Dealing with Sexual Harrassment in the Workplace: The Promise and Limitations of Human Rights Discourse

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Abstract
This paper examines the value of liberal rights in launching a political movement against sexual harassment, while reassessing their limitations for changing the practice of harassment. For rights to benefit women, decision makers must mean the same thing women do when speaking of sexual harassment. The paper analyzes how dominant ideology misshapes the delivery of rights against sexual harassment, normalizes male aggression, and reconstructs the struggle into one not about power but about taste, free speech, and a conflict between abstract rights. The paper examines how other rights discourses can empower women to combat harassment in a proactive way.

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DEALING WITH SEXUAL HARASSMENT IN THE WORKPLACE: THE PROMISE AND LIMITATIONS OF HUMAN RIGHTS DISCOURSE

BY FAY FARADAY*

This paper examines the value of liberal rights in launching a political movement against sexual harassment, while reassessing their limitations for changing the practice of harassment. For rights to benefit women, decision makers must mean the same thing women do when speaking of sexual harassment. The paper analyzes how dominant ideology misshapes the delivery of rights against sexual harassment, normalizes male aggression, and reconstructs the struggle into one not about power but about taste, free speech, and a conflict between abstract rights. The paper examines how other rights discourses can empower women to combat harassment in a proactive way.

Cet article examine la capacité des droits libéraux à lancer le mouvement politique contre l'harcèlement sexuel, tout en se rendant compte de leurs limites pour en prévenir la pratique. Afin que les droits soient profitables aux femmes, il faut que ceux qui prennent les décisions soient d'accord avec les femmes dans leur définition de l'harcèlement. L'article analyse comment l'idéologie dominante puisse déformer l'application des droits contre l'harcèlement sexuel, normaliser l'agression masculine, et transformer la polémique en une qui ne soit pas à propos du pouvoir, mais bien à propos du goût, de la liberté d'expression et des droits abstraits. L'article examine aussi comment d'autres discours des droits puissent donner aux femmes le pouvoir de combattre l'harcèlement sexuel d'une façon proactive.

The universal practice of mankind ... has recognised the right of the male sex to make the overtures of marriage, and has thrown upon the other sex the task of yielding to or resisting these importunities.

—Canada Lancet (1874)1

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I. INTRODUCTION

Catharine MacKinnon defines sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."² Sexual harassment in the workplace is the abuse of (overwhelmingly) male economic and sexual power to undermine (overwhelmingly) female economic security, personal integrity, and safety. It constitutes sexual discrimination because it creates a barrier to women's equal participation in the workforce.³ It is illegal. The Canadian Charter of Rights and Freedoms prohibits discrimination on the basis of sex,⁴ and both the Canadian and Ontario human rights codes explicitly prohibit sexual harassment in the workplace.⁵ Yet studies still estimate that between 42 and 80 per cent of women are sexually harassed at work.⁶ Laws against discrimination have not transformed sexual power relations, and it becomes crucial to reassess whether liberal rights can ever change the practice of sexual harassment.

This essay begins with a theoretical analysis of both the promise and the limitations of rights discourse as it relates to sexual harassment. On one hand, rights are an important and powerful tool in the strategy

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⁴ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 15(1) [hereinafter Charter].
⁵ Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 2, 14; Human Rights Code, R.S.O. 1990, c. H.19, ss. 7(2), 7(3).
for political change because they identify social injuries using a language that is persuasive in Canada’s liberal political culture. Rights give previously marginalized groups a legitimate public voice and encourage consciousness-raising. On the other hand, the exercise of rights is limited by the ways in which rights define social problems. Liberal rights construct power relations in individual terms, speak largely to formal equality, and provide only very abstract guidelines of what constitutes equality. Moreover, rights remain reactive: they punish a course of conduct after the fact but cannot prevent abusive conduct.

Next, the essay looks at the way rights against sexual harassment have been applied. Relatively few sexual harassment cases go to court: most are settled at human rights boards of inquiry or labour grievance arbitration boards. It is important to analyze how justice is delivered at this level. This section then examines the ideology that shapes the manner in which boards of inquiry do and do not identify sexual harassment, how they construct the facts, how they treat complainants, and what kind of equality they permit women to enjoy.

Finally, the essay examines alternatives to human rights legislation that could be used to discourage sexual harassment. In searching for practical ways to end sexual harassment, it must be remembered that it is only one manifestation of the male/female power imbalance: it is a social problem that cannot be eradicated by individualized remedies. Moreover, it cannot be eradicated by the law alone. Those who seek equality must remain cognizant of the other power discourses that structure male/female power relations and socialization, which also call for reform.

II. AN ANALYSIS OF RIGHTS DISCOURSE

Carol Smart writes that, when planning a strategy for social change, “we cannot know in advance whether a recourse to law will empower women.” Women cannot predict whether the law will recognize their rights claims or whether they will have the legal power to define the meaning of those rights. It is also difficult to predict how dominant groups will react to and challenge a claim to rights. Rights and politics are never static: they are bound in a dialectical relationship.

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8 E.M. Schneider, “The Dialectic of Rights and Politics: Perspectives from the Women’s Movement” (1986) 61 N.Y.U. L. Rev. 589 at 590. Schneider explains that political pressure leads a legislature to enact a right. The form of political agitation then changes as different groups present
Thus, rights serve different purposes at different stages in the evolution of a political movement. They act as catalysts early in a movement for reform, because they identify a formal inequality. But feminism demands more than this: it demands substantive equality. In this context, Smart argues that the continued pursuit of more formal equality rights is problematic, as “the rhetoric of rights has become exhausted, and may even be detrimental.”

It is valuable to assess what human rights legislation has achieved and what it can do in the present political context to promote or to inhibit sexual equality.

Law is an enormously powerful discourse, both ideologically and practically. It distributes social power and structures the ways in which we understand and value experiences by granting public legitimacy to particular ways of interacting. Legal rights are normative: they identify the boundaries of acceptable social interaction, shape an individual’s sense of self, and impose a social responsibility to achieve in practice the ideals that are articulated in formal laws. Legal rights thus have intrinsic value because, once articulated as formal principles, they change the way society identifies injuries and recognizes an entitlement to restitution.

For groups who historically have been disempowered, acquiring legal rights is an important prerequisite to further reform. “[Rights elevate] ... one’s status from human body to social being” because, through rights, a group’s experiences acquire public value for the first time. Acquiring formal rights raises the consciousness both of members of the subordinated group and of society at large. Further, rights provide a practical means by which to claim entitlements and to attack existing power relations. Smart writes:

To claim that an issue is a matter of rights is to give the claim legitimacy ... to make the claim “popular” ... it makes the claim accessible ... It enters into a linguistic currency to which everyone has access.

When liberal ideology holds as its fundamental values the right of an individual to be free of interference from other individuals or collectives, and the right to be treated according to individual merit, it is difficult to dispute a claim to be treated in accordance with those principles. In this

different interpretations of the scope and meaning of the right. This leads to a further articulation of the right, this time through the courts, and the cycle continues.

9 Smart, supra note 7 at 139.


11 Smart, supra note 7 at 143.
political context, "the expansion of bourgeois legal rights is a necessary condition for social transformation."12

Two decades ago, sexual harassment did not have a name. It was neither a private nor a public injury. It was simply "a normal and inevitable activity of men when exposed to female co-workers."13 But the articulation of laws against sexual harassment made this behaviour illegitimate. Laws against discrimination publicly condemned the various forms of coercive behaviour women experienced and acknowledged the injuries these dynamics caused. The existence of these laws allowed feminists to name the variety of harassing dynamics women experience. MacKinnon categorized sexual harassment as either "quid pro quo" or "hostile-environment" harassment. Quid pro quo harassment occurs when unwanted sexual interaction is made the condition of hiring, continuing in a job, or getting a promotion. Rejection of sexual advances leads to job-related reprisals: firing, demeaning assignments, or intense criticism. Hostile-environment harassment involves continued verbal, physical, or psychological harassment—leering, unwanted touching, comments about a woman's sexuality—which undermines a woman's job performance, threatens her position in the workforce, and causes physical and emotional harm.14 While the Canadian Human Rights Act prohibits sexual harassment "in matters related to employment," the Ontario Code adopts MacKinnon's analysis and explicitly prohibits both hostile-environment and quid pro quo harassment.15 Both codes identify sexual harassment as an infringement which prevents women from enjoying "equal rights and opportunities" in the workplace.16

The power to name these experiences as injuries has more than symbolic importance. In practical terms, the law provides women with a form of redress for a socially-recognized injury. It provides a route by which women can change the conditions under which they actually live. In terms of consciousness-raising, the articulation of a right to not be sexually harassed allows women to see sexual harassment as a pattern of behaviour rather than as an isolated event which happens to them alone.

12 J. Fudge, "What Do We Mean by Law and Social Transformation?" (1990) 5 Can. J. of Law & Soc'y 47 at 49 [hereinafter "Law and Social Transformation"].
13 Schneider, supra note 8 at 643.
14 Sexual Harassment, supra note 2 at 32-40.
15 Canadian Human Rights Act, supra note 5, s. 14; Ontario Human Rights Code, 1981, supra note 5, ss. 6(2) and 6(3).
16 Human Rights Code, supra note 5, preamble.
It gives women a stronger sense of self-worth and links individual women to a broader social group.17 Holly Fechner is particularly optimistic about the potential formal rights have to transform opinions and behaviour on a broad scale. She writes that new laws promote consciousness-raising which, in turn,

create[ ] a social climate for rethinking doctrine in which legal decision makers begin to construe facts differently. Reformulated doctrine reinforces social change and provokes more widespread consciousness-raising.18

But rights discourse does not inevitably lead to this process of growing social enlightenment. The dialectic between rights and politics is more uneven, unpredictable, and inherently more conflictual than Fechner and Schneider indicate. Rather, as Judy Fudge warns, the positive influence that the articulation of rights has on the political mobilization of groups committed to social reform must be weighed against the results of litigation and the political mobilization of groups committed to preventing social reform.19 The political and legal discourses that emerge from this interaction between rights and politics may in fact obscure the power relations that must be changed.

Once a right has been articulated, the group that agitated for its enactment loses control over its use and meaning. The very articulation of a right oversimplifies complex social relations and freezes the meaning of a right.20 This is so because, if universal laws are to apply equally to all members of a society, they must be expressed in language which abstracts them from concrete fact and power situations. But abstract rights can be appropriated by anyone, including dominant social groups.21 And more ominously, when rights conflict, one abstract right is pitted against another. The doctrine of stare decisis requires that principles which emerge from the balancing of conflicting rights be applicable to other similar conflicts of rights. Therefore, any particular

17 Schneider, supra note 8 at 617-18.


19 "Law and Social Transformation," supra note 12 at 58; Williams, supra note 10 at 412; J.A. Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 Int'l J. Soc'y of Law 445 at 448 [hereinafter "Entrenching a Bill of Rights"].

20 Smart, supra note 7 at 144; Schneider, supra note 8 at 595.

21 See, for example, G. Brodsky & S. Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989) c. 5. Brodsky and Day write that many more men than women have used s. 15(1) of the Charter to raise and to win sex discrimination cases.
rights conflict is resolved at a level of generality which ignores the concrete power relations experienced by real individuals. The focus of rights discourse is always on abstract principles, because

[Instead of directly confronting the issue of how best to balance the competing social interests and policies ... the argument is cast in the form of competing constitutional rights. ... While it is true that social conditions will figure in their argument, they will figure only indirectly and to the extent that it is necessary to establish the rights claim.]

When human relations are characterized as rights conflicts, political discourse relies increasingly on the courts to resolve social power imbalances. And this dialectic “has polarized and narrowed the debate without challenging prevailing [social] practices.”

The backlash against anti-harassment legislation has used the discourse of abstract rights effectively to change the nature of the debate from one about transforming the relative economic and sexual power of men and women as groups to one about protecting individual morality, freedom of speech, and management’s right to control capital. And litigation to date has shown that these individualist doctrines are more persuasive than feminist analyses in shaping the meaning of the rights. The dialectic of rights and politics can thus benefit the backlash against social reform as much as it can the movement for social reform. The evolution of rights practice ultimately depends on the relative power of forces for and against change.

Acquiring a formal right can lead one to believe that a systemic power discrepancy has been rectified. But only a minute fraction of existing social conflicts ever make their way to courts or administrative tribunals. Rights discourse, then, can only transform broad social relations if there is general knowledge about current conflicts and judicial decisions, if popular media supply an accurate and comprehensible translation of judicial reasoning, and if the public at large accepts the judicial interpretation of relative entitlements. There are many “ifs” involved here. Consequently, the political struggle is not won when a legislature has granted a right or a court or tribunal has

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22 “Law and Social Transformation,” supra note 12 at 59-60.
23 “Entrenching a Bill of Rights,” supra note 19 at 458.
24 For the purposes of this essay, “tribunals” will refer generally to the different administrative decision-making bodies which have carriage of sexual harassment cases: boards of inquiry under provincial legislation, tribunals and review tribunals under the Canadian Human Rights Act, and grievance arbitration boards under collective agreements.
rendered a decision. There is another danger inherent in rights discourse: by framing social conflicts in terms of legal rights, the discourse presupposes a legal solution. Legal academics and practitioners must therefore remain cognizant of the need for extralegal political activity in order to give legal entitlements any substantive meaning. Before canvassing alternative means of addressing sexual harassment, though, it would be valuable to analyze how the rights discourse has evolved. In order for women to be protected or empowered by rights against sexual harassment, legal decision makers must mean the same thing women do when they speak of sexual harassment. At this stage in the rights/politics dialectic, it is important to examine how legal decision makers have defined sexual harassment.

III. A PRACTICAL APPLICATION OF RIGHTS

The Supreme Court’s 1987 decision in Robichaud v. Canada (Treasury Board), and its 1989 decision in Janzen, are Canada’s leading statements of the principles for identifying sexual harassment. These cases have established that sexual harassment is sex discrimination and, as in other acts of discrimination, the perpetrator need not be motivated by an intention to discriminate in order to be found liable. Explicitly recognizing both quid pro quo and hostile-environment harassment as an “abuse of power,” Chief Justice Dickson in Janzen defined sexual harassment in the workplace as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.” Explicitly recognizing both quid pro quo and hostile-environment harassment as an “abuse of power,” Chief Justice Dickson in Janzen defined sexual harassment in the workplace as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”

The “course of employment” in which harassment occurs must be defined broadly to encompass conduct that occurs in a work context even though not prescribed in a job description. Not all the women working in an establishment need be subjected to sexual harassment in order for one of them to bring a claim for harassment. Finally, an employer is liable for the sexually harassing behaviour of supervisors and employees.

These principles appear to be responsive to women’s experiences of harassment. But decisions by courts and boards of inquiry, both

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27 Supra note 3.
28 Ibid. at 375.
29 Robichaud, supra note 26 at 90-95; Janzen, supra note 3 at 376-80.
before and since these landmark cases, show that the struggle for rights is waged primarily at the level of legally constructing the relevant facts of a case. Fechner points out that “[a]ltering doctrine alone is often insufficient to reform law because legal decision makers remain free to select and shape facts in accordance with their socially influenced vantage point.” Legal decision makers are overwhelmingly upper-middle class white males, and their attitudes toward sex roles and sex privilege are as shaped by the dominant culture as are those of male perpetrators. Not surprisingly, legal decision makers have tended to “accept men’s versions of the facts as more true than women’s versions,” with the result that women’s concerns are submerged even before legal principles are brought into play.

The ideology that shapes the delivery of rights against sexual harassment can best be analyzed by looking at why women need to take their claims to a legal forum, what threshold must be reached to characterize behaviour as creating a hostile environment, how tribunals identify behaviour as “sexual,” how tribunals reconstruct the “relevant” facts and, ultimately, what form of equality these rights allow women to enjoy. The effectiveness of the rights discourse must be measured against its ability to transform the social relations that spawn sexual harassment. Women are more likely to experience hostile-environment than quid pro quo harassment, but tribunals have been reluctant to recognize the former type of sexual coercion. This essay examines primarily hostile-environment cases to reveal the assumptions that have influenced the legal construction of the facts, and that have thereby limited women’s access to rights against discrimination.

A. Resorting to Law

Women need to bring their claims of sexual harassment to a third party because employers and co-workers are overwhelmingly unwilling to admit sexual harassment exists in their workplace. Many women who have been harassed indicate their discomfort to their harassers but, whether they are bosses or co-workers, harassers readily

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30 Fechner, supra note 18 at 505.

31 See M. Angel, “Sexual Harassment by Judges” (1990-1991) 45 U. Miami L. Rev. 817. Angel demonstrates that despite social mythology to the contrary, judges, lawyers, and other men with prestigious jobs are as likely to be guilty of sexual harassment as are men in other jobs.

32 Fechner, supra note 18 at 504.
When women harassed by supervisors and co-workers complain to their employers, employers likewise tend not to take the complaints seriously, even though they may be liable for damages. In Gervais v. Canada (Agriculture Canada), a female employee endured a period of verbal sexual harassment from a male co-worker, who eventually raped her. The report from an internal investigation recommended firing the male employee, but instead the Director General of Agriculture Canada (Ontario Region) ordered that the two employees “should resume their work and behave normally in the workplace.” When faced with such unhelpful employers, women may find courts and tribunals more receptive to their claims. Conversely, however, harassers can use tribunals to overturn the actions of employers who do discipline harassers. Unionized employees who have been dismissed for sexual harassment have successfully used the grievance arbitration process to allege dismissal without just cause, and arbitrators have reinstated harassers to their jobs with back pay.

B. Identifying a Rights Claim

It is, thus, difficult for women to predict whether tribunals will help or hamper their rights claims. But, as a prior issue, the wording of the legislation itself makes it difficult for women to identify whether they are entitled to make a rights claim at all. Section 6(2) of the Ontario Human Rights Code provides:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

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36 Ibid. at D/5005.

The Code defines “harassment” as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.” Legal decision makers retain a broad discretion when interpreting each of the three factors in this definition of hostile-environment harassment.

First, at what point has behaviour persisted long enough to constitute “a course of vexatious comment or conduct” which becomes a “condition of work?” Legal evaluation of this point differs from case to case. Firmly entrenched in a “sticks-and-stones” mind-set, tribunals are particularly reluctant to recognize verbal harassment as an injury. In order to create a hostile environment, verbal harassment must be more frequent and persistent than physical harassment, and its frequency must be inversely proportional to its offensiveness. Such an open standard makes it difficult for women to know if they have suffered “enough.” In Bell, adjudicator Shime held that, because the female employee only worked with her harasser on 50 per cent of her shifts, the harassment could not be considered a condition of work. MacKinnon points out that this ambiguity about when women can activate a right can lead them to downplay the injury they have suffered:

When the design of a legal wrong does not fit the wrong as it happens to you, ... that law can undermine your social and political as well as legal legitimacy in saying that what happened was an injury at all—even to yourself.

Second, the law requires that sexual harassment be experienced as “vexatious” and “unwelcome” by the complainant. The law is formally sensitive to women’s subjective experience of harassment. But in practice, tribunals and courts are quick to overrule women’s assessments of what vexes them. As recently as October 1991, Mr. Justice Southey of the Ontario Court (General Division) proclaimed (despite assertions to the contrary by the complainants) that, although they had been fondled and “propositioned” by a male co-worker, the “unwanted touching ... was of no great significance to the persons

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38 Supra note 5, s. 9(f).
39 Watt v. Regional Municipality of Niagara and Wales (1984), 5 C.H.R.R. D/2453 at D/2456 (Ont. Bd. Inq.) [hereinafter Watt]. The adjudicator set out the threshold test for verbal harassment at D/2467: “[T]nsluts or taunting of this kind must, through a combination of offensiveness and frequency, reach a level at which the victimised employee reasonably believes that continued exposure to such conduct is a condition of the job.”
40 Supra note 33 at D/158.
involved.” In other cases, women have been told that they are “obviously over-sensitive and over-imaginative,” and that they “totally over-reacted.” In practice, then, this subjective standard of vexatiousness is scrutinized according to an external (male) objective standard.

Third, tribunals repeatedly hold that women must express directly and unambiguously to their harassers their disapproval of the harassing conduct. This does nothing to challenge the male sexual privilege which gives rise to sexual harassment and, in fact, it normalizes male sexual aggression in the workplace. Based on a stereotypical assessment of “normal” heterosexual “courting” patterns, the legal system affirms that it is “natural” for men to make sexual advances to women, and that the onus is on women to indicate, after the fact, that this sexual attention is unwanted. Despite the formally objective standard of this test (“ought reasonably to have known”), there is no practical onus on men to recognize that some conduct is objectively unwelcome. In practice, men are permitted to behave aggressively up to the point at which a woman responds with an unambiguous “no,” and confusion persists over just what “no” means. The legal system imports a subjective standard—that of the male harasser—into its evaluation and blames women for not being clear enough. In Ottawa Board of Education, a female office worker told a subordinate male co-worker that she felt uncomfortable with his attentions and, showing him photographs of her family, told the harasser that she was happily married and had children. She also asked him to stop coming into her office (as he did several times a day), to stop giving her flowers, and to stop asking her out. The adjudicator was “satisfied that she was simply being polite to the grievor and trying to discourage him in a non-confrontational way. However, it was a rather oblique message she was giving him.” In fact, he added, the man may have interpreted her refusals as “neutral or even encouraging.” In another case, when a woman used coarse language to express her displeasure to her harasser,

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43 Re Canada (Treasury Board—Employment and Immigration) and Broomfield (1989), 6 L.A.C. (4th) 353 at 366 (C.P.S.S.R.B.) [hereinafter Broomfield]; and Aragona, supra note 33 at D/1111.


45 Ottawa Board of Education, supra note 37 at 179.
the adjudicator held that, given the woman's "feistiness," it was not surprising that her supervisor reacted with further harassment.46

Women's access to rights against sexual harassment is thus controlled by jurisprudence interpreting the formal definition of sexual harassment. And this interpretation often fails to accord with women's own definitions of what constitutes a vexatious course of conduct. The onus on women to articulate their discomfort to their harassers is also out of step with women's actual behaviour. Because of intimidation, shame, or economic vulnerability—the very feelings the practice of sexual harassment aims to reinforce—women do not complain. And this silence is later held to absolve harassers who claim they did not know that the woman objected. This in turn reinforces women's perception that a resort to law will be futile, and discourages the reporting of sexual harassment.

C. Identifying Sexual Harassment: Just What is Sex Anyway?

Beyond the jurisprudence that limits the formal definition of sexual harassment, one of the greatest obstacles to identifying a particular instance of sexual harassment is the fact that the infringement refers to "sex." Tribunals and courts are trapped in a discourse through which they evaluate sexual harassment in terms of its similarity to "normal" heterosexual behaviour. The Catch-22 is that if conduct looks like "sex," it cannot be harassment, and if it does not look like "sex," it cannot be sexual harassment. This discourse transforms the rights claim into an individualized moral (and therefore private/extralegal) conflict, and relies on (and reinforces) traditional gender stereotypes to set the boundaries for acceptable behaviour between men and women. It reinforces the notion that sexual harassment is about misdirected sexual attention and not about power. And it fails to ask what it is about sexually directed behaviour that is pernicious in the workplace.

Some tribunals remain oblivious to the ways in which sex is used as a lever to undermine women's position in the workplace. When an employer repeatedly told his female employee how "sexy" she looked and, particularly, how sexy her legs were, a Board of Inquiry found that such comments could not always constitute sexual harassment. The adjudicator held that "much will depend on the circumstances. A businessman who wears shorts to work or a secretary who wears a short

46 Watt, supra note 39 at D/2463.
mini-skirt might well invite such comments.” This illustrates a fundamental problem with the “reasonableness” standard that is employed in objectively identifying sexual harassment. Men and women experience identical comments about their sexuality differently. To remind a man of his sexuality is to remind him of his power; to remind a woman of her sexuality is to remind her of her vulnerability. This sort of comment is in fact a demonstration of power politics, an assertion of power that happens to be expressed in a physical manner. It is the ultimate reminder to women that their fundamental status in society is that of sex object, and that they hold their positions in the workforce only on male sufferance.

What sort of behaviour, then, do tribunals recognize as “sex” for the purposes of sexual harassment law? Tribunals will generally recognize the physical touching of genitals, buttocks, and breasts as sexual harassment that creates a hostile environment. But if the harassing conduct “objectively” resembles consensual heterosexual relations, some tribunals are unable to recognize that the accompanying power dynamic makes the conduct subjectively coercive.

Bonnie Robichaud discovered that this misconstruction of the facts happens even in clear quid pro quo harassment cases. Robichaud was a probationary employee at the Department of National Defence when her supervisor, Dennis Brennan, coerced her into having intercourse with him. At the initial hearing, adjudicator Abbott found that, even though Robichaud had told Brennan on at least three occasions that his advances were unwelcome, “each rejection was followed by ‘sexual encounters in which it must be assumed she participated voluntarily’ and from which Brennan could perceive that her protests were insincere.” This decision was overturned on appeal, but it illustrates the danger that a tribunal will characterize any sexual intercourse between co-workers as a private relationship which has only incidental connections with the workplace. In fact, this “consent” is doubly coerced: economic pressure is applied to force women into

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47 Aragona, supra note 33 at D/1113.
48 Sexual Harassment, supra note 2 at 171.
unwanted sexual activity, and sexual pressure becomes a condition of continued employment.\footnote{Sexual Harassment, supra note 2 at 171. For a clear example of the nexus between sexual and economic coercion, see Torres v. Royalty Kitchenware Limited and Guercio (1982), 3 C.H.R.R. D/838 at D/861 (Ont. Bd. Inq.) [hereinafter Torres]. The defendant employer, Guercio, raised as his main defence that “if he was in fact guilty of sexually harassing a female employee (which he denied) ... she should simply quit her job if she did not like it.”}

Tribunals have even more difficulty identifying sexual/economic coercion in less overtly “sexual” behaviour. In some cases, sitting or standing overly close to a female employee, making sexually-degrading comments about female customers, or asking a female employee about her sexual habits, have been recognized as creating a hostile environment.\footnote{See Noffke, supra note 44; Potapczyk v. MacBain (1984), 5 C.H.R.R. D/2285 (C.H.R.T.); and Torres, ibid.} But tribunals are very inconsistent. In other cases (and many of the reported decisions fall into this group), identical and similar behaviour has been dismissed as showing no cause of action. Massaging a woman’s neck and shoulders, stroking her hair, staring at her, asking her about her sexual habits, chasing her around a desk in a locked room, have all been dismissed as not creating a hostile environment because “[n]o invitation was offered, no request made, no order given.”\footnote{Broomfield, supra note 43 at 356; Re Canadian Union of Public Employees and Office & Professional Employees’ International Union, Local 491 (1982), 4 L.A.C. (3d) 385 [hereinafter cuPE]; and Bell, supra note 33.}

In identifying hostile-environment harassment, these tribunals have examined whether the behaviour could be construed as a “pick-up.” This becomes the threshold for a finding of sexual harassment. A woman who worked on a grounds crew was repeatedly subjected to degrading comments from her supervisor, including comments that women “were [not] put on this earth to do the work of men,”\footnote{Watt, supra note 39 at D/2454.} that having sex with her would be like “sleeping with a lumberjack,”\footnote{Ibid. at D/2454.} and that women were only good as “bed-warmers.”\footnote{Ibid. at D/2455.} The Ontario Board of Inquiry held that “none of these incidents could be said to have involved something in the nature of a sexual overtue” and, given that her supervisor was “some forty years her senior,” the woman “had no reason to believe” he was making improper sexual advances to her.\footnote{Ibid. at D/2454.}
In a 1991 case, *Shaw v. Levac Supply Ltd.*, it was held that "sexual references or comments that do not amount to sexual advances or solicitations may in some circumstances constitute sexual harassment." This language suggests a tentative amendment of the principles by which harassment is identified, and reflects a recognition of the economic and social coercion that inheres in sexual harassment. But the facts of this case do not uphold the promise of the expanded principle. For fourteen years a male co-worker had called a female worker a "fat cow" and made other disparaging remarks about her obesity. It was held to be

incontestable that to express or imply sexual unattractiveness is to make a comment of a sexual nature ... [I]t is sexual harassment in the workplace if it is repetitive and has the effect of creating an offensive work environment.

This conclusion certainly makes creative use of the principles to expand the realm of behaviour characterizable as sexual harassment, but it remains committed to a paradigm which draws analogies between sexual harassment and consensual sexual relations. *Shaw* differs from previous cases largely in that it involves the recognition of sexual harassment in the context of a "sexual put-down" rather than a "pick-up."

Human rights jurisprudence which analyzes sexual harassment in terms of a (hetero)sex paradigm is problematic, because it situates sexual harassment along a continuum of heterosexual behaviour that is more or less welcome. Sexual harassment is depicted as something that may be an unwelcome or misunderstood invitation to a consensual sexual relation. This individualizes the conflict, downplays the economic coercion that is inherent in sexual harassment, and absolves the employer of responsibility for changing inter-sexual relations in the workplace. It ultimately turns the debate about sexual harassment into a question of morality rather than domination, and of sexual taste rather than sexual and economic discrimination. This manoeuvre shifts the emphasis on which particular facts become relevant in the legal construction of sexual harassment.


60 *Ibid.* at D/55.
D. Reconstructing the Facts

If, building on the (hetero)sex paradigm, tribunals assume that sexual harassment is an individual misunderstanding rather than a problem of systemic inequalities, they will construct the facts in a way that supports this assumption. And this is precisely what they have done. Tribunals analyze separate incidents of harassment in isolation so that an overall pattern of persecution becomes invisible. The fact that it is the cumulative experience of sexual harassment which creates the injury is also rendered invisible. Tribunals also characterize the conflict as a clash of personalities or, drawing on racial stereotypes, of cultures. They pit female employees against each other so that, if some employees say they have not been harassed, their testimony undermines the credibility of the woman who complains. And, most seriously, tribunals ignore women’s own descriptions of vexatious experiences. They downplay harassing behaviour as jokes, teasing, or harmless horseplay. In so doing, legal decision makers shift the emphasis from facts about experiences of power and its abuse, to facts about taste and morality. The case of Allan and Wilson v. Riverside Lodge illustrates how tribunals use these techniques to recharacterize the nature of the dispute.

At the Riverside Lodge, female cocktail waitresses wore a uniform that resembled a “genie costume”: tank tops and baggy pants that were slit up the side of the leg to the hip, so that the women’s underwear was visible. Several waitresses complained that the costume made them feel uncomfortable, and that clients verbally and physically harassed them. Some clients would stick their hands in through the slits and squeeze the waitresses’ buttocks. The Board of Inquiry found that there was no evidence of sexual harassment. The fact that male waiters wore the traditional uniform of black trousers and white shirts was dismissed as irrelevant. As the women’s uniform was designed by a female bartender, the Board held that “different waitresses ... had strong and varying aesthetic opinions on the uniform.” The Board dismissed
the possibility that the uniform may invite harassment by finding as a fact that "[t]acky [the uniform] may be; excessively sexy it is not." By characterizing the dispute as an aesthetic one, the Board ignored the actual incidents of physical harassment the waitresses described. In its reconstruction, the Board ignored the fact that such uniforms encourage the sexualization of women's work, as well as the fact that this is a problem particularly for women in the restaurant trade, who have historically been stereotyped as sexually available to their customers.

Legal decision makers wield enormous power when they characterize vexatious behaviour as something other than harassment. Since a legal decision becomes a precedent against which future decisions are evaluated, "[j]udicial opinions reify facts that could have been presented from another point of view." This makes it even harder for future complainants to have their experiences recognized as harassment. And, to the extent that this reconstruction abstracts the conflict from broader social power dynamics, it becomes correspondingly more difficult to change the workplace structures which encourage harassment.

Yet the legal procedures that structure anti-discrimination inquiries encourage an individualization of the conflicts. Under human rights legislation, a complainant must prove both that the allegedly harassing conduct occurred and that, under the circumstances, the conduct constituted sexual harassment. As it is constructed, the burden of proof individualizes the dynamics of sexual harassment, feeds into the assumption that women bring false complaints about sexual harassment, and makes the complainant's character, behaviour, and motivations relevant legal facts. By attacking a woman's credibility in this way, tribunals do not deny that the facts of harassment happened, but structure those facts so that it appears unreasonable for the complainant to have experienced them as harmful. Sexual harassment is reduced to a matter of individual hysteria or vengefulness.

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66 Ibid. at D2982.
67 Fechner, supra note 18 at 502.
68 Gallivan, supra note 6 at 36.
69 C.A. MacKinnon, "Sexual Harassment: Its First Decade in Court" in MacKinnon, supra note 41, 103 at 108. Some academics reject MacKinnon's characterization of sexual harassment as a social problem of economic and sexual domination, and continue to insist that sexual harassment is in fact a matter of individual sexual desire and preference. For an example of this view, see E.F. Paul, "Sexual Harassment as Sex Discrimination: A Defective Paradigm" (1990) 8 Yale L. & Pol'y Rev. 333.
It is very hard to prove that sexually-harassing behaviour occurred, because often the only witnesses are the harasser and the complainant. Alleged harassers can raise doubts about the existence of the conduct by showing that the woman had motives to fabricate a complaint. In *Bell*, an early case that is cited frequently in sexual harassment jurisprudence, the complainant alleged that her employers made crude propositions to her, commented on her sex life, slapped her buttocks, and fired her when she complained. The employers responded that she had been fired for incompetence, and that she was bringing the complaint because she had subsequently been unemployed for seven months and needed money. The adjudicator agreed that the possibility of this motivation undermined her credibility. A more recent case, *Broomfield*, applied the same logic. Ms. Broomfield had been sexually harassed for two years, but did not make a formal complaint until she was passed over for a promotion. She made no secret of the fact that the economic retaliation motivated her complaint, and the tribunal held that this cast a shadow on her credibility. Both Ms. Bell and Ms. Broomfield lost their cases.

Theoretically, the standard of proof in discrimination cases is the civil standard of a "balance of probabilities." But because the facts of sexual harassment are open to a multitude of interpretations, it has been held that for "conduct to be found harassment in the workplace because of sex [it] must be consistent with the allegation of such gender-based harassment and inconsistent with any other explanation." This burden, in practice, approaches the criminal law standard of "beyond a reasonable doubt." As in rape trials, the complainant’s history is analyzed in great detail. If a woman alleges that she was fired, not promoted, or subjected to intense criticism because she rejected sexual advances, her work history is scrutinized for other explanations which could justify these penalties. Some tribunals have gone so far as to

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70 *Bell*, supra note 33 at D/157.

71 *Broomfield*, supra note 43 at 359 and at 367-68. *Ottawa Board of Education*, supra note 37 took a slightly different approach regarding a woman’s motive. At 176, it was held that the woman only lodged a sexual harassment complaint because she had heard that her harasser had, at least twice before, been relocated by his union because of sexual harassment charges. Rather than being viewed as lending credibility to her complaint, this evidence was used to question her motives in bringing the claim: "Had she not heard of his reputation, she would probably not have considered that his attentions to her were serious enough to warrant reporting the matter to her supervisor."

72 *Shaw*, supra note 58 at D/59.

73 *Bell*, supra note 33 at D/157.
analyze a woman’s work record at jobs which predated the one in which the allegation of harassment arose.\footnote{Watt, supra note 39 at D/2460.}

In a similar vein, complainants must prove that the injuries they suffered in fact resulted from the harassment and from no other source. Backhouse and Cohen write that the pattern of injuries which sexual harassment complainants suffer is so uniform that it has been recognized as “sexual harassment syndrome.” The syndrome manifests itself in anger, shame, depression, nausea, headaches, insomnia, erosion of self-confidence, and fear.\footnote{Watt, supra note 39 at D/2463. In \textit{Cure}, supra note 53 at 404, a woman’s claim that she suffered stress-related injuries because her supervisor harassed her was dismissed. It was found that she was ill, “not necessarily because he had done or was doing something particularly wrong, but because of her \textit{instinctive emotional reactions to him}” [emphasis added].} Where women have presented these symptoms, tribunals have held that they can be attributed just as easily to other events in a woman’s personal life—divorce, custody battles, and general levels of stress.\footnote{Watt, supra note 39 at D/2463. In \textit{Torres}, supra note 51 at D/861, begins with the warning that “[o]ne has to be careful in assessing a complaint of sexual harassment ... [T]he accusation will sometimes be simply the means of retaliation by a disgruntled, fired employee.”} The fact that the harassment may have aggravated or contributed to these symptoms is not considered relevant or actionable.

The analysis of a woman’s credibility operates from the presumption that women will bring false accusations.\footnote{Broomfield, supra note 43 at 368-69.} So, a woman’s behaviour on the witness-stand becomes highly relevant to the disposition of a case. The fact that the complainant refused to look at her alleged harasser, that she constantly wrung her hands while testifying, that she became upset and had to leave the hearing room, or that she could not provide exact dates for the incidents of harassment, have all gone to undermine the complainant’s credibility.\footnote{In fact, Torres, supra note 51 at D/861, begins with the warning that “[o]ne has to be careful in assessing a complaint of sexual harassment ... [T]he accusation will sometimes be simply the means of retaliation by a disgruntled, fired employee.”} Such conclusions ignore the real dynamics of, and the injuries that result from, sexual harassment. When harassment creates a hostile environment, it becomes a condition of work by definition. It pervades the workplace. It is thus unreasonable to expect women to provide exact dates and times to prove that the behaviour occurred. And when sexual harassment has undermined a woman’s self-confidence, it is likewise unreasonable to expect her to remain calm and collected while giving testimony.
E. Defining Equality

It is important to analyze how tribunal jurisprudence makes it difficult for women's complaints to be taken seriously, but an analysis of what sort of equality successful complainants are able to win is just as important. MacKinnon indicates that the sameness/difference approach to equality enshrined in liberal rights discourse sets up two possible analyses of a situation of inequality. The male standard prescribes that, to the extent that women are “the same as men,” they should be treated the same as men. The female standard prescribes that, to the extent that women are “different from men,” they require protective legislation which allows them to be treated differently. But MacKinnon warns that this analysis conceals

the substantive way in which man has become the measure of all things ... Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.79

This analysis assumes that the male and female standards are not themselves shaped by existing power imbalances between men and women. And when sexual harassment jurisprudence adopts the sameness/difference approach, it thereby overlooks the consequences of social power imbalances in the workplace.

Re Canada Post Corp. v. Canadian Union of Postal Workers (Gibson)80 typifies the law's uncritical assumption that existing conditions in the workplace are sex-neutral. It makes male workplace culture the standard against which equality is measured. In Canada Post, a woman became the first permanent female employee at a Canada Post loading dock. When she complained of, primarily, verbal sexual harassment, her harasser was fired, but the trade union grieved that he had been dismissed without just cause. Arbitrator Swan found that

[i]n this essentially male atmosphere, an ethos not unlike that of the proverbial locker-room appears to have developed. The work often involves heavy physical labour, and the employees tend to converse in a correspondingly rough fashion. There is a good deal of generally insulting comment, more or less good-natured, as well as stories, jokes and comments of an explicitly sexual nature, all punctuated by the regular use of obscene and blasphemous language. The female employee testified that she had been led to expect

79 “Difference and Dominance: On Sex Discrimination” in MacKinnon, supra note 41, 32 at 34.

this kind of atmosphere, and that she had been told by fellow employees that if she wanted to work on the dock she would simply have to put up with it.\textsuperscript{82} Swan concluded that there were few comments which would not be tolerated on the dock, and that the woman herself admitted using “obscene and insulting language.”\textsuperscript{82} Swan characterized her as “not only a tolerant victim, but an active participant, in the perpetuation of this atmosphere.”\textsuperscript{83} The arbitration board upheld the dismissal, but did so on the ground that “even by the standards of the dock, the grievor's conduct went too far.”\textsuperscript{84} Ultimately, then, the standard of objective reasonableness set out in formal provisions against sexual harassment is, in practice, transformed into a highly contextualized subjective standard: it becomes the standard of the reasonable harasser \textit{in that workplace}.\textsuperscript{85}

Tribunals dealing with sexual harassment in traditionally male workplaces ignore several important facts in evaluating what constitutes harassment and what constitutes equality. Tribunals overlook the fact that many women working in traditionally male industries are often the only female workers on their shifts. This social isolation makes the incidents of sexual harassment ever more threatening.\textsuperscript{86} The voluntary-assumption-of-risk attitude posited by Swan disregards the fact that women need to “play along” with male culture in order to deflect more harassment. A female road-maintenance worker in \textit{Watt} testified that, “[i]n order to try to be accepted with them ... you have to put yourself at their level and then when it comes time to go home, then you go back to yourself.”\textsuperscript{87} In this case, as in \textit{Canada Post}, the fact that the woman acted like “one of the boys” undermined the credibility of her claim that she found the harassing behaviour vexatious.

\textsuperscript{81} \textit{Ibid.} at 29.
\textsuperscript{82} \textit{Ibid.} at 45.
\textsuperscript{83} \textit{Ibid.}
\textsuperscript{84} \textit{Ibid.} at 46.

\textsuperscript{85} See \textit{Watt, supra} note 39 for another example of a female employee harassed in a traditionally male-dominated workplace. But this acceptance of the \textit{status quo} in workplace environments is not limited to traditionally male-dominated establishments. \textit{Aragona, supra} note 33 held that, since almost all of the female employees at the establishment had accepted the employer's physical and verbal sexual conduct towards them, they had acquiesced in the atmosphere and could not later claim that the man's conduct constituted harassment.

\textsuperscript{86} The perception of the threat increases, but so does the actual threat and danger. See, for example, the testimony of women in \textit{Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)}, [1987] 1 S.C.R. 1114 [hereinafter \textit{CNR}].

\textsuperscript{87} Ms. Marshall quoted in \textit{Watt, supra} note 39 at D/2454.
Tribunals also overlook the fact that male workplace culture gives male workers as a group the collective social power to intimidate their female co-workers. Although a male worker may hold the same or even a lower rank in the workplace hierarchy than his female co-worker/supervisor,

[the power of male rapport means that nonsupervisory male workers may enjoy a camaraderie with their male supervisors that allows them to exploit the (male) power reflected from the supervisors.]

Human rights litigation, then, provides formal equality. It assumes that, once women have entered a workplace, equality is served by treating men and women in the same way. In practice, this means that women must accommodate themselves to the social and institutional norms already in place at the establishment, although women have had no part in shaping those norms. But substantive equality would require that these social patterns change to accommodate women, because they constitute the foundation which supports sexual harassment.

Human rights jurisprudence has assumed that giving women equal rights in the workplace is compatible with the notion that nothing fundamental need change between the way men and women interact socially. Tribunals have in fact argued that human rights legislation was never intended to shape social behaviour. A leading American case, Rabidue v. Osceola Refining Co., is cited often in Canadian decisions for the proposition that

it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII [legislation against discrimination] was not meant ... to bring about a magical transformation in the social mores of American workers.

But human rights legislation was in fact enacted for that very purpose: to change social mores in contexts where discrimination against less powerful social groups is the accepted practice. Those who oppose legislation against sexual harassment, however, have recast the conflict as one not about discrimination, but about free speech.

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91 Ibid. at 430.
Bell is routinely cited for the proposition that the Ontario Human Rights Code “ought not to be seen or perceived as inhibiting free speech.” This passage from Torres is invoked with a similar purpose:

There are some employers (and employees) who simply are very crude and who speak in bad taste in discussing in the workplace their relationships with the opposite sex, or in telling sex “jokes.” It is not the intent, or effect, of the Human Rights Code, or the function of a Board of Inquiry, to pass judgment upon such persons.

Freedom of speech is one of the highest constitutional values in a liberal society, and it is a brave legal institution indeed which will place limits on speech. Doubts persist about whether the behaviour women identify as sexual harassment is indeed harmful, and the free speech discourse encourages tribunals to treat laws against discrimination not as rules prohibiting conduct which results in social and economic injury, but as guidelines for a new protectionist morality. This construction of the law makes tribunals reluctant to find men guilty of sexual harassment, because

there are risks of unfairness in proscribing conduct that cannot be clearly defined, that is a fairly common, if unfortunate feature of our social environment, and that has not been previously understood to be unlawful in any sense.

Tribunals express the concern that “relations between the sexes may be chilled if men fear that behaviour offensive to a sensitive woman may be actionable in court,” and that “the work place may become more dull as a result.”

The free speech discourse treats sexual harassment as a matter of “mere” sexism, a matter of an individual’s misinformed opinions which are not indicative of broader social injuries. Tribunals that characterize sexist social conduct in the workplace as private behaviour which is beyond the reach of the law respond to sexual harassment by invoking the defence of “cultural determinism”: men who have grown

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92 Supra note 33 at D/156.
93 Supra note 51 at D/661.
94 Watt, supra note 39 at D/2456.
95 Ibid. [emphasis added].
96 Broomfield, supra note 43 at 371.
97 See, for example, Watt, supra note 39 at D/2465.
98 Rhode, supra note 89 at 1781. See also cupe, supra note 53 at 408, where the sexual harassment was characterized as a personality clash:

The problems may have resulted in part from the sexist structure of our society, where men are usually the bosses and women are the subordinates, even though the woman in
up in a sexist culture cannot be expected to act in non-sexist ways. What emerges is the presumption that male socialization and male public aspirations are non-negotiable whereas women’s are. The free speech discourse relies on an implied community-standards test to determine what sort of speech is permissible. Again, Rabidue is cited to show that sexual harassment litigation attempts to impose a restrictive morality. In Rabidue, a female worker alleged that the pin-ups which covered her workplace created a hostile environment for women workers. The Court held that

[fn]For better or worse, modern America features open displays of written and pictorial erotica. Shopping centres, candy stores and prime time television regularly display pictures of naked bodies and erotic real or simulated sex acts. Living in this milieu, the average American should not be legally offended by sexually explicit posters.99

But sexual harassment is not about women being “offended;” it is about men undermining women’s personal integrity and economic potential in the workforce. The free speech/morality discourse abstracts sexual harassment from real power relations and transforms it into a contest between abstract rights. This discourse again assumes that the patterns of social interaction that exist in the workplace and in society at large represent substantive equality, and that words and pictures cannot inflict emotional and economic injuries on women in the workplace. But general workplace culture does not provide women with social and economic equality, and this is the very state of affairs that rights against sexual harassment were intended to rectify.

IV. TOWARDS A WORKABLE REMEDY

Ultimately, human rights legislation fails to provide an adequate avenue of redress for many women. The legal power to define harassment rests overwhelmingly with legal decision makers who have subjected complainants to as much, or more, scrutiny as their harassers. Although human rights tribunals are empowered to act proactively, in practice the scheme is primarily complaint-driven, and it currently takes three years before a complaint will be heard by a tribunal.100 This gives

many work relationships may have more intelligence than her supervisor. This can create problems when his authority is challenged ... But the male supervisor’s responses or anger cannot be immediately characterized as sexual harassment.

99 Supra note 90 at 433 [emphasis in the original].

complainants very little control over the legal proceedings and undermines the effectiveness of the available remedies. In order to assess how useful rights against sexual harassment are for promoting equality, it is necessary to look at the remedies they provide and to envisage alternative ways of structuring the rights discourse, so that it will be more effective in eradicating discrimination.

Human rights legislation is meant to be remedial rather than punitive. Consequently, the damages that can be secured are limited. Both the Canadian and the Ontario human rights codes allow tribunals to issue a broad range of orders to curtail ongoing, and to prevent future, harassment. Successful complainants can also claim lost wages plus interest, and special damages of up to $5,000 (federal) or $10,000 (provincial) for mental anguish. While successful complainants regularly receive monetary compensation, tribunals rarely order employers to change their work practices. Occasionally, tribunals will make offenders promise not to harass other female workers in the future. But because these remedies do not provide sufficient financial or legal incentives to restructure work habits, there is no long-term deterrent to harassment. And the losses the complainant has suffered are not adequately compensated by the monetary awards. Because they have been dismissed, actively or constructively, most complainants are unemployed at the time of the complaint. The trauma of sexual harassment syndrome makes it difficult for them to seek or hold another job. The resulting losses in seniority, pension benefits, and skills training are not measured when reimbursing women for their lost wages and mental anguish.

Because human rights jurisprudence balances the right to be safe from sexual harassment against the right of free speech and the right of management to organize production, “the social construction of sexuality and the social relations of power in which sexual practices take place fade into the background.” But, if the rights discourse were

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101 Human Rights Code, supra note 5, s. 40(1)(b); Canadian Human Rights Act, supra note 5, s. 53(3).

102 CNM, supra note 86 is a rare example in which a human rights tribunal ordered the offending employer to implement an employment equity hiring plan. It did, however, take three years of litigation before the Supreme Court of Canada approved the remedy as being within the jurisdiction of the tribunal. And complainants seeking monetary damages are not necessarily more successful. After seven years of litigation, the plaintiffs in Jansen, supra note 3 were awarded a generous settlement, only to find that they were unable to collect their award because their former employers had disappeared: see “Money gone, victors find” The [Toronto] Globe and Mail (3 January 1992) A6.

103 “Entrenching a Bill of Rights,” supra note 19 at 459.
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structured differently, it would allow women more control over the legal process and could produce more effective remedies. The following is a brief examination of the promises of rights discourses that could emerge from tort law, conciliation, and occupational health and safety.

Sexually harassing conduct could be made the basis of a tort action for assault and battery, intentional interference with contractual relations, or intentional infliction of nervous shock and emotional distress. A tort action is advantageous for complainants because it allows them to bring their cases to trial more quickly, to retain control over the development of the case, and to seek larger damage awards. But there are also procedural and strategic disadvantages.

The Supreme Court of Canada, in Board of Governors of the Seneca College of Applied Arts and Technology v. Bhadauria, held that discrimination under the Ontario Human Rights Code does not give rise to a tort of discrimination, or to a cause of action for a breach of statutory duty. The discrimination alleged must, therefore, be challenged directly under the Code. Since Seneca College dealt with the creation of a new tort of discrimination, it is not clear whether this ruling would effectively bar a cause of action under traditional tort categories. If a tort action can be brought, a complainant must still face the same ideological prejudice that she faces under human rights litigation: she must prove that the alleged conduct in fact constitutes an injury. And because of the (hetero)sex paradigm, "[w]omen are, it seems, supposed to consider acts in this tradition harmless." Moreover, a woman must bear the costs of hiring a lawyer, and the remedy of reinstatement to her job is not available. Tort law, which is inherently individualistic, also poses a serious strategic problem because it characterizes sexual harassment as a private harm:

To the extent that tort theory fails to capture the broadly social sexuality/employment nexus that comprises the injury of sexual harassment, by treating the incidents as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.

Because it overlooks the social and economic dimensions of sexual harassment, tort law also entails the risk of according legal weight to a

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104 Backhouse & Cohen, supra note 49 at 141-42.
106 Sexual Harassment, supra note 2 at 166.
107 Ibid. at 88.
restrictive definition of female sexuality and public morality. Finally, tort law can only be activated after an actual injury has been suffered.

Informal mediation and occupational health and safety legislation are two alternative constructions of the sexual harassment rights discourse, which aim to empower women to exercise their rights before the injury of sexual harassment becomes too severe.

Informal mediation may encourage more women to bring complaints (it is clear that sexual harassment is vastly under-reported), and may facilitate workplace education on sexual harassment. Many complainants who use the internal mediation procedures available in their workplaces attest that, if that were their only option, they would not launch a formal complaint or participate in a formal hearing. They cite many reasons, including shame, fear of retaliation, desire to keep the proceeding private, desire to avoid disrupting workplace relations, and concern that they could not establish sufficient proof to succeed at a formal hearing.\textsuperscript{108} Mediation focuses on building trust, educating instead of punishing, changing attitudes, and restoring relations between people who must continue to work together.\textsuperscript{109} Debbie Field argues that this avenue may be particularly valuable for women working in traditionally male industries who are harassed by male co-workers. In this unionized context, a complaint to an employer or to an external judicial body would likely result in increased harassment on the shop floor, because the complainant’s “co-workers would have seen her as a ‘rat’, someone who broke ranks and tattled on fellow workers.”\textsuperscript{110}

But informal mediation poses the same strategic problems as tort actions do. Mediation individualizes the conflict, so much so that several mediators refer to sexual harassment as an “interpersonal conflict”\textsuperscript{111} rather than as “a form of social violence.”\textsuperscript{112} Privatizing the conflict fails to address the fact that many women blame themselves for the


\textsuperscript{110} Field, supra note 88 at 151.

\textsuperscript{111} See “Formal and Informal Options,” supra note 108; “Interpersonal Conflict,” supra note 109; and Rifkin, supra note 109 at 29-30.

\textsuperscript{112} Catherine Frazee, Chief Commissioner of the Ontario Human Rights Commission, quoted in Crawford, supra note 100 at 22.
harassment that has occurred, and so downplay the nature of the injury. This feeds into the mythology that sexual harassment is misdirected sexual interest. Moreover, there is always the danger that the power dynamics that allowed sexual harassment to develop will be replicated in the mediation session, with the result that the complainant will be unable to ask for and receive the form of restitution which she would prefer.

An effective exercise of rights against sexual harassment must make the cost of such behaviour public. As an example, a Black woman who worked at a Colgate-Palmolive factory endured six years of extremely vicious sexual and racial harassment, before suffering physical and psychological damage that led her to quit her job, and that has prevented her from working in the years since her constructive dismissal. In 1991, she was awarded benefits by a Workers’ Compensation Appeals Tribunal.113 This was an important decision because it recognized that sexual harassment causes both physical and emotional injury. But it should not be necessary to endure sexual harassment up to the point that workers’ compensation becomes a necessity. Still, the Colgate-Palmolive case raises the issue of whether women will be able to use occupational health and safety legislation to avoid such injuries.

Women who have been harassed exhibit a pattern of stress-related illnesses—“weight loss, diarrhoea, sleeplessness, headaches, fatigue ... loss of self-worth, acute depression, anxiety, and nervousness.”114 Sexual harassment also causes objective work-related dangers, because it distracts women from the job they are supposed to be performing. If these health hazards are recognized, a woman could use section 43(3) of the Ontario Occupational Health and Safety Act115 to exercise her right to refuse work that she has reason to believe may cause injury to herself or to others. Under the Act, an immediate internal investigation must take place. If, following the in-house investigation, the complainant still has reasonable grounds to fear for her health and safety, she may continue to refuse to work. An investigation by the Ministry of Labour will ensue, during which no other employee may be assigned the work unless that employee has been


informed of the previous refusal and the reasons for it. The complainant will be assigned alternative work during the investigation and will be paid regular or premium wages. She is also shielded from employer retaliation.\textsuperscript{116}

Although it has yet to be used in sexual harassment litigation, the occupational health and safety legislation gives women the strongest protection of their rights.\textsuperscript{117} It enables a woman to be proactive, since she need not suffer an actual injury before she can exercise her right to refuse.\textsuperscript{118} Moreover, because the Act imposes on the employer the duty to “take every precaution reasonable in the circumstances for the protection of a worker,”\textsuperscript{119} the right to refuse work effectively makes sexual harassment the responsibility of the entire workplace. The obstacles to using this legislative scheme are that most women do not work in unionized settings, and do not have health and safety committees that could support their claims or set up a buffer between themselves and their employers or harassers.

V. CONCLUSION

Sexual harassment, then, can be approached through several legal routes. This demonstrates that the rights discourse can be structured in a variety of ways which may be more or less effective in addressing the social problems involved in sexual harassment. Tort law, mediation, and occupational health and safety legislation are valuable frameworks, because they remain clearly focused on the injury that a woman has suffered. These approaches avoid the de-contextualization of human rights discourse, which frames the legal relevance of sexual harassment in terms of a conflict between abstract rights. Human rights legislation remains mired in a formal equality discourse and, to the extent that other legislative schemes allow one to work towards a substantive equality and to change the structures of the workplace, they should be pursued. Ultimately, however, feminist reformers must not place too much faith in the law. Smart warns that

\textsuperscript{116} Ibid. ss. 43, 50.

\textsuperscript{117} This power to exercise work-refusal rights in the context of sexual harassment has been enshrined in at least two collective agreements: CUPE Local 1 in its agreement with Toronto Hydro; and the Canadian Auto Workers union in its agreement with the Big Three car manufacturers.

\textsuperscript{118} Cornish & Trachuk, supra note 114 at 4.1.04.

\textsuperscript{119} Occupational Health and Safety Act, supra note 115, s. 25(2)(h).
legal rights do not resolve problems. Rather they transpose the problem into one that is defined as having a legal solution ... the solution may itself do little to alter the power relations that remain intact.

The exercise of rights and the use of litigation are only a part (albeit a tremendously powerful one) of the dialectic between rights and politics out of which social reform grows. Indirectly, legal discourse can achieve many valuable objectives. It can raise political consciousness, dramatize a particular form of social injustice, and generate funds for a political movement. But sexual harassment cannot be solved in isolation from all the other aspects of female/male socialization and power distribution which underpin it. The concentration on rights discourse must not deflect from the necessity to alter other powerful discourses—those shaping the broader social and economic structures which constrain the exercise of rights.

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120 Supra note 7 at 144.
121 Hutchinson, supra note 25 at 365.
122 Rhode, supra note 89 at 1742.