. In the months following those historic hearings, the effect of the debates on public consciousness regarding sexual harassment became increasingly apparent. And it is noteworthy that sexual harassment became part of public consciousness not through the force of a social movement aimed at increasing public awareness and sensitivity, but rather through a sensationalized, racially charged, and highly contested account of one woman’s experience.

The civil rights movement of the mid-twentieth century brought

16. See Joan Kennedy Taylor, What to Do When You Don’t Want to Call the Cops 7 (1999) (arguing that expanded sexual harassment laws and aggressive policing are actually harmful to the interests of women in the workplace).


21. See Darrin Hicks & Phillip J. Glenn, The Pragmatics of Sexual Harassment: Two Devices for Creating a "Hostile Environment," in The Lynching of Language: Gender, Politics, and Power in the Hill-Thomas Hearings 215 (Sandra L. Ragan et al. eds., 1996) (citing the Thomas hearings as a "lightening rod" for the first nationwide discussions of sexual harassment and for introducing sexual harassment into the public consciousness as a "problem," while also showing that sexual harassment is almost by definition an isolating experience for many victims).
with it a call for change accompanied by countless examples of the effects of racism on equal opportunities for African-Americans. The call for change in social mores that followed the Thomas hearings, on the other hand, had no analogous escort. Academics scrambled to generate distilled summaries of complex social scientific studies of sexual harassment for public consumption, but these lacked the emotional features of individual stories and accounts that made the issue of racial discrimination accessible to the (predominantly white) voting public. Unlike victims of other forms of protected class discrimination, victims of sexual harassment were generally reticent to discuss their experiences publicly—in fact many refused to speak with anyone, even close friends and intimates, about their experiences. Concerned that their claims would be minimized, they would be blamed, and their perpetrators would be defended in the court of public opinion, many victims of sexual harassment, like victims of sexual assault and domestic violence, suffered in silence.

Initial public sentiment regarding Anita Hill’s testimony about Clarence Thomas’s alleged misconduct while he was her supervisor at the Equal Employment Opportunity Commission (EEOC) confirmed the worst fears of many sexual harassment victims. Most women who experience sexual harassment at work tend not to talk about it. Like Hill, most sexual harassment victims are afraid of adverse career consequences, concerned that they will be subject to allegations of impure motives, or worried that the truthfulness of their allegations will be challenged. The adversarial nature of the hearings, opportunistic accusations leveled at Hill by the Judiciary Committee members questioning her, and harsh reconstruction of Hill’s identity and motives by the media fueled the initial negative public sentiment regarding Hill in particular, and sexual harassment victims in general. Yet within a scant six months public attitudes had changed

22. See Stephen C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 311 (1995) (arguing that vigorous enforcement of the civil rights court victories caused courts and litigators to lose sight of the benefits that were originally sought).
23. See id. at 312-13 (emphasizing the civil rights movement’s objective was not to merely eliminate segregation, but also to eliminate the injury that segregation ultimately caused).
24. See Hicks & Glenn, supra note 21, at 216-17 (discussing and critiquing several such publications that emerged in the wake of the hearings).
25. Ragan et al., supra note 19, at xvi.
26. Id.
27. Id.
28. Id.
dramatically. The most dramatic shifts in attitude came from women, who overwhelmingly reported believing that Hill told the truth and was terribly mistreated by the all-white, male Senate Judiciary Committee. During these same six months, a record number of women came forward to file sexual harassment claims with the EEOC.

B. Sexual Harassment as an Emerging Justice/Rights Dilemma

The shift in public attitudes and increased willingness of working women to formally report allegations of sexual harassment on the job came at an important time in the evolution of equal employment opportunity rights in the U.S. Premised on the underlying assumption that private lawsuits would be the primary mechanism through which employees would seek relief, the 1972 amendments to Title VII expanded the EEOC’s jurisdiction and gave it the power to enforce its own findings by filing lawsuits. Since the 1970s, the rise in litigation of employment discrimination cases had been producing a corollary effect of increasing employee access to internal grievance mechanisms. Faced with an increasingly sophisticated and empowered workforce, employers began looking for ways to avoid the expense and organizational impact of litigation by expanding human resource and personnel offices so as to resolve employee concerns “in house.”

The public spectacle of the Thomas hearings also inspired President George H.W. Bush to sign the Civil Rights Act of 1991.
CRA) on November 7, 1991 after much delay. The 1991 CRA, which granted plaintiffs the right to jury trials in cases where intentional discrimination is alleged and a claim for punitive damages where intentional discrimination is proved, provided employers a powerful new incentive to develop and enforce strong non-discrimination policies and offer employees meaningful access to internal grievance resolution options. That same year, the EEOC began a mediation pilot program in four field offices to address the backlog of existing cases it had been unable to close.

The flood of inquiries and charges brought to the EEOC in the months following the Thomas confirmation hearings sent shockwaves through the civil rights enforcement community. A less ambivalent and increasingly well-informed public brought individual and organized efforts demanding accountability on behalf of the fifty to eighty-five percent of American women who experience some form of sexual harassment during their working lives. Employers quickly launched sexual harassment education and prevention programs, while labor unions, academic institutions, and agencies emphasized rights-based analyses and services. Existing avenues and traditional mechanisms for redress were reevaluated and new options explored.

While scholars quickly weighed in with a wide range of opinions as to the relative merits of various approaches to resolving sexual harassment disputes, several underlying themes quickly became apparent. Among them: (1) sexual harassment is a uniquely “sensitive” problem and resolving claims requires attention to the emotional aspects of the situation; (2) victims of sexual harassment

34. Green, supra note 8, at 948-49.
35. Civil Rights Act of 1991, 42 U.S.C. § 1981 (2006); see also Susan Schenkel-Savitt & Brian S. Rauch, Title VII, ADEA, Civil Rights Act of 1991 and Selected Local FEP Statutes, 621 PRACTICING L.I. LIT 65, 70 (1999) (explaining that punitive damages may be awarded where discriminatory acts were perpetrated with “malice” and “reckless indifference,” and pointing out that, although these terms focus on the actor’s state of mind, the employer’s conduct need not be independently egregious or outrageous for punitive damages to flow).
36. See Beverly Bryan Swallows, Reducing Legal Risk and Avoiding Employment Discrimination Claims, 19 FRANCHISE L.J. 9, 16 (1999) (stating that maintaining a fair and accurate performance evaluation systems is one way employers can avoid discrimination claims).
37. Green, supra note 8, at 950.
38. Stamato, supra note 8, at 167.
39. Id. at 168.
40. Id.
41. See Rebecca A. Thacker, Mark Stein & Samuel J. Bresler, Mediation Keeps Complaints Out of Court, HR MAGAZINE, May 1994, at 72 (suggesting that in order to respond effectively to sexual harassment, its unique features must be acknowledged and addressed); see also James K. Hoenig, Mediation in Sexual Harassment: Balancing the Sensitivities, 48 DISP. RESOL. J. 51, 53 (Dec. 1993) (offering a mediator’s
want/need to preserve their privacy and avoid the stress of formal, adversarial proceedings; (3) sexual harassment victims want/need to personally confront the harasser; (4) sexual harassment is an inherently subjective and ambiguous phenomenon; and (5) formal complaint adjudication disadvantages victims of sexual harassment.

These five themes have been touted as justifying mediation as the preferred resolution option for sexual harassment from the victim’s perspective. The argument goes something like this: “Interest-based” options that provide for quick, informal responses to sexual harassment (e.g., job reassignment or change in work hours for the victim, opportunity to discuss how the harassment made the victim feel, and so on) are what victims need to move beyond the experience and get on with their lives. And while sexual harassment victims frequently choose not to file complaints, often accept blame for their situation, and frequently fear retaliation, these factors provide evidence in support of a dispute resolution system that will ensure that effective measures are taken to end harassment and prevent retaliation, as opposed to supporting interest-based options as preferred alternative dispute resolution mechanisms for victims.

It is important to note that these five themes emerged to justify first-hand account of the need to constantly gauge the emotions of parties in a sexual harassment mediation).

42. See Hoenig, supra note 41, at 52 (relaying how one plaintiff in a sexual harassment case became much more amenable to a reasonable settlement after a mock cross-examination during mediation).
43. Id.
44. See Stamato, supra note 8, at 169.
45. Id.
46. See Mary P. Rowe, Dealing with Sexual Harassment: A Systems Approach, in SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 241, 250 (Margaret Stockdale ed., 1996) (defining interest-based options, but cautioning that these alone do not provide an adequate solution to harassment claims).
47. See Anna Marie Marshall, Idle Rights: Employee Rights Consciousness and the Construction of Sexual Harassment Policies, 39 LAW & SOC’Y REV. 83, 111 (2005) (describing women as their own “gatekeepers” who do not file sexual harassment claims partially out of fear of their supervisor’s reaction); see also Louise F. Fitzgerald, et al., The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace, 32 J. VOCATIONAL BEHAV. 152, 162 (1988).
48. See, e.g., Nina Burleigh & Stephanie Goldberg, Breaking the Silence: Sexual Harassment in Law Firms, A.B.A. J., Aug. 1989, at 46, 48 (discussing the reluctance of female attorneys to report sexual harassment for fear of being perceived as weak or unable to handle the problem themselves).
49. See MARTIN ESKENAZI & DAVID GALLEN, SEXUAL HARASSMENT: KNOW YOUR RIGHTS! 166 (Cartroll & Graf Publishers, Inc 1992) (citing EEOC guidelines relating to evaluating welcomeness, which state, in pertinent part, “[w]hile a complaint or protest is helpful to a charging party’s case, it is not a necessary element of the claim). Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. Id.
mediation only for victims of sexual harassment; they have not served as rationale for mediating other forms of workplace discrimination. In certain respects, sets of practices that discriminate against particular groups of people are unique from one another. Few would argue that discrimination based on race will “look” like discrimination based on religion, although there may certainly be some overlap. But with the exception of sexual harassment claims, all forms of workplace discrimination have been, in effect, treated equally. In other words, claims of discrimination have been subjected to fact-finding and decision-making that recognized the “need to draw bright lines delineating acceptable behavior in the workplace.”

And while the EEOC’s mediation program expanded into a nationwide system that has helped to reduce the backlog of charges in all categories, the application of ADR and mediation principles to sexual harassment within the legal academic community and among practitioners has not been without controversy. The sudden recognition and acceptance of sexual harassment as a serious social problem sparked immediate calls for a wholly different approach to addressing this particular form of employment discrimination. Why? And perhaps more importantly, how did these calls for applying modified discrimination resolution mechanisms to sexual harassment cases come to be met and satisfied almost exclusively by ADR proponents, many of whom come from a solidly liberal, pro civil rights, and/or labor oriented backgrounds?

II. REFRAMING SEXUAL HARASSMENT RESOLUTION IDEOLOGY

“The glories of cooperation...are easily exaggerated.”
— Trina Grillo

A. Blurring Boundaries

It is easy to point to management consultants and employer defense firms as the main proponents of mediation for resolving sexual harassment complaints. There is ample literature to suggest that these entities, along with some scholars and others generally hostile to

50. Irvine, supra note 7, at 28.
51. Green, supra note 8, at 950.
52. Stamato, supra note 8, at 169.
53. This question implicates complex issues of ADR history, strategy, process, goals, and objectives. Exploration of these issues is beyond the scope of this paper, which attempts to assess a single aspect of the larger ADR/mediation phenomenon—its application to sexual harassment and other individual claims of workplace discrimination.
54. Grillo, supra note 10, at 1608.
gains made by civil rights advocates of the 1950s-1980s, banked heavily on the social anxiety that the rise in sexual harassment lawsuits produced to generate support for their own efforts to promote its use. Legal scholars and attorneys, who had accepted without question warnings from the elite within the legal community that “adversarial modes of conflict resolution were tearing the country apart,” further fueled this anxiety.

Yet some of the most influential proponents of mediation to resolve sexual harassment disputes have been women and employee rights advocates who argue that mediation, among all the possible resolution options, best meets the needs and serves the interests of sexual harassment victims. Creators designed mediation, which is promoted as a “win-win” approach to employment discrimination through which both parties can come to understand the other’s perspective and become educated in the process, to diffuse acrimony between parties. Susan Sturm argued that in order to continue advancing in the workplace, women need to gain the capacity to develop social capital by nurturing and strengthening informal relationship networks with men in the workplace who make promotion and hiring decisions.


56. Nader, supra note 12, at 5-6 (discussing the 1976 Roscoe Pound Conference at which Chief Justice Warren Burger, leaders of the American Bar Association and members of the American judiciary concurred that American lawyers are too adversarial and that the American people too litigious). Nader suggests that those in attendance promoted alternative dispute mechanisms so lawyers could heal a system that was infected by many ills and in dire need of treatment. Id. Nader argues that Chief Justice Burger and his supporters presented their own values as facts and that few within the legal profession questioned the factual basis for the statements promoting ADR as a means of reforming the legal system. Id.

57. See, e.g., Rowe, supra note 46, at 250 (suggesting that mediation may allow employee needs to be more easily met and contrasts “interest-based” informal procedures with “rights-based” formal adjudicative procedures). The typical rationales for using “interest-based” procedures are (1) that the harassment or discrimination may have been the result of a “misunderstanding” or “ignorance” by the perpetrator(s), and/or (2) that it may be difficult or even impossible for a decision-maker to determine who is telling the truth. Id.


cooperation, shared values, and goals, mediation purports to provide women, the most frequent victims of sexual harassment, an opportunity to engage in a nurturing, educationally-oriented resolution process more appropriate to their natural, “relational” selves.\(^6^0\) As an added bonus, mediation also fits comfortably within most organizations’ preferred non-adversarial approach to resolving conflict.\(^6^1\) But as Professor Mori Irvine points out, those who argue that education, rather than discipline, is the appropriate response to sexual harassment minimize the harm that sexual harassment produces for victims and the larger workforce by subordinating public acknowledgement of the injury and its impact in the “guise of . . . reconciliation.”\(^6^2\)

Menken-Meadow points out that mediation is often justified on the basis of the perceived “consent” of the parties even while acknowledging the contested nature of “consent” in the context of race, class, sex, gender, and other power inequalities—institutional and otherwise.\(^6^3\) Yet Menken-Meadow also argues that when mediation and other ADR alternatives are compared to litigation, we must be clear about “what is being measured against what.”\(^6^4\) In other words, equal access to legal resources, money, and the multitude of other factors that affect the outcome of a jury case must be taken into account.\(^6^5\)

Anthropologist Laura Nader has examined harmony ideology at work on unsuspecting citizens in different contexts.\(^6^6\) She has found that social influence and cultural power mechanisms amount to covert control and suggests that while both attorneys and clients are likely to be sensitive to overt acts of dominance and control to which they are subject or witness, attorneys in particular may not be alert to or able to protect their clients from overt mechanisms of control and domination within law or legal processes.\(^6^7\) Nader goes on to suggest

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60. Grillo, supra note 10, at 1550-56.
61. See Sturm, supra note 59, at 640 (noting that most organizations prefer a system that grants workers more ability to participate in decision-making).
62. Irvine, supra note 7, at 50-51.
63. See Menkel-Meadow, supra note 6, at 22-23 (emphasizing the disputed nature of consent and the idea that economic and social power has a significant impact on altering the equality of bargaining positions in mediation).
64. See id. at 22.
65. See id. (stating that the factors limiting fairness in mediation are equally present in trial situations).
66. See Nader, supra note 12, at 1-2 (suggesting that “harmony ideology” is a rhetorical strategy for achieving “peace through consensus” and that within the legal profession harmony ideology became rooted in the culture through controlling processes, i.e., the intense influence of socially and/or institutionally powerful advocates and the related agendas they promoted).
67. See id. (demonstrating that while the United States has constitutional
that attorneys should educate themselves to learn to recognize controlling processes in law in order to better critique and engage with their profession in a proactive way. Because sexual harassment claims do not rest on the treatment of individual women, even when these claims are brought forward by individuals, they have implications for the entire workplace. As such, these claims, and the individuals who bring them forward, are uniquely vulnerable to the controlling mechanisms Nader and others have identified.

B. The Sexual Harassment Resolution Themes

1. Sexual harassment is a uniquely “sensitive” problem and resolving claims requires attention to the emotional aspects of the situation.

There is little doubt that sexual harassment causes victims stress, emotional anguish, and other personal and professional disturbance. What is less clear is whether victims of sexual harassment suffer a different, more sensitive type of injury than victims of other forms of workplace discrimination. If they do, the relational discourse that blankets discussion of sexual harassment grievance resolution might be justified. If they do not, then this discourse may be little more than a facile excuse for disparate treatment of sexual harassment cases by employers and by employee rights advocates.69

It is well documented that people who experience sexual harassment at work generally want (1) the offensive conduct to stop; (2) assurances that the conduct will not reoccur and that others will not be treated similarly; (3) protection from retaliation; and (4) to regain the type of work environment they had prior to experiencing the offensive conduct. However, these goals fall neatly within the protections against overt acts of domination, indirect acts receive less security).68

68. Id. at 4.

69. Among the group of “employee rights advocates,” I include labor organizations and employee unions, labor and employment attorneys, and some women’s rights groups such as 9–5 and the Working Women’s Institute. Perhaps the most controversial claim I make in this paper is that many liberal supporters of traditional affirmative action and equal opportunity programs have found common ground with political conservatives, supporting sexual harassment grievance response mechanisms that re-privatize sexual harassment, thus rendering the discourse less threatening to conservative goals and agenda. Alternative dispute resolution generally, and mediation specifically, fit neatly within the liberal scheme for achieving a gender-blind workplace; personal empowerment rhetoric conforms both to the overarching goals of ADRL and the procedural and substantive objectives of mediation.

70. See Howard Gadlin, Mediating Sexual Harassment, in SEXUAL HARASSMENT ON CAMPUS 186, 189 (Bernice R. Sandler & Robert J. Shoop eds., 1997) (suggesting that most victims of sexual harassment want their story to be believed and to protect their privacy and reputation); see also Ford Motor Co. v. Equal Emp. Opportunity Comm’n, 458 U.S. 219, 290 (1982) (finding that securing and maintaining employment are the primary motives of employees when filing employment discrimination complaints); Harkavy, supra note 8, at 156-57 (arguing that mediation
rubric of rights-based resolution objectives and reflect the practical concerns that compel those who experience many, or even most, forms of discrimination at work to file complaints.\footnote{See Jeanette N. Cleveland & Kathleen McNamara, \textit{Understanding Sexual Harassment: Contributions from Research on Domestic Violence and Organizational Change, in Sexual Harassment in the Workplace; Perspectives, Frontiers, and Response Strategies} 217, 235-36 (Margaret S. Stockdale ed., 1996) (examining the problem of blaming the victim, which often results in the victim losing her job as an obstacle to reporting sexual harassment).} Empirical studies that have examined the question refute the notion that sexual harassment victims have different goals and objectives from victims of other forms of workplace discrimination. In fact, the sharp increase in EEOC complaints filed after the Thomas hearings suggests that sexual harassment victims are more than willing to file complaints when they perceive the public as accepting the legitimacy of sexual harassment and concomitantly believe that their complaint will be taken seriously.\footnote{See Grossman, \textit{supra} note 13 (detailing the increase in the receipt of sexual harassment charges filed under Title VII and the percentage increase in charges filed by males).}

Mediation literature continues to stress the importance of sexual harassment victims identifying their feelings, venting anger and other emotions, and figuring out what they "really want" out of a resolution.\footnote{See Carol A. Wittenberg et al., \textit{Why Employment Disputes Mediation is on the Rise}, 770 PLI/LIT. 747, 749-50 (1998).} In this regard, mediation theory and mediation practice appear to conflict. Where emotional issues are brought forth in mediation practice, the emphasis is generally on "redirect[ing the emotions] in a productive manner."\footnote{See Harkavy, \textit{supra} note 8, at 158; see also Conley & O'Barr, \textit{supra} note 9, at 50 (demonstrating a situation in which a mediator helps the parties to move past emotions and arrive at a compromise); Christina Lepera & Jeannie Costello, \textit{New Areas in ADR}, 605 PLI/LIT. 593, 608 (1999) (describing how mediators help the parties see beyond their emotions to their actual bargaining positions).} As Grillo pointed out in her comprehensive and influential work on mediating divorce, "negative" emotions such as expressions of anger, in particular, are frequently discouraged during mediation, especially when expressed by women.\footnote{See Grillo, \textit{supra} note 10, at 1572-73 (making a strong case that among women, the sanctions imposed for expressions of anger correlate with race and ethnicity, with black women experiencing the most dramatic pressure to modulate or suppress their anger, and making equally clear that the expressions of anger legitimized through the adversary system are not wholly without problems because they are often expressed not by the parties but by their representatives and it is often not the "actual anger that is being expressed but rather the anger the party is expected to have").} Other studies have similarly shown that, because

allows a complaining employee to confront her harasser without fear of retribution and to put the incident behind her).
“cooperation is the highest normative value” in mediation, mediators often denigrate expressions of anger or frustration that arise during mediation and/or label the outbursts as “counterproductive” to the goals of compromise and, ultimately, consensus.

2. Victims of sexual harassment want/need to preserve their privacy and avoid the stress of formal, adversarial proceedings.

The persistent emphasis on mediation as a means for resolving sexual harassment without “revealing publicly the intimate and embarrassing details of conduct . . . and degradations” so as to protect the victim belies the truth and substance of the claim itself. If sexual harassment is accepted as a form of sex discrimination, being sexually harassed neither reflects poorly on the victim nor constitutes conduct she or he should be embarrassed about. In many respects, the filing of a sexual harassment complaint signals the victim’s acknowledgment that she or he is not at fault—a recognition that the conduct complained of “is not purely personal behavior, nor simply natural attraction gone awry.” However, for sexual harassment to remain intimate or the stuff of personal embarrassment, it must continue to be treated as a private shame. Mediation’s emphasis on confidentiality as a means of protecting victims affirms, but also relies on, its continuing status as a deeply personal and necessarily private injury. Creating a non-judgmental atmosphere and “win-win” outcomes further disempower an already subordinated person. Significantly, a documented disadvantage of mediation for sexual

76. Conley & O’Barr, supra note 9, at 58.
77. Id. at 50 (drawing disturbing conclusions from their review of the microdiscourse of mediation literature, pointing out that while mediation is designed to equalize power between parties to a dispute, the more competitive party will be most advantaged by the process because of the emphasis on cooperation and relational goals). The party whose personal style or position makes them more facilitative will be more likely to compromise and may concede important points in the interest of cooperation rather than fairness. Id. The claimant is more likely to be the less competitive party in employment discrimination cases). Id.
78. Harkavy, supra note 8, at 157.
79. Hill, supra note 5, at 125.
80. See id. (arguing that emphasizing the embarrassment of sexual harassment will promote its continuation).
81. See Wittenberg et al., supra note 73, at 750 (describing the benefits to both parties during sexual harassment mediation).
82. Grillo, supra note 10, at 1610 (grappling with the manner in which mediation, which purports to help the subordinated victim avoid the adversary system, also harms the victim’s cause by forcing her to compromise).
harassment victims is the “absence of public vindication.”83 Because, in a mediation context, the identity of the person telling the truth is largely irrelevant to the outcome of the mediation, the victim has no chance of personal or professional exoneration through the process. In most situations, other employees have either direct or indirect knowledge of the victim’s allegations. Public vindication by a neutral third party (judge, jury, arbitrator, or other decision-maker) is a key element of a satisfying resolution in sexual harassment cases because it helps reestablish the victim’s credibility among her or his peers and supervisors.84 This outcome is almost never available to the sexual harassment victim who enters into mediation.

3. Sexual harassment victims want/need to personally confront the harasser.

A key selling point of mediation is that it provides a victim of sexual harassment the opportunity to “tell him to his face”85 and regain self-esteem and a “sense of competence”86 in a manner unavailable through formal adjudication processes. However, as Howard Gadlin and others have noted, despite the claim for confrontation as an advantage of mediation, many sexual harassment victims are reluctant to meet with, let alone confront, their harasser.87

Coworkers and supervisors often minimize and downplay sexually harassing behavior.88 Where a coworker or supervisor’s sexually harassing conduct manipulates or coerces an individual, the notion that a mediation can propel the victim onto equal footing with the harasser is “magical thinking” at its best. Advocates of formal adjudication argue that the abuse of power that produces sexual harassment makes a “fair and equitable resolution through mediation impossible because the [victim] is not in an equal bargaining position with her [or his] harasser, and they are bargaining over matters that

83. Harkavy, supra note 8, at 161; see Jean R. Sternlight, ADR is Here: Some Preliminary Reflections on Where It Fits in a System of Justice, 3 NEV. L.J. 289, 299-300 (2003) (acknowledging the significance of a party’s emotional needs within the justice system).
84. Harkavy, supra note 8, at 161-62 (discussing the value of public vindication to both sides of a mediation).
85. See Gadlin, supra note 70, at 194 (stating that when a trusted person supports the victim by accompanying them to the mediation, victims more often desire to meet the harasser in person).
87. Gadlin, supra note 70, at 194; see also Marshall, supra note 47, at 106-109 (implying that harassed employees often avoid confronting their harasser because of the negative impact the action will have on their work situation).
88. See Irvine, supra note 7, at 38 (stating that male coworkers use peer pressure to entice harassed employees to join the group as a means of ending the harassment).
are not negotiable." In such a context, face-to-face confrontation can only increase the vulnerability of the victim by opening her or him to further manipulation or additional abuse.

4. Sexual harassment is an inherently subjective and ambiguous phenomenon.

In stark testimony to nine years work as a district attorney in New York City’s Special Victim’s Unit, Alice Vachss wrote that society has “allowed sex crimes to be the one area of criminality where we judge the offense not by the perpetrator but by the victim.” In the sexual harassment arena, courts have consistently upheld the notion that “power in a hierarchical work force can be sexualized.” When federal courts began evaluating sexual harassment claims through the lens of a reasonable person in the same circumstances as the victim, they sent an implicit message that prevailing stereotypes and behavior that have long reinforced discriminatory practices against women workers would no longer be tolerated. In other words, the courts affirmed challenges to discriminatory practices that women, but not necessarily men, find objectionable. In a society that largely views interactions between women and men as inherently sexual, the import of this arguably radical legal development is profound. At the

89. Id. at 39
90. See Gadlin, supra note 70, at 194 (advocating “shuttle-mediation,” a process in which the mediator meets with the parties individually and helps develop a settlement agreement between them, where it is otherwise impossible to avoid “abusive negotiation” between the parties).
92. Harkavy, supra note 8, at 148.
93. See Irvine, supra note 7, at 42-43; see also Ellison v. Brady, 924 F.2d 872, 878, 880-81 (9th Cir. 1991) (adopting the “reasonable victim’s perspective” standard in order to move away from older ideas of what constitutes non-harassing behavior); see also Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524-25 (M.D. Fla. 1991) (adopting the victim’s perspective test to determine the nature of the objectionable behavior and noting that the fact that other employees did not complain did not alter the objective basis for the finding).
94. See Ellison, 924 F.2d at 879 (asserting that because women are more often victims of rape they are more concerned with milder forms of harassment, fearing that the behavior may be the beginnings of a larger problem).
95. See William Broyles, Jr., Public Policy, Private Ritual, N.Y. TIMES, October 16, 1991, reprinted in DEBATING SEXUAL CORRECTNESS: PORNOGRAPHY, SEXUAL HARASSMENT, DATE RAPE, AND THE POLITICS OF SEXUAL EQUALITY 144, 144-46 (Adele M. Stan ed. 1995) (arguing that the Thomas hearings “put on public display the private rituals by which men and women come together,” and suggesting that because men are generally the initiators of romantic relationships with women, they are responsible (post-hearings) for “consequences ranging from sexual harassment to beginning a lifetime relationship”). Broyles also bemoans the fact that the “rules of sexual harassment are not objective but [are] determined by the reactions of the woman involved” and suggests that this is the real reason that men “don’t get it” and never will. Id.
same time, the courts’ emphasis on the “reasonableness” part of the standard left the power of the victim to define her or his injury open to question, scrutiny, and dismissal. It has long been presumed that being emotional and being rational are mutually exclusive states of mind and that emotional individuals are susceptible to exaggeration, misperception, and overreaction while rational individuals are more reliable, competent, and objective. That women are “emotional” and men are “rational” is the prevailing stereotype throughout much of Western culture. That a (usually female) victim of sexual harassment would be emotional about her experience confirms not only the stereotype about women generally but more importantly contrasts her perceptions against those of her more rational and objective, albeit harassing, counterpart. Thus, the crucial role subjectivity plays in determining what constitutes sexual harassment becomes an unyielding weapon in the hands of one ill equipped to evaluate its use.

5. Formal complaint adjudication disadvantages victims of sexual harassment.

Richard Delgado argues that formal (courtroom) rules of procedure and evidence create normative expectations that result in behavior reflecting “higher” public values of “fairness, equality, and respect for personhood.” Clear legal principles may also help the victim of sexual harassment define her injury in a context where the assertion of legal rights is legitimate and, optimally, transformative. Vachss argues convincingly that political “aid and comfort” discourse is often used to promote social and/or legal “reform” by social liberals invested in maintaining their own status but unwilling to say so openly. That this myth would remain within the consciousness of


97. See Florence L. Geis, Self-Fulfilling Prophecies: A Social Psychological View of Gender, in The Psychology of Gender 9, 31, 32 (Anne E. Beall & Robert J. Sternberg eds., 1993) (discussing the difficult situation confronting women when coworkers expect them to exhibit traditionally masculine traits, such as objectivity and leadership, while simultaneously maintaining their sexuality and femininity).

98. See Broyles, supra note 95 (suggesting that “highly professional, otherwise capable women imagine relationships that did not exist . . . and contrive harassment charges to revenge other slights or to advance themselves”).


100. See Grillo, supra note 10, at 1558 (comparing formal adjudication with mediation of divorce cases, specifically identifying the traditional adversarial litigation process as the more potentially effective means for addressing fault and redressing past injury).

101. See Vachss, supra note 91, at 279.
the legal community practiced in the art of formal complaint adjudication is a conundrum that will be addressed further below.

C. The Privatization of Workplace “Justice”

Scholars and practitioners have raised objections to mediation for women, people of color, and others disenfranchised within institutions because of concerns that mediation is risky since mediators themselves may be biased and will exert a great deal of power in the process, mediation perpetuates power imbalances, mediation does not involve fact-finding, and perhaps most importantly, mediation does not involve an assertion of “rights.” Further, research comparing mediated and litigated outcomes has raised significant questions about the substantive justice that women and people of color obtain through mediation.

Procedures emphasizing relational, as opposed to rights-based outcomes, tend to decrease the likelihood of a victim of sexual harassment achieving what the law entitles her. Mediator and practitioner Jonathan Harkavy suggests that as the courts increasingly emphasize employer self-enforcement in sexual harassment cases, workplace justice will likely be “privatized to a considerable extent with the aid of mediators.” Internal sexual harassment complaint procedures have been described as creating a “double consciousness” about the law of sexual harassment for victims who have increased knowledge about their rights under existing statutes and employer policies but who experience significant barriers to rights enforcement, both procedural and in terms of the social pressure from supervisors and others not to adjudicate their complaints.

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102. See Grossman, supra note 13, at 66.
103. See id.
104. See id. (citing Mori Irvine, Mediation: Is it Appropriate for Sexual Harassment Grievances?, 9 OHIO ST. J. ON DISP. RESOL. 27, 37 (1993)).
105. See Schneider, supra note 2, at 627-33 (discussing the significance and benefits of women asserting their rights under the law).
106. See Gary LaFree & Christine Rack, The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 LAW & SOC’Y REV. 767, 789 (1996).
107. See generally Marjorie A. Silver, The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement, 55 GEO. WASH. L. REV. 482, 526 (1987) (suggesting that methods which increase the likelihood of a victim actually receiving nominally available statutory rights are needed).
108. See Harkavy, supra note 8, at 148 (discussing how the Supreme Court’s most recent Title VII sexual harassment decisions, rather than elucidating a definitive test for hostile environment sexual harassment, have instead created an incentive-based approach aimed at preventing this form of discrimination, and noting that while creating a purportedly uniform and predictable standard of employer liability, the Court left open most of the questions regarding the scope of actionable conduct or the contours of disparate conditions of employment in the sexual harassment arena).
Both the process and outcome goals of mediation in the employment context prioritize creative over substantive resolutions and mitigating rather than correcting the injury that is the substance of the victim’s claim. In their sociolinguistic analysis of legal discourse within the practice of mediation, Conley and O’Barr point out that “it should come as no surprise that women should at once like mediation and fare badly in it.”

The authors suggest that women are socialized to seek non-confrontational, relational strategies for resolving disputes rather than strategies that emphasize rights-based outcomes. Women who engage in informal dispute resolution with men tend to be disadvantaged because men are socialized to pursue self-interest and a favorable outcome when involved in disputes.

Nancy Welch has recently suggested that it is time for legal scholars, and I would argue attorneys as well, to make a commitment to extending the goals of mediation beyond simple resolution of disputes to include substantive justice goals.

III. PRIVATE SHAME AND PUBLIC CHOICES

A. The Promise and the Myth of Mediation

Subordinated groups have long used their collective power to inspire and demand social change. Public outcry over “private” injuries of sex abuse, domestic violence, and workplace discrimination have repeatedly sparked an increase in the recognition of the prevalence and validation of the impact of these social ills. Both the promise and the myth of mediation is that it provides the opportunity for all parties to a dispute to “win.” Where a dispute stems from poor communication and does not implicate subordination of important rights, social justice, or legal principles, a process designed to facilitate compromise and win-win outcomes can be of significant value, particularly in the business world, where conflicts may stem from poorly planned commercial transactions and the inability to find a compromise solution could result in greater financial harm to both parties. But disputes involving allegations of

110. See CONLEY & O’BARR, supra note 9, at 132.
111. Id. at 132-33.
sexual harassment do implicate these things. So, what does the promise of mediation mean in the context of sexual harassment complaint response?

There appears to be little room for discussion of sexual harassment as a form of invidious sex discrimination in contemporary treatment of the problem when mediation is in the mix. The fact that sexual harassment is a symptom of biased attitudes toward women poses a threat to workplace norms and culture in a manner not implicated by the glass ceiling, wage differentials, and other forms of sex discrimination women in the U.S. experience on the job. Even Justice Scalia’s admonishment that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination”114 has done little to undermine the argument that “sex arrived at work when women did” and that sexual harassment laws have taken aim at the occasional “dirty joke or clumsy flirtation.”115 And while some argue that employers are increasingly motivated by recognition of the need for a diverse workforce to accommodate a range of employee needs and rights,116 others suggest that rules of liability, at least with respect to sexual harassment, have created an environment in which employers have very few incentives to provide more than the minimum process required by law.117 Privatizing the problem of sexual harassment with responses that shield perpetrators and reinforce stereotypes that sexual harassment is shameful for the victim allows for social dynamics that foster unchecked sexual harassment in the workplace.

B. No Longer a “Dirty Secret”118

The relative ease with which the backlash against sexual harassment and its victims has made its mark was, perhaps, predictable. Unlike forms of discrimination in which the perpetrator subjects a victim to biased or hostile treatment easily identified as group or identity based, perpetrators of sexual harassment usually target a single victim for

114. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (finding that Title VII is not a “civility code” and harassment that is sexual in nature does not automatically equate to discrimination).

115. See Broyles, supra note 95, at 145-46.

116. See Green, supra note 8, at 970 (stating that “major U.S. employers have adopted a diversity rationale as a measure of good business”).

117. See Grossman, supra note 13, at 70 (noting that employers have, in fact, been reinforced for “gam[ing] the system” and aiming at precise rule compliance, i.e., providing options for complaint resolution but not encouragement or assistance in reporting sexually harassing conduct and that these employers fare best in litigation).

individualized discriminatory treatment. It is here that one significant difference between sexual harassment and other forms of discrimination rests and perhaps where the source of much social anxiety around sexual harassment for civil rights advocates and others lies.

Sexual harassment, although group based, is a uniquely isolating experience for victims. Unlike race discrimination, in which the target of the biased treatment can readily tap into shared experience of other workers or even family members of the same racial background who may have had similar experiences, victims of sexual harassment have no analogous shared history with other victims. Sexual harassment is a newly acknowledged form of sex discrimination. Until Anita Hill’s taped testimony was broadcast on national and international network television, sexual harassment was a private shame with its public consequences largely ignored. There have been other sexual harassment cases since the Thomas hearings, but none with the impact of Professor Hill’s story, which galvanized the nation on this issue.

Significantly, while Anita Hill was initially vilified and publicly excoriated by the press, politicians, and the public, she exemplified none of the negative stereotypes commonly attributed to women victims of sexual harassment. Hill was “careful and deliberate,” in control, and even-handed throughout her testimony to the Committee. And as the heat of the moment dissipated, her credibility became increasingly apparent to members of the press and the public. The long-term impact of Hill’s testimony on workplace norms and values threatened traditional power dynamics and hierarchies in ways that continue to resonate today. Within a year, public opinion had shifted dramatically in Hill’s favor and women workers around the country rallied in support of their own rights to a workplace free from sexual harassment. Their efforts to employ public dialogue and communitarian strategies to keep sexual


122. See Bystrom, supra note 29, at 262, 270-75 (suggesting that anger at the Senate Judiciary Committee’s treatment of Anita Hill at the Thomas hearings contributed to the elections of Carol Mosley-Braun, Pattie Murray, Diane Feinstein, and Barbara Boxer to the U.S. Senate in 1992).
harassment evolving within public consciousness\(^{123}\) quickly met the resistance of employers and others determined to quash the momentum generated by the Senate Judiciary Committee hearings—hearings that had resulted in the confirmation of Clarence Thomas to the U.S. Supreme Court. And so we return to the question: Why were calls for applying modified discrimination resolution mechanisms to sexual harassment cases successful?

\section*{C. Does the Legal Community Understand Sexual Harassment?}

Researchers have developed several models to help explain sexual harassment. One model, the “natural/biological model,” may provide an insight into the tremendous reach mediation has had in the sexual harassment dispute resolution arena. The natural/biological model is premised on the assumption that the human sex drive is stronger in men than in women,\(^{124}\) presumes heterosexual normativity, that both sexes will participate in sexualized behavior in the workplace, that they like it this way, and that “harassing” conduct is idiosyncratic.\(^{125}\) This theory has been widely dismissed by sexual harassment researchers in favor of socio-cultural and organizational explanatory models. However, the courts have drawn on aspects of the natural/biological model in analyzing cases of heterosexual sexual harassment cases, suggesting that the theory continues to carry some currency within the legal profession.\(^{126}\)

Where the natural/biological model is applied, a perpetrator of sexual harassment is presumed to be acting on sexual desire that may or may not have been encouraged or discouraged by his (typically female) object of desire.\(^{127}\) Either way, the issue of discrimination is not part of the analysis and there are analogous presumptions that the target of attention should be flattered by the behavior, or at least not offended by it, and that she will suffer no negative consequences since the behavior was not motivated by discriminatory animus.\(^{128}\)

\begin{itemize}
  \item \(^{125}\) \textit{Id.}
  \item \(^{126}\) See Grossman, \textit{ supra} note 13, at 28-29.
  \item \(^{127}\) \textit{Id.}
  \item \(^{128}\) See Tangri et al., \textit{ supra} note 124, at 37.
\end{itemize}
CONCLUSION

“The lesson that stays with me is that it takes both legal action and direct political agitation to sustain even limited victories in this highly contested area of...rights to dignity and economic parity.”

— Martha Chamallas

Michael Green has argued that employees vulnerable to discrimination in the workplace must have “flexibility in their employment discrimination dispute resolution systems.” Most legal scholars and attorneys would likely agree that it is important for disputants to feel that they were treated fairly and that they obtained a just outcome through whatever dispute resolution mechanism they have employed. But because mediation is almost always conducted privately and mediated cases and their outcomes generally result in little or no public debate or discussion, claimants generally have no basis upon which to evaluate their result from a substantive justice perspective. They must rely on their attorneys to inform them of the relative “fairness” of their result.

The confidential and undocumented nature of most mediation has made empirical data tracking applied to mediation difficult to obtain. Calls have begun to emerge for more and better research that could help explain why mediation has proven so attractive to legal scholars and practitioners despite significant evidence that it has failed to live up to its promise. Mediation practitioners’ highly credible accounts offer insight into the dynamics employees who

129. See Martha Chamallas, Anatomy of a Lawsuit, in SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 248, 259 (Bernice R. Sandler & Robert J. Shoop eds., 1997) (analyzing the case of Professor Jean Jew who successfully sued the University of Iowa for race and sex discrimination. Jew, a first generation Chinese-American, received her M.D. at the age of twenty-four and joined the University in 1973 as the only woman faculty member in the College of Medicine. In the course of winning her lawsuit, Jew became one of the few faculty members to successfully argue that her academic department constituted a hostile work environment); see also Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990).

130. See Green, supra note 8, at 958.

131. See Sternlight, supra note 83, at 296-97.

132. See Grossman, supra note 13, at 65.

133. See id. (discussing the difficulty of evaluating mediation for distributive justice because decisions are not published); CONLEY & O’BARR, supra note 9, at 157 (explaining that a benefit of mediation is the confidential nature of the proceedings).

134. See Katherine R. Kruse, Learning from Practice: What ADR Needs From A Theory of Justice, 5 NEV. L. J. 389, 397 (2004-05) (arguing convincingly that only through testing mediation methods (i.e., legal processes) will we know whether our underlying theories and the methods we chose to implement them are effective); Sternlight, supra note 83, at 297 (calling for additional research exploring the reasons that different potential litigants prefer mediation).
mediate claims of sexual harassment continue to face. Alternative dispute resolution (ADR) mechanisms such as mediation frequently fail to provide victims of sexual harassment meaningful resolution to their injuries. Yet mediation continues to be promoted by legal scholars and practitioners as a desirable and effective alternative to litigation in sexual harassment cases, particularly from the victim’s point of view.

As women increasingly come to challenge institutions that perpetuate their subordination, the tendency has been “to blame and/or restrict women while excusing men’s behavior.” This practice has often extended to so-called solutions to social problems that fail to challenge the underlying assumptions regarding the rights of women, especially when doing so involves questioning the concomitant responsibilities of men or their surrogates. With mediation, women have come to depend upon a system and processes that enable sexual harassment against them to go unpunished—a system that regulates sexual harassment rather than correcting it in the “guise of protecting women”—a system that effectively trades justice for harmony. The time has come to put the mediation of sexual harassment to the test. As legal scholars and practitioners assess the level of understanding of sexual harassment within the legal community and researchers address empirical gaps that have emerged in the field, the distance between mediation ideology and its application to sexual harassment dispute resolution—in some respects space between myth and reality—may begin to prove easier to navigate.

135. See Grillo, supra note 10; Silver, supra note 107; see also Conley & O’Barr, supra note 9 (relying on case studies and/or sociolinguistic analytical methods, but also grounding their contextual critique of mediation in their own experiences as professional mediators).

136. See Patricia D. Rozee, Women’s Fear of Rape: Cause, Consequences, and Coping, in Lectures On The Psychology Of Women 276, 286 (Joan C. Chrisler, Carla Golden & Patricia D. Rozee eds., 1996) (discussing society’s inclination to blame the victims of rape for their experiences).

137. See id. (illustrating an example of society imposing restrictions on women’s activities in an attempt to reduce rape).

138. See id. (arguing that the criminal justice system, which is male dominated, regulates violence against women in “the guise of” protecting women).

139. See Nader, supra note 12, at 1.