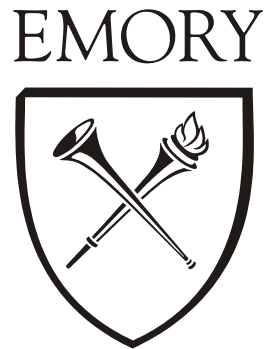


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FORM AND (DYS)FUNCTION IN SEXUAL HARASSMENT LAW: BIOLOGY, CULTURE, AND THE SPANDRELS OF TITLE VII

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FORM AND (DYS)FUNCTION IN SEXUAL HARASSMENT LAW: Biology, Culture, and the Spandrels of Title VII

Julie A. Seaman[†]

***ABSTRACT:** The question of sex difference has long divided feminists, social scientists, policymakers, and legal academics. Most recently, the issue has resurfaced as prominent legal scholars have relied on evolutionary arguments to suggest that men and women might be different in ways that are relevant to sex discrimination law in general and to sexual harassment law in particular. At the same time, the question of causation under Title VII, which requires that discrimination be “because of” a plaintiff’s sex in order to be actionable, has assumed central importance in sexual harassment doctrine. This article proposes that the very evolutionary theories advanced by critics of Title VII sex discrimination doctrine in fact support the view that the typical behavior patterns seen in sexual harassment cases occur “because of” the plaintiff’s sex. Furthermore, this article argues that, under current Supreme Court jurisprudence setting out the contours of employer liability for harassing behavior by employees, employers should be liable for harassment that results where the employer allows, fosters, or fails to correct workplace conditions that are likely to give rise to the typical harassment behaviors analyzed herein. Though often perceived as being in conflict, biological explanations of many human behaviors and feminist conceptions of the causes and harms of workplace sexual harassment share much common ground. This article seeks to explore that common ground and, in so doing, to offer constructive solutions to specific doctrinal and societal problems.*

[†] Assistant Professor, Emory University School of Law. J.D. Harvard Law School. I am grateful to many people who offered their time and their thoughts in connection with previous drafts of this article. In particular, I wish to thank Howard Abrams, Martha Fineman, Rich Freer, Bill Mayton, Patricia Adair Gowaty, Marc Miller, Michael Perry, Jennifer Romig, Paul Rubin, Ani Satz, Charlie Shanor, Sara Stadler, and participants at the Emory Law School faculty workshop at which I presented an earlier version of this article. I also wish to thank participants at the 7th Annual SEAL Conference for most thoughtful and helpful questions and comments. Owen Jones was especially generous with his time, expertise, and wisdom. Finally, Kingsley Browne provided insightful and incisive comments and made me thankful to be part of an intellectual community in which disagreement coexists with discussion. It should go without saying that my mention of their names in no way implies that any of these individuals endorses the views set out in this article. Finally, I am grateful for the wonderful research assistance provided by Sarah Kemmerer, Bethany Kohl, and Jordan Reifler.

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The great central dome of St Mark's Cathedral in Venice presents in its mosaic design a detailed iconography expressing the mainstays of Christian faith . . . Each quadrant meets one of the four spandrels in the arches below the dome. Spandrels—the tapering triangular spaces formed by the intersection of two rounded arches at right angles—are necessary architectural by-products of mounting a dome on rounded arches . . . The design is so elaborate, harmonious and purposeful that we are tempted to view it as the starting point of any analysis, as the cause in some sense of the surrounding architecture. But this would invert the proper path of analysis.¹

I. INTRODUCTION

The conflict between those who would explain human behavior as a product of genes and those who would explain it as a product of environment is an old one. Recently, however, the debate has garnered renewed public interest with the “mapping” of the human genome² and stories in the press about genes “for” traits and behaviors from shyness to depression to homosexuality.³ The debate is reflected, too, in the legal

1. Stephen Jay Gould & Richard C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, 205 PROC. OF THE ROYAL SOC. OF LONDON 581, 581–82 (1979).

2. See MATT RIDLEY, *GENOME: THE AUTOBIOGRAPHY OF A SPECIES IN 23 CHAPTERS*, at 2 (2000) (“On June 26, 2000, President Bill Clinton in the White House and Tony Blair in Downing Street simultaneously announced that the rough draft [of the entire human genome] was complete.”). For examples of contemporaneous media accounts, see Sharon Begley, *Just How Many Genes Does It Take to Make a Human? Wanna Bet?*, WALL ST. J., May 23, 2003, at B1; Claire Fraser, *Who's Next*, NEWSWEEK, Dec. 31, 2001, at 83; Bernadette Tansey, *Genome Project Completes Map of Human DNA*, S.F. CHRON., Apr. 15, 2003, at A2; Nicholas Wade, *Gene-Mappers Take New Aim at Diseases*, N.Y. TIMES, Oct. 30, 2002, at A23; *Unraveling the Genome*, NEWSWEEK, June 24, 2002, at 76.

3. E.g., Mike Bygrave, *The Year of the Gene: False Dawns in the Brave World of New Genetics*, OBSERVER, Dec. 22, 2002, at 20; Benedict Carey, *Payback Time: Why Revenge Tastes So Sweet*, N.Y. TIMES, July 27, 2004, at F1 (“[T]he urge to extract a pound of flesh, researchers find, is primed in the genes.”); *Gene Linked to Shyness*, TIMES (London), Apr. 15, 2003, at Public Agenda 6; *Mental Health: Genetic Differences Partly Account for Higher Incidence of Depression in Women*, GENOMICS & GENETICS WKLY., Aug. 8, 2003, at 34 (discussing findings regarding a gene “for” depression in women); *“Shyness Gene” Discovered*, HEALTH NEWSWIRE CONSUMER, Apr. 8, 2003; *Environmental Factors Triggering Illness and What Scientists are Doing to Identify the Genes That Contribute to Depression* (NPR radio broadcast, July 18, 2003) (discussing a “gene for” depression). The 2003 Pulitzer Prize for literature was recently awarded to a novel depicting a genetically male person with a rare recessive genetic mutation that results in his being born with ambiguous outward genitalia and raised as a female and then,

academy and in the contours of the law itself. The recent law and evolution scholarship, on the one hand, and some feminist legal scholarship, on the other, tend to approach legal issues from the contrasting perspectives of either biology or culture.⁴ In addition, courts routinely rely on some conception of “human nature” in formulating and applying legal rules.⁵

at puberty, experiencing a crisis of identity. See generally JEFFREY EUGENIDES, MIDDLESEX (2002). The story has close factual parallels with an actual case of a genetic male raised as a female. See JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL (2000) (describing the identity crisis and its effects); see also MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE 258 (2003) (describing 5-alpha-reductase deficiency, the rare genetic condition that underlies the events fictionalized in Jeffrey Eugenides’s novel). Sadly, the person described in Colapinto’s book recently committed suicide. John Colapinto, *Gender Gap: What Were the Real Reasons Behind David Reimer’s Suicide?*, at <http://slate.msn.com/id/2101678/> (last visited Feb. 20, 2005).

4. For examples of law and evolution scholarship, see generally JOHN H. BECKSTROM, EVOLUTIONARY JURISPRUDENCE: PROSPECTS AND LIMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS (1989); KINGSLEY R. BROWNE, BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY (2002) [hereinafter BROWNE, BIOLOGY AT WORK]; RICHARD A. POSNER, SEX AND REASON (1992); Kingsley R. Browne, *An Evolutionary Perspective on Sexual Harassment: Seeking Roots in Biology Rather Than Ideology*, 8 J. CONTEMP. LEGAL ISSUES 5 (1997) [hereinafter Browne, *Seeking Roots*]; Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L. J. 617 (1984) [hereinafter Browne, *Biology, Equality*]; Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995) [hereinafter Browne, *Sex and Temperament*]; Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51 (2001) [hereinafter Browne, *Women at War*]; Charles C. Crawford & Marc A. Johnston, *An Evolutionary Model of Courtship and Mating as Social Exchange: Implications for Rape Law Reform*, 39 JURIMETRICS J. 181 (1999); Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL’Y 331 (1995) [hereinafter Epstein, *Two Challenges*]; Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, With Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069 (1999); Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117 (1997) [hereinafter Jones, *Child Abuse*]; Owen D. Jones, *Law and Biology: Toward an Integrated Model of Human Behavior*, 8 J. CONTEMP. LEGAL ISSUES 167 (1997) [hereinafter Jones, *Law and Biology*]; Owen D. Jones, *Law, Emotions, and Behavioral Biology*, 39 JURIMETRICS J. 283 (1999); Owen D. Jones, *Reproductive Autonomy and Evolutionary Biology: A Regulatory Framework for Trait-Selection Technologies*, 19 AM. J.L. & MED. 187 (1993); Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827 (1999) [hereinafter Jones, *Rape*]; John Monahan, *Could “Law and Evolution” Be the Next “Law and Economics”?*, 8 VA. J. SOC. POL’Y & L. 123 (2000); Jeffrey Evans Stake, *Can Evolutionary Science Contribute to Discussions of Law?*, 41 JURIMETRICS J. 379 (2001). See also Richard A. Epstein, *Liberty, Patriarchy, and Feminism*, 1999 U. CHI. LEGAL F. 89, 105–112 [hereinafter Epstein, *Liberty, Patriarchy*] (discussing the issue of differential outcomes and suggesting that they can be largely explained by differing average endowments and psychologies on men and women that are rooted in biological differences). For examples of feminist legal scholarship focusing on culture and minimizing biology, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989) (“Clearly, there are many differences between women and men. Systematically elevating one-half of a population and denigrating the other half would not likely

produce a population in which everyone is the same.”); *see also* Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1023 (1992) (reviewing social constructionist feminist theories of difference, and arguing that these theories offer “a useful corrective to many popular, and some scholarly, conceptions” of biological or “natural” sex difference); Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 23 (“Social structures and the individuals within them create and reproduce inequalities linked to sex, race, class, religion, ethnicity, and other ‘differences.’”); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 n.8 (1998):

I use the terms “gender” and “sex” interchangeably . . . to refer to the complex process of socializing human beings into the identities of men and women, to the element of social relationships based on differences that society attributes to people with those two identities, and to the process of signifying power through those identities.

Id.; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 826 (1989) (“In fact, both discrimination against women and women’s ‘choices’ must be seen as elements of an integrated system of power relations that systematically disadvantages women.”).

5. A recent Westlaw search for the term “human nature” in the state and federal court databases resulted in more than 3,000 cases since 1998. *See, e.g.*, *Manson v. Brathwaite*, 432 U.S. 98, 134 (1977) (Marshall, J., dissenting) (“[I]t is deeply ingrained in human nature to agree with the expressed opinions of others—particularly others who should be more knowledgeable—when making a difficult decision.”); *Andersen v. United States*, 170 U.S. 481, 510 (1898) (“The law in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood, produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder.”); *Alvarez-Machain v. United States*, 331 F.3d 604, 664 (9th Cir. 2003) (Gould, J., dissenting) (“Human nature being what it is, and judicial nature following human nature, it is only natural that well-meaning judges will desire to comment on important affairs of the day involving political relations with other nations.”); *Newport News Shipbuilding & Dry Dock Co. v. Ponders*, 326 F.3d 455, 459 (4th Cir. 2003) (“Human nature as it is, company doctors, however honest, are likely to give the close calls to those who pay their salaries.”); *Lansdale v. Hi-Health Supermart Corp.*, 314 F.3d 355, 359 (9th Cir. 2002) (“It is not at all surprising that [the plaintiff] wants even more than Congress provided; that is just the working out of one of human nature’s quotidian drives. However, she must be content with her six figure judgment, faute de mieux.”); *Cal. First Amendment Coalition v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002):

Finally, public observation of executions fosters the same sense of catharsis that public observation of criminal trials fosters. Although this may reflect the dark side of human nature, the Supreme Court has recognized that the public must be permitted to see justice done, lest it vent its frustration in extralegal ways.

Id.; *Raheem v. Kelly*, 257 F.3d 122, 138 (2d Cir. 2001) (“Further, it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it.”); *CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 713 (7th Cir. 1999) (“Whenever accidental death occurs, it is human nature to place blame.”); *Paolella v. Browning-Ferris, Inc.*, 973 F. Supp. 508, 514 (E.D. Pa. 1997) (“It is a matter of common sense, and of general knowledge of human nature, that people are not inclined knowingly to consent to being economically gouged.”); *United States v. Gorayska*, 482 F. Supp. 576, 582 n.10 (S.D.N.Y. 1979) (“The choice of false confession is voluntary, but the false confession is associated with a prospect (namely, of escape from present harm) so tempting that it is not in human nature to resist it.”). Jurisprudes, of necessity, confront the issue as the foundation of their thinking:

Workplace sexual harassment presents an ideal arena in which to examine the interaction among law, biology, and cultural understanding. It is a phenomenon that generally involves behavior between males and females.⁶ It involves patterns of behavior implicating sex, aggression, and resource acquisition that are of primary interest to behavioral biologists. It involves patterns of subordination and dominance, both sexual and economic, of primary interest to critical scholars who focus on entrenched cultural patterns and sex roles. It raises questions of sex and gender difference that are of central concern to evolutionary biologists, feminists, legal scholars across various areas, and humans in general. It is notoriously resistant to easy answers, either legal or social. In sum, sexual harassment presents a nearly perfect crucible in which simmer the incendiary questions of sex, gender, biology, culture, and law.

The Supreme Court's pronouncement in 1986 that sexual harassment was a form of sex discrimination⁷ prohibited by Title VII of the Civil Rights

"What is a human being? Legal theorists must, perforce, answer this question: jurisprudence, after all, is about human beings." Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1 (1988).

6. The vast majority of sexual harassment complaints concern male harassment of females. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TRENDS IN HARASSMENT CHARGES FILED WITH THE EEOC DURING THE 1980S AND 1990S, <http://www.eeoc.gov/stats/harassment.html> (last visited Jan. 6, 2005) (finding that, between 1992 and 1998, approximately one-tenth of harassment complaints were filed by men); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 560 (2001) (finding, in their comprehensive survey of all published sexual harassment decisions in federal district courts between 1986 and 1995, that men comprised only 5.4% of plaintiffs). The more exceptional or marginal cases have, however, been the basis for much of the scholarly debate which has been instrumental in providing the theoretical underpinnings of the doctrine. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995) ("[Q]uite apart from the concerns we have for men, particularly effeminate men, in and of themselves, it is important for women and feminists to concern themselves with the treatment of the effeminate man."); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 695 (1997) ("The disjunctive doctrine that has emerged from the courts' difficulty in dealing with the same-sex cases provides a timely opportunity and excuse for reexamining, reaffirming, and updating feminist conceptions of sexual harassment as a form of sexual discrimination."); cf. Schultz, *supra* note 4, at 1774-89 (demonstrating that her proposed "competence-centered" paradigm provides a principled way of deciding the same-sex cases, based upon whether the male harassers have engaged in "harassment that drives away men who fail to conform to the desired image of masculinity or that incorporates them as weak and inferior workers"). Whether one views the same-sex or female-harassing-male cases as relatively anomalous, or rather as central to the theoretical project of building a foundation for the more usual cases, depends in large part upon one's conception of the causes and harms of sexual harassment.

7. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986). The Court held, in a part of its opinion with which all nine justices concurred, that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of

Act of 1964⁸ raised more questions than it answered. In subsequent years, the Court has moved, in fits and starts, toward a coherent explanation of when an employer is liable under Title VII for abusive working conditions created by coworkers and/or supervisors of a complaining employee.⁹ In a unanimous decision addressing the issue of same-sex harassment, the Court stressed that, in all sexual harassment cases, proof that the harassing behavior was based on the plaintiff's sex is critical.¹⁰ At the same time, feminist legal scholars have attempted to make sense of the wrong of sexual harassment and to explain precisely why it constitutes discrimination "because of . . . sex" as required under Title VII.¹¹ And social scientists and

sex." *Id.* at 65 (alteration in original). Indeed, the Court noted that even the petitioner in the case did not challenge this general proposition. *Id.*

8. 42 U.S.C. § 2000e-2 (2000).

9. The Supreme Court has considered major substantive issues concerning sexual harassment sex discrimination under Title VII in six decisions, three of which were decided without dissent. *See Pa. State Police v. Suders*, 542 U.S. 129, 134 (2004) (holding that constructive discharge effectuated by hostile environment sexual harassment precludes employer from asserting affirmative defense only where "the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation"); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (clarifying standards of employer liability for discriminatory actions of supervisors); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (same); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–80 (1998) (holding that same-sex sexual harassment is actionable under Title VII); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (holding that plaintiff need not demonstrate serious psychological harm in order to state a claim for hostile environment discrimination, and clarifying standards under which offensive behavior is actionable under Title VII); *Meritor*, 477 U.S. at 66 (recognizing that hostile environment harassment may give rise to liability for sex discrimination under Title VII).

10. *See Oncale*, 523 U.S. at 81 ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.") (alterations in original); *see also id.* at 82 (Thomas, J., concurring) ("I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'").

11. Under § 703 of Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2004). For a critical discussion of the various theories upon which causation has been based, and the articulation of an alternative theory, see generally Franke, *supra* note 6. *See also* Case, *supra* note 6, at 3 (arguing that a wide spectrum of Title VII cases can, and should, be understood as caused by gender discrimination; that is, that employers impose upon both men and women requirements to conform to stereotypically masculine or feminine roles and that such requirements place women in traditionally masculine jobs in the "double bind" of simultaneous expectations of both masculine and feminine behavior); Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 99–104 (2004) (criticizing the approaches of Professors Franke and Schwartz for eliminating the statutorily required element of intent in disparate treatment cases); David S. Schwartz, *When is Sex Because of Sex? The*

evolutionary psychologists have sought to measure and explain the behaviors and psychologies that underlie the phenomenon of sexual harassment in the workplace.¹²

Recently, some Title VII litigants and legal scholars have chipped away at the veneer of the assumption of male-female equality to assert overtly what had theretofore lurked below the surface: that men and women are different in ways that are relevant to antidiscrimination law in general and to workplace sexual harassment law in particular. They have grounded this assertion on theories of sex difference, including but not limited to biological theories of difference. Though few courts have relied explicitly on such theories to find in favor of defendants,¹³ it is likely that notions about male and female roles, temperament, and cognitive strengths and weaknesses influence decisions in more subtle ways. In addition, it is likely that these assumptions influence the decisions and behavior of employers and employees in the workplace. Because laws aimed at altering entrenched behavior patterns¹⁴ are bound to fail absent a concurrent change in social

Causation Problem in Sexual Harassment Law, 150 U. PA. L. REV. 1697, 1700 (2002) (proposing that sexual words and conduct should be held to be “because of . . . sex” as a matter of law); cf. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (describing similar double bind in the context of gay cultural assimilation and the pressure on gays to “cover”—to “make[] it easy for others to disattend [their sexual] orientation.”)

12. See generally ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977); Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, 51 J. SOC. ISSUES 193 (1995); Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 335 (1992); Barbara A. Gutek & Bruch Morasch, *Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOC. ISSUES 55 (1982); Margaret S. Stockdale et al., *Acknowledging Sexual Harassment: A Test of Alternative Models*, 17 J. BASIC & APPLIED SOC. PSYCHOL. 469 (1995); David E. Terpstra & Douglas D. Baker, *A Hierarchy of Sexual Harassment*, 121 J. PSYCHOL. 599 (2002).

13. There have been some notable (and widely discussed) exceptions. See *Equal Employment Opportunity Comm’n (EEOC) v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1305 (N.D. Ill. 1986), *aff’d.*, 839 F.2d 302 (7th Cir. 1988). See generally Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992) (analyzing judicial treatment of the “lack of interest defense,” in both sex and race discrimination cases, where the alleged lack of interest stems from either cultural, social, or biological forces); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (analyzing Supreme Court decisions addressing lack of interest doctrine and how courts have drawn the boundary between “coercion” and “choice”); Williams, *supra* note 4, at 813–21 (discussing *EEOC v. Sears* and the perils of modern domesticity).

14. See Michael L. Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Norms*, working paper abstract, at <http://ssrn.com/abstracts=453485> (last revised Feb. 19, 2005) (showing that patterns of egregious and blatant employment discrimination are still the norm, and not more subtle, unconscious discrimination as many had hypothesized); see also Owen D. Jones, *Law and the*

norms and attitudes,¹⁵ it is important to address theories about sex differences rather than ignore them.

This article focuses on the issue of hostile environment sexual harassment, and proposes that the insights of evolutionary science, combined with those of feminist legal theory, can help to explain why the patterns of behavior typically seen in workplace hostile environment cases amount to discrimination “because of” sex in violation of Title VII. An evolutionary perspective suggests that many of the typical patterns of behavior aimed at soliciting sex, at status competition and exclusion, and at exclusion of women from predominantly or traditionally male workplaces, are ultimately based on the target’s sex. Furthermore, much feminist legal analysis of sexual harassment is fully consistent with these explanations of the underlying causes of sexual harassment. Finally, recent work in evolutionary biology that focuses on the role of female choice in the coevolution of male and female characteristics, and the implications of constraints on female choice to the model of sexual selection, strongly implies that the workplace context is highly relevant to understanding both the causes of, and the harms that result from, sexual harassment.

Furthermore, an evolutionarily-informed explanation of the gendered nature of workplace harassment¹⁶ fits quite easily into the existing doctrinal framework of Title VII, once the fundamental structure of that framework is understood. To reveal the primary, weight-bearing aspects of that structure and to separate these from the theoretically more peripheral doctrinal elements, I borrow from the debate in evolutionary biology the concept of

Biology of Rape: Reflections on Transitions, 11 HASTINGS WOMEN’S L.J. 151, 151–54 (2000) (noting that despite necessary and well-intentioned legal reforms aimed at increasing deterrence, reporting, and punishment, “rape reforms have had far less impact than hoped”); Jones, *Rape*, *supra* note 4, at 830 & n.5 (same) (citing research generally reaching this conclusion).

15. Cf. Book Note, *Real Reform?*, 101 HARV. L. REV. 1978, 1979–83 (1988) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)) (arguing that Estrich, by presenting the “easy” cases in an emotionally persuasive way, fails to address the entrenched underlying social norms that would have to change in order for her proposed legal reform to be effective). For an argument that law is largely reactive to social change, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 11, 15–16 (1995) (“Law is a conservative discipline, not easily used for ends that undermine the status quo.”); see also LARRY D. BARNETT, *LEGAL CONSTRUCT, SOCIAL CONCEPT: A MACROSOCIOLOGICAL PERSPECTIVE ON LAW* 13 (1993); AUGUSTUS B. COCHRAN III, *SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE* 191–208 (2004); Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1583–84 (1989); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 507 (2001).

16. Cf. FINEMAN, *supra* note 15, at 12, 49–54 (describing the concept of a “gendered life,” which “references the actual or potential situations and circumstances women as a group may encounter in our society,” and which “distinguish[es] women’s ‘reality’ from men’s in our society”).

evolutionary “spandrels”¹⁷ and apply that concept to the law of sexual harassment. As an evolutionary and biological metaphor, the architectural term “spandrel” has proven illuminating, if controversial.¹⁸ In architecture, the term refers to a space necessarily created by the architect’s functional design decisions. Thus, the decision to mount a dome on four arches entails, as a byproduct, four tapering triangular spaces between the sides of the arches and the bottom of the dome.¹⁹ In 1979, Harvard scientists Stephen Jay Gould and Richard Lewontin published a now-famous paper in which they used the architectural analogy to criticize what in their view was the tendency of evolutionary biologists to explain every atomistic trait of an organism as an evolutionary adaptation.²⁰

Regardless of the correct view of evolutionary adaptation, the spandrel as a metaphor for structural byproducts presents intriguing possibilities for the examination of complex legal doctrine. In the arena of Title VII sexual harassment law, the spandrel metaphor is especially apt because of the complicated way that current doctrine has evolved. The law of sexual harassment was born of two very disparate jurisprudential parents: an analogy to hostile racial environment discrimination on the one hand, and

17. In architecture, a spandrel is “an area between the extradoses of two adjoining arches, or between the extrados of an arch and a perpendicular through the extrados at the springing line.” RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1828 (2d ed. 1998). Spandrel as a metaphor thus refers to a feature that appears to be designed or functional but actually emerged only as the byproduct of other functional or designed features. The spandrels of the Cathedral of San Marco in Venice might seem to have been a functional part of the design of the cathedral, but in fact they are only the byproduct of the architecturally necessary arches. They are the triangular spaces, albeit lovely, between the arches. See Gould & Lewontin, *supra* note 1. According to this analysis, we might admire these triangular features of the cathedral, but we should not pretend that they were purposely put there to serve a particular function in the building. See *id.* In the same way, there are spandrels that have resulted from the evolution of the law, but which did not themselves evolve to serve some independent function.

18. See, e.g., DANIEL C. DENNETT, *DARWIN’S DANGEROUS IDEA* 267–68 (1995) (“[Gould and Lewontin] introduced another term, ‘spandrel,’ which has proven to be a highly successful coinage in one sense: it has spread through evolutionary biology and beyond.”); Stephen Jay Gould, *The Exaptive Excellence of Spandrels as a Term and Prototype*, 94 PROC. NAT’L ACAD. SCI. U.S. 10750, 10750 (1997) [hereinafter Gould, *Term and Prototype*] (responding to criticisms); Stephen Jay Gould, *Fulfilling the Spandrels of World and Mind*, in UNDERSTANDING SCIENTIFIC PROSE 310, 325 (Jack Selzer ed., 1993).

19. When the arches are perpendicular to one another, as they are in the Cathedral of San Marco in Venice which Gould and Lewontin use as the primary illustration for their analogy, the spaces that are left between the arches exist in three dimensions rather than two. Technically, the triangular wall spaces thus formed are called “pendentives.” There is some disagreement as to whether these pendentives are a subset of the category “spandrels.” As Gould points out in a later article revisiting his spandrel argument, critiques based on this terminological rigidity are, in terms of evolutionary argument, utterly beside the point. See Gould, *Term and Prototype*, *supra* note 18.

20. See Gould & Lewontin, *supra* note 1.

the radical feminist critique of sexuality-as-dominance on the other.²¹ It is possible, indeed likely, that the functional necessities of the doctrinal or theoretical structures in each of these areas might have produced doctrinal byproducts that are nonfunctional, or perhaps even *dysfunctional*, in the current environment. In this article, I evaluate Title VII sexual harassment doctrine from this perspective, and ask whether certain elements are in fact “legal spandrels.”²² Because the inquiry is metaphorical rather than tangible, it leaves much room for a decision to discard those doctrinal appendages that are found to be dysfunctional in the current environment.²³

In order to situate the evolutionary and legal analysis within a factual context, the Article begins in Part II with a series of snapshots of potentially actionable harassment scenarios. Following each hypothetical case is a brief summary of the way in which the approach proposed in this Article would apply, and also the way in which this approach might differ from the current doctrinal and theoretical framework.

Part III begins with a description of the terms of the debate over the respective influences of biology and culture upon human behavior in general, and upon male-female differences in behavior in particular. It first lays out the evolutionary, biological approach to sex difference. That approach is then compared to the social construction explanation of differences between men and women, after which focus shifts to the scholarly debate in the legal literature about the existence, meaning, cause, and relevance of average differences between men and women in preference, ability, and cognition. In particular, this Part addresses the question why it might matter if certain observed average differences between men and women have resulted, in part, from evolved, biological processes rather than solely from social forces shaping gender roles. With

21. See *infra* text accompanying notes 247–90.

22. Note, however, that the simple conclusion that an attribute of a building, organism, or doctrine is a “spandrel” does not necessarily imply that it is nonfunctional or dysfunctional. Some spandrels, including those in the Cathedral of San Marco, are coopted to serve decorative, useful, or even highly adaptive functions. When a spandrel becomes secondarily adaptive in this way, Gould labels it an “exaptation.” See Gould, *Term and Prototype*, *supra* note 18; cf. Sherry Ahrentzen, *The Space Between the Studs: Feminism and Architecture*, 29 SIGNS 179, 194 (2003) (describing account of the design of the Seven Sisters women’s colleges, where “[c]ollege planners designed spaces intended to isolate and protect students, but such paternalistic intentions were subverted by the development of a flourishing student culture in which campus space was put to varying uses.”). Ironically, in the field of architecture itself, a metaphorical adaptation became an exaptation by virtue of the lived experience of women students which defied the paternalistic expectations and intent of the design of their space.

23. In this sense, the analogy to architecture and biology is an imperfect one; the structural spandrels of a building or an organism are as necessary as the design features that give rise to their existence. The imperfection of the analogy is, however, to the benefit of the doctrine if it allows a kind of “genetic engineering” that might not be possible in biology.

respect to the issue of sexual harassment in particular, it concludes that, when one looks beyond the rhetoric, there is much common ground between the proponents of biological and social constructionist positions.

Part IV sets out evolutionary theories as they bear more specifically on certain typical behavior patterns observed in workplace harassment suits. In addition, this Part demonstrates that evolutionary analysis can be especially helpful in understanding these behavior patterns and in analyzing sexual harassment claims in light of the particular evidentiary hurdles often present in Title VII discrimination cases premised upon sexual harassment. Although the federal courts exhibit a nearly obsessive concern with context in determining whether the facts of any particular case rise to the level of actionable harassment,²⁴ in fact there are certain readily discernible factual patterns in sexual harassment cases. Accordingly, this Part describes, in general terms, several scenarios that tend to recur in the case law. It then breaks down these behaviors into those that tend to be especially relevant to evolutionary analysis, and explains how they might be understood in evolutionary terms. Finally, it demonstrates how the common evidentiary difficulty presented by the intent (or causation) element of a Title VII harassment lawsuit might usefully be addressed by an approach that takes into account some of the insights gained from evolutionary analysis.

Part V examines current Title VII sexual harassment doctrine and argues that there exist at least three general sets of “legal spandrels”—doctrinal spaces that have come to be understood as primary but which in fact are mere byproducts of other, functional aspects of the law. Indeed, an improper focus on these spandrels often runs counter to the fundamental, designed purposes of the law, and therefore these elements are not only nonfunctional but dysfunctional. Part IV thus describes and analyzes three legal spandrels in Title VII sexual harassment law, and then proposes to re-focus the doctrine by incorporating the insights gained from the evolutionary analysis in the previous Part. In particular, the causation requirement contained in Section 703 should be presumed satisfied in harassment cases that fall within one of the three broad behavioral patterns outlined in Part IV. Specifically, where a plaintiff demonstrates that the conduct of coworkers or supervisors falls within one of these sex-based harassment patterns, courts should presume both that the conduct satisfies

24. *E.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 677 (1999); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *O’Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1096 (10th Cir. 1999); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 667 (10th Cir. 1998); *Quiroz v. Hartgrove Hosp.*, 1999 U.S. Dist. LEXIS 4595 at *50 (N.D. Ill. Mar. 25, 1999); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1494–95 (M.D. Fla. 1991).

the “because of . . . sex” requirement, and that the employer knows or reasonably should know that such harassing conduct amounts to sex-based discrimination. Accordingly, the employer should be held liable based upon *its* discriminatory intent. Furthermore, with respect to application of the *Faragher/Ellerth* affirmative defense,²⁵ employers, to be reasonable, must act to prevent or deter situations likely to lead to these harassing behavior patterns.

Because courts, legislators, and members of society affected by legal rules all come to the table with assumptions about human nature in general, and male and female natures in particular, it is incumbent on legal scholars to acknowledge and engage emerging scientific understandings rather than ignore them.²⁶ And, more importantly, if antidiscrimination laws are to remain vital through a moment of scientific uncertainty and through ongoing discoveries in the fields of human genetics, development, and behavior, it is crucial that these laws rest on a normative and doctrinal foundation that is not built on the shifting sands of any single theory of causation, whether genetic or environmental.

25. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), decided on the same day, the Supreme Court held that an employer in a sexual harassment case may assert an affirmative defense to vicarious liability for harassment by a supervisor only where there has been no tangible employment action taken. To prevail on the affirmative defense, the defendant must demonstrate both: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807.

26. There has been a tendency in law and other fields to label the most reprehensible of human behaviors (and even of animal behaviors) as pathological, and to treat them as anomalous. Evolutionary and biological insights have the potential to reveal that the behaviors are not necessarily pathological, and thus to affect policy choices for minimizing or punishing socially harmful behavior. See, e.g., SARAH BLAFFER HRDY, *THE WOMAN THAT NEVER EVOLVED* 76–95 (1981) (discussing debate over infanticide in primates, and arguing that such behavior, though relatively rare, is not pathological and follows definite evolutionarily-rooted patterns); Katharine K. Baker, *What Rape Is and What it Ought Not To Be*, 39 *JURIMETRICS J.* 233, 236 n.15 (1999) (citing studies that demonstrate that many people view rape as caused by mental illness, and referencing legislative history of Federal Rule of Evidence 413 to the effect that rapists constitute a “depraved” minority); Jones, *Child Abuse*, *supra* note 4, at 1214–16 (exploring the possible legal implications of scientific understandings that grew out of evolutionary work on infanticide); cf. Owen D. Jones, *Realities of Rape: Of Science and Politics, Causes and Meanings*, 86 *CORNELL L. REV.* 1386, 1401 (2001) [hereinafter Jones, *Realities*] (reviewing RANDY THORNHILL & CRAIG T. PALMER, *A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION* (2000)) (discussing the widespread, yet erroneous, belief that sexual coercion and sexual violence are a uniquely human phenomenon).

II. APPLICATION TO SELECTED CONTEXTS

This Part offers a very brief illustration of how the proposed approach would apply to some factual scenarios that have often been problematic under current sexual harassment theory and doctrine. It is not intended to be comprehensive, but rather to situate and make concrete the evolutionary and doctrinal discussion that follows in the next several Parts of the Article.

A. *Preexisting Sexualized Atmosphere in the Workplace*

Jane works for the Big Man Machismo Corporation (BMMC). After she has been with BMMC for about six months, she is promoted and transferred to a division that had until that time been all-male. The other employees, as well as the supervisor, often use crude language and gestures, describe to one another their sexual exploits, and hang “girlie” pictures in their work areas. This behavior is identical before and after Jane enters the workplace. Jane complains about the sexualized atmosphere, but it continues.

Under existing doctrine and theory, courts have some difficulty deciding whether Jane has been discriminated against under Title VII. She has not been treated differently than the men at BMMC; furthermore, it does not appear she has been specifically “treated” at all. She has simply entered a preexisting work environment and now argues that this environment is hostile to her because she is a woman. The individual actors involved in creating the hostile environment (Jane’s coworkers and/or supervisors) have no apparent bad intent toward Jane; they simply continue to behave as they have always behaved. In cultivating or participating in a “macho” atmosphere in their workplace, have Jane’s coworkers “discriminated” against her “because of” her sex?

Whereas the answer to this question is not always clear under sexual harassment doctrine as currently understood, an evolutionary analysis aids in understanding the true role of sex-based causation in this hypothetical workplace. As described in Part IV, an evolutionary analysis demonstrates a strong likelihood that (1) the males in this workplace behave as they do both because they are male and in order to signal their possession of certain characteristics either to females or, more likely, to other males; and (2) women in such a workplace are likely to be differentially affected, on average, by such behavior.

B. Same-Sex Male on Male Harassment

John works in a warehouse. All of his coworkers are men. Several of the guys routinely boast of their (hetero)sexual exploits, tell sexual jokes, and post and comment on “girlie” pictures. John is visibly bothered by these discussions. In addition, John talks, dresses, and behaves in what some of the men consider an insufficiently masculine way. After it becomes clear that John is uncomfortable and is not willing to participate in this workplace culture, several of his coworkers start calling him “girlie-man,” grabbing his testicles when he walks by (“bagging” him), poking him in the buttocks (“goosing” him), and generally escalating the level of macho talk and behavior whenever he is around.

Under these circumstances, many courts find that John is not entitled to relief under Title VII because he has not been discriminated against because of his sex. Though an increasing number of courts are willing to entertain the theory that John has been subject to “gender norm enforcement” in such a way as to offend Title VII, others find that this scenario represents discrimination on the basis of sexual orientation, which is not prohibited by the statute.

Under the approach suggested in this Article, a court could find that John’s coworkers likely behaved toward him as they did because he is a man. In fact, an explanation of the coworkers’ behavior that draws upon the insights of evolutionary psychology is entirely consistent with feminist descriptions of the behavior as discriminatory gender norm enforcement. By treating John in this way, the other men are engaging in male-bonding behavior and are excluding a male who might not have been sufficiently aggressive in hunting or war. Their conduct might also be understood as a form of status and gender signaling. Under prevailing theories of behavioral biology, this pattern of conduct would tend to be explained as closely tied to the sex of the target of the behavior.

C. One or a Few Women in a Predominantly Male Workplace

Michele and Susan are firefighters. All of the other employees in their unit are men. The men seem to dislike Michele and Susan, and they exclude them from social events and avoid interacting with them at work. The women’s coworkers work together in many ways that make the unit run more smoothly; they do not offer this collegial collaboration to the two women, who are often left to fend for themselves and to figure out on their own certain “tricks of the trade” that the men teach one another.

In this scenario, Michele and Susan might believe that they are being treated differently because they are women. Their male coworkers might argue that they simply do not like Michele and Susan very much and that their behavior toward the women reflects not sex discrimination but a personality conflict. Many courts would agree: absent evidence of sexualized behavior in the workplace or evidence of discriminatory intent on the part of the men (for example, sexist statements that reflect a belief that women should not be firefighters), Michele and Susan likely would fail to state a claim of sexual harassment under Title VII because they cannot demonstrate that they have been treated badly “because of . . . sex” as required under the statute.

Under my approach, this workplace context characterized by small numbers of women and a traditionally male-identified occupational skill set should raise a presumption that the differential treatment of the women has occurred because of sex. Furthermore, regardless of the subjective intent or motives of their male coworkers whose collective conduct has created the hostile working environment, the employer would be presumed to have acted (or failed to act) with the requisite intent under the statute. Based upon an evolutionary analysis that would predict harassing behavior by males against females under certain environmental contexts, employers which are found to have maintained such environments or allowed them to persist should be held to have acted with the intent required to sustain a cause of action under Title VII for hostile work environment sexual harassment.

III. THE DEVELOPMENT WARS: BEYOND GENES VERSUS ENVIRONMENT

It is nearly impossible to read a newspaper or popular news magazine without finding an account of a skirmish in the nature-nurture wars.²⁷ If there is a point of agreement about the nature of the human mind, it is the

27. Most recently, the remarks of Laurence Summers, president of Harvard University, have crystallized the debate over whether there might exist innate differences in ability between men and women. See, e.g., Sam Dillon and Sara Rimer, *No Break in the Storm over Harvard President's Words*, N.Y. TIMES, Jan. 19, 2005, at A14; See also, e.g., Sharon Begley, *The Nature of Nurture: How the Environment Can Shape Our Genes*, WALL ST. J., June 14, 2002, at B1; *Do You Think Your Actions Have Been Predetermined by God?*, WASH. POST, Jan. 4, 2004, at C11; John Pekkanen, *Nature or Nurture?*, WASHINGTONIAN, Oct. 2000, at 64; Michael Prowse, *Nurture Versus Nature is a Childish Debate*, FIN. TIMES, Sept. 1, 2003, at 17; Matt Ridley, *What Makes You Who You Are; Which is Stronger—Nature or Nurture? The Latest Science Says Genes and Your Experience Interact for Your Whole Life*, TIME, June 2, 2003, at 54; Tom Siegfried, *Of Mice, Men and Behavior; Scrutiny Reveals Flaws of Nature vs. Nurture Debate*, DALLAS MORNING NEWS, May 12, 2003, at 1E; *The Nature/Nurture Debate: 'Blank' Slate Born Quite Full*, ATLANTA J.-CONST., Sept. 21, 2003, at 3C.

universal acknowledgment that we are endlessly fascinated by ourselves. Studies purporting to offer genetic explanations of why humans do the things that they do, and why they feel the things that they feel, are certain to garner media attention regardless of the soundness of the underlying findings.²⁸ Where those studies focus on biological differences between males and females, the media attention is even more intense.²⁹

28. See, e.g., Genetta M. Adams, *Are Genes to Blame for Celeb Gossip?*, PITTSBURGH POST-GAZETTE, July 31, 2004, at B14 (“Our obsession with celebrity gossip and culture may be part of our genetic code.”); Anjana Ahuja, *Our Fateful Genes*, TIMES (London), Dec. 4, 2003, at 14 (discussing role genetics plays in determining many aspects of life); Sharon Begley & Erika Check, *Sex and the Single Fly*, NEWSWEEK, Aug. 14, 2000, at 44 (discussing promiscuity); Sandra Blakeslee, *How Does the Brain Work?*, N.Y. TIMES, Nov. 11, 2003, at F4 (discussing how genes affect brain activity and other traits); Carey, *supra* note 3, at F1 (“[T]he urge to extract a pound of flesh, researchers find, is primed in the genes.”); George Howe Colt, *Were You Born That Way?*, LIFE, Apr. 1998, at 38 (discussing the nature versus nurture debate and media reporting of genetic discoveries); Clive Cookson, *Gene Defect Offers Clue to Causes of Autism*, FIN. TIMES, Sept. 10, 2003, at 6; *Gene Linked to Shyness*, TIMES (London), Apr. 15, 2003, at 6; Erica Goode, *Jealous? Maybe it’s Genetic. Maybe Not.*, N.Y. TIMES, Oct. 8, 2002, at F1; Dean Hamer, *God is in Your Genes*, TORONTO STAR, Oct. 2, 2004, at L10 (discussing the “God gene”); *Helping Young Girls Avoid Depression*, CONN. POST, Oct. 24, 2003 (discussing the use of genes to identify young girls at risk for depression); Ronald Kotulak, *IQ May be More than Matter of Genes*, CHI. TRIB., Dec. 2, 2003, at C1; Sarah Leshner, *A Move Toward ‘Designer Genes’?*, THE HILL, June 18, 2003, at 46 (discussing the manipulation of genes for choice of particular traits); Ian Sample, *Mindless Brutality? No, It’s the Spiteful Gene*, GUARDIAN (London), Sept. 3, 2004, at 9 (“gene or set of genes for spitefulness”); Shankar Vedantam, *Desire and DNA: Is Promiscuity Innate?; New Study Sharpens Debate on Men, Sex and Gender Roles*, WASH. POST, Aug. 1, 2003, at A1 (discussing male promiscuity); Ingrid Wickelgren, *Discovery of ‘Gay Gene’ Questioned; Gene Supposedly Responsible for Homosexuality*, SCIENCE, Apr. 23, 1999, at 571. These examples represent a mere fraction of articles that have appeared in the popular press over the last few years. For an argument that such media coverage, particularly on the subject of genetic male-female difference, is distorted and sensationalistic, see Cheryl Brown Travis, *Talking Evolution and Selling Difference*, in *EVOLUTION, GENDER, AND RAPE* 3, 9–17 (Cheryl Brown Travis ed., 2003).

29. One Sunday issue of the New York Times contained several articles on male-female differences. The cover article of the magazine section, with the headline “*Q: Why Don’t More Women Get to the Top? A: They Choose Not To: Abandoning the Climb and Heading Home*,” suggested that many highly educated professional women leave the workforce not because of discrimination, but because they have a reasonable excuse to do so. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine) at 42. A front page article in the business section of the same issue reported and discussed a study finding that parents of girls are more likely than parents of boys to divorce, and positing that this higher divorce rate might help explain gender gaps in employment. See David Leonhardt, *It’s a Girl! (Will the Economy Suffer?)*, N.Y. TIMES, Oct. 26, 2003, section 3, at 1; see also Debra Nussbaum, *Education; Lessons in Diversity And Aggressive Recruiting*, N.Y. TIMES, Oct. 26, 2003, section 14NJ, at 6; David Rohde, *India Steps Up Effort to Halt Abortions of Female Fetuses*, N.Y. TIMES, Oct. 26, 2003, section 1, at 3.

The debate over nature versus nurture, and among feminists, behavioral biologists, and law and evolution theorists, has longstanding roots.³⁰ In its starkest terms, the nature argument posits that human behavior and psychology are in large part controlled and determined by genes,³¹ while the nurture argument posits that environmental influences are determinative and controlling.³² Though repeatedly pronounced dead, the nature-nurture debate refuses to remain buried.³³

30. See Anne Fausto-Sterling, et al., *Evolutionary Psychology and Darwinian Feminism*, 23 FEMINIST STUD. 403, 406–407 (1997) (review essay) (recounting the longstanding dispute between Darwinians and feminists beginning with Antoinette Brown Blackwell's 1875 book-length reaction to Darwin's *Descent of Man, and Selection in Relation to Sex*); SARAH BLAFFER HRDY, *MOTHER NATURE: MATERNAL INSTINCTS AND HOW THEY SHAPE THE HUMAN SPECIES* 20–22 (1999) (same); Zuleyma Tang-Martinez, *The Curious Courtship of Sociobiology and Feminism: A Case of Irreconcilable Differences*, in FEMINISM AND EVOLUTIONARY BIOLOGY: BOUNDARIES, INTERSECTIONS, AND FRONTIERS 116 (Patricia Adair Gowaty ed., 1997) [hereinafter FEMINISM AND EVOLUTIONARY BIOLOGY] (summarizing feminist criticisms of sociobiology and evolutionary psychology).

31. This characterization of the “nature” position is in fact a caricature; no mainstream scientist or academic who posits genetic bases for behavior actually claims that genes are determinative or controlling. See, e.g., STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 112–13 (2002) (“Neither [Richard] Dawkins nor any other sane biologist would ever dream of proposing that human behavior is deterministic, as if people *must* commit acts of promiscuity, aggression, or selfishness at every opportunity.”); Jones, *Child Abuse*, *supra* note 4, at 1125–26 (“This Article does not suggest that genes ‘determine’ specific human behavior. They do not.”). In fact, it is the critics of sociobiology and related fields who paint the position as “determinist” or “reductionist.” See *id.* at 105–20. I frame the debate in this manner simply to emphasize the extremes in order to contrast them. Of course, most people on both sides of the debate take much more nuanced and sophisticated positions. Indeed, most of those who rely on biological arguments state that the nature-nurture dichotomy is a false one. E.g., Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1168 (2001) [hereinafter Jones, *Rationality*] (“Arguing about whether or not a given behavior is the product of genes or culture is (as is often noted) like arguing about whether the area of a rectangle is the product of its length or its width.”). In addition, an emerging theory in evolutionary biology, known as the “Developmental Systems Approach” or DSA, has challenged the traditional framework of even those biological accounts that recognize the interrelationship of genes and environment. See Russell Gray, *In the Belly of the Monster”: Feminism, Developmental Systems, and Evolutionary Explanations*, in FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 30, at 385 (discussing implications of DSA); see also MATT RIDLEY, *NATURE VIA NURTURE: GENES, EXPERIENCE AND WHAT MAKES US HUMAN* 128–30 (2003) (summarizing history and current state of the “developmentalist challenge” in biology); MARY JANE WEST-EBERHARD, *DEVELOPMENTAL PLASTICITY AND EVOLUTION* (2003); Ani B. Satz, *Testing Access: Toward a Theory of Entitlement to Genetic Testing*, at 90–100 (defining genetic determinism and discussing the implications of genetic determinism and reductionism) (unpublished Ph.D. thesis, Monash University) (on file with author).

32. Similarly, this characterization of the “social construction” position does not account for the spectrum of views held by those generally associated with it. Although there do exist academics who seem at times to assert that there is *no* biological component to human nature or to differences between the sexes, see Judith Lorber, *Believing is Seeing: Biology as Ideology*, 7

This Part summarizes the nature-nurture debate as specifically related to human sex differences, describing both the arguments from nature and the arguments from nurture as they are used to explain differences between women and men. It then focuses on the legal scholarly debate and, in

GENDER & SOC'Y 568, 568–71 (1993), most adherents of a social construction perspective acknowledge some biological component but stress the amplifying role of culture in building upon small or socially insignificant biological traits or differences, *see* David A. Strauss, *Biology, Difference, and Gender Discrimination*, 41 DEPAUL L. REV. 1007, 1011 n.9 (1992) (arguing that the assertion that there are biological tendencies toward certain behavioral or psychological characteristics “is compatible with the position that society has heightened those tendencies in illegitimate ways”); *cf.* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 547–553 (1994) (analyzing several strands of “essentialism” and “constructivism” in the context of the debate over the nature of sexual orientation). Still others question whether the issue of cause is relevant at all to the feminist project. *See* FINEMAN, *supra* note 15, at 34 (stating that “[e]ven if differences are considered to be socially rather than biologically constituted, nothing is resolved.”). Professor Strauss’s position, ironically, is consistent with a point made by one of the “most extreme proponents of sociobiology,” E. O. Wilson. *See* EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* 11–13 (1975) [hereinafter WILSON, *SOCIOBIOLOGY*] (explaining the concept of the Multiplier Effect, whereby “[a] small evolutionary change in the behavior pattern of individuals can be amplified into a major social effect by the expanding upward distribution of the effect into multiple facets of social life.”); Abrams, *supra* note 4, at 1025 (criticizing the “small but hardy band” of extreme sociobiologists exemplified by E. O. Wilson for “extrapolat[ing] from the species to the individual and from physical characteristics to psychological ones”) (quoting CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 47 (1988)); *see also* MARGARET MEAD, *MALE AND FEMALE, A STUDY OF THE SEXES IN A CHANGING WORLD* 7 (1949) (pointing out the universal tendency of societies to “elaborate the biological division of labour into forms often very remotely related to the original biological differences that provided the original clues”), *quoted in* Browne, *Seeking Roots*, *supra* note 4, at 5 n.3). For a debate about the meaning of the term “social construction,” *see generally* 41 DEPAUL L. REV. 981–1056 (collection of articles debating role of biology as relevant to antidiscrimination statutes). In fact, E. O. Wilson’s personal views concerning human sex difference can appear distinctly moderate. He has stated that he believes that the evidence on humans shows that:

modest genetic differences exist between the sexes; the behavioral genes interact with virtually all existing environments to create a noticeable divergence in early psychological development; and the divergence is almost always widened in later psychological development by cultural sanctions and training. Societies can probably cancel the modest genetic differences entirely by careful planning and training

E. O. WILSON, *ON HUMAN NATURE* 129 (1978), *quoted in* HRDY, *supra* note 26, at 200–01 n.1. It might be noted that this statement of biological sex differences by Wilson, the father of sociobiology, is strikingly congruent with the definition of social construction in Professor Strauss’s Reply to Professor Epstein in the DePaul Law Review colloquy. David A. Strauss, *Biology, Difference, and Gender Discrimination*, 41 DEPAUL L. REV. 1007, 1011 (1992).

33. *See generally* PINKER, *supra* note 31 (detailing the long history of the debate over biology versus environment); RIDLEY, *supra* note 31 (same); LESLEY ROGERS, *SEXING THE BRAIN* (1999) (evaluating scientific evidence concerning biological sex differences in brain physiology and function).

particular, on its application in the context of sexual harassment in the workplace. It ends with an account of more recent work by evolutionary biologists, some of whom have approached the issues of sexual selection and sexual dimorphism from a self-consciously feminist perspective and have made important and widely recognized contributions to scientific understanding in the field.

A. Arguments from Nature: Natural Selection and Sexual Selection

The scientific field of evolutionary biology looks at species-typical physical traits, for example the giraffe's long neck, the lion's sharp tooth, or the human's opposable thumb, and explores the ways in which such features could have evolved. One of the ways in which many features evolve is through the process of "Darwinian," or natural, selection.³⁴ Those organisms which embody heritable characteristics³⁵ that help them to survive and reproduce at the expense of similar organisms which lack those characteristics pass on their genes in greater proportion to future generations. Those that don't, don't. Thus, every living organism is by definition the end result of a long line of reproductively successful ancestors. Biologists and anthropologists might disagree over the details of Darwinian selection,³⁶ but they generally agree that the process of natural

34. Though natural selection is generally thought to account for much evolution and speciation, other mechanisms of evolution also operate. These include genetic drift and founder effects. See Victoria L. Sork, *Quantitative Genetics, Feminism, and Evolutionary Theories of Gender Difference*, in FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 30, at 86, 104–05.

35. Some recent scholarship in evolutionary biology questions the centrality of genes to the concept of heritability. Based upon the definition of heritability pronounced by John Maynard Smith, who is generally considered among the greatest evolutionists of the Twentieth Century, these scholars have argued that factors other than genes can be properly considered "heritable." Maynard Smith defined heritability as information transfer between the generations. See, e.g., John Maynard Smith, *The Concept of Information in Biology*, 67 PHIL. SCI. 177, 178–79 (2000). Accordingly, it has been argued that learning and culture, among other nongene-centered factors, may properly be considered heritable, and that these may contribute to evolutionary success. See generally Stephen M. Downes, *Heredity and Heritability*, in STAN. ENCYCLOPEDIA PHIL. (forthcoming Fall 2004 ed.) (describing debate over centrality of gene-centered view of heredity and citing numerous sources), available at <http://plato.stanford.edu/archives/fall2004/entries/heredity/> (last visited Feb. 28, 2005).

36. For example, there has been much debate concerning the level at which natural selection operates. In other words, scientists disagree about the correct "unit" of natural selection: the gene, the individual organism, the social group, or the species. Biologist Richard Dawkins is most clearly associated with the theory of gene selection. See RICHARD DAWKINS, *THE SELFISH GENE* 38–39 (1986) ("Any gene which behaves in such a way as to increase its own survival chances in the gene pool at the expense of its alleles will, by definition, tautologously, tend to survive. The gene is the basic unit of selfishness."); see also GEORGE C. WILLIAMS, *ADAPTATION AND NATURAL SELECTION: A CRITIQUE OF SOME CURRENT*

selection is the primary engineer that has designed³⁷ the “survival machines”³⁸ that are alive today. To the extent that evolutionists disagree about natural selection, that disagreement tends to be concerned with the appropriate way to determine whether a particular trait is an “adaptation.”³⁹

EVOLUTIONARY THOUGHT 20–56 (1966). The late Harvard Paleontologist Stephen Jay Gould was the most visible proponent of the theory of group, or species, selection. *See, e.g.*, Stephen Jay Gould & Elisabeth A. Lloyd, *Individuality and Adaptation Across Levels of Selection: How Shall We Name and Generalize the Unit of Darwinism?*, 96 PROC. NAT'L ACAD. SCI. 11904, 11908–09 (1999); Elisabeth A. Lloyd & Stephen Jay Gould, *Species Selection on Variability*, 90 PROC. NAT'L ACAD. SCI. 595, 595–97 (1993). For an accessible discussion of this debate, see generally KIM STERELNY, *DAWKINS VERSUS GOULD* (2001). *See also* Marcy F. Lawton et al., *The Mask of Theory and the Face of Nature*, in *FEMINISM AND EVOLUTIONARY BIOLOGY*, *supra* note 30, at 63, 68 (arguing that the prevailing paradigm of “selfish individualism” in evolutionary biology prevented scientists from examining the data and issues surrounding sociality in species). After the publication of Williams’s critique of group selection theory, the gene selection model came to dominate the field. However, some recent literature has revived the theory of group selection. *See* ELLIOTT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* 132–58 (1998); Robert Boyd & Peter J. Richerson, *Group Beneficial Norms Can Spread Rapidly in a Structured Population*, 215 J. THEOR. BIOL. 287, 287–88 (2002); Elliott Sober & David Sloan Wilson, *Reintroducing Group Selection to the Human and Behavioral Sciences*, 17 BEHAV. & BRAIN SCI. 585 (1994); Ted C. Bergstrom, *Evolution and Group Behavior: Individual and Group Selection*, 16 J. ECON. PERSP. 67 (2002), available at <http://repositories.cdlib.org/ucsbecon/bergstrom/2002A> (last visited Mar. 7, 2005). This more recent group of selectionist literature, however, recognizes other levels of selection as significant and is more often characterized as “multi-level” selection theory.

37. Biologist Richard Dawkins uses the phrase “the blind watchmaker” to illustrate both the nonpurposefulness and the magnificently functional design of natural selection. *See generally* RICHARD DAWKINS, *THE BLIND WATCHMAKER* (1986).

38. The phrase is Dawkins’s. *See, e.g.*, DAWKINS, *supra* note 36, at 37 (“[Genes] are the replicators and we are their survival machines.”); WILLIAMS, *supra* note 36, at 24 (“Socrates’ genes may be with us yet, but not his genotype, because meiosis and recombination destroy genotypes as surely as death.”); John H. Beckstrom, *The Potential Dangers and Benefits of Introducing Sociobiology to Lawyers*, 79 NW. U. L. REV. 1279, 1281 (1984–85) (“A considerable and continually increasing body of scientific evidence suggests that all living organisms, including humans, can be thought of as vehicles that carry genetic material from one generation to the next.”).

39. Evolutionary biologists generally recognize an architectural element of an organism as a presumptive adaptation when “it solves an adaptive problem with ‘reliability, efficiency, and economy.’” Leda Cosmides & John Tooby, *Evolutionary Psychology: A Primer*, Univ. of Cal. Santa Barbara Center for Evolutionary Psychology, at <http://www.psych.ucsb.edu/research/cep/primer.html> (last visited on Mar. 7, 2005) (*quoting* WILLIAMS, *supra* note 36). The late Professor Stephen Jay Gould, however, frequently criticized sociobiology and evolutionary psychology for a propensity to explain nearly every trait as an adaptation. He argued that many characteristics of organisms could better be explained as byproducts of other, adaptive, traits. *E.g.*, Gould & Lewontin, *supra* note 1.

Evolutionary psychology⁴⁰ is a particular application of evolutionary biology that applies the model of Darwinian selection and adaptation to explain mental processes and human behaviors.⁴¹ Just as the human brain

40. One might note about evolutionary psychology that the field itself is in an evolutionarily unstable state. It is young. It is changing rapidly, with new discoveries almost daily being reported. To push the metaphor further, the field is in the “punctuated” stage of a punctuated equilibrium. This is partly because evolutionary psychology draws from several diverse but interrelated fields of study. Thus, and most notably, the explosion of data in the fields of neuroscience and genetics has profoundly affected not only the empirical base of evolutionary psychology, but the very conceptual foundations on which it rests. Resting legal proposals upon this shifting foundation is a perilous business at best and one that must, at the very least, be approached with a degree of humility.

41. The various labels attached to evolutionary theorizing about humans and animals can be daunting. The field is sometimes called “sociobiology.” The concept of sociobiology, a term popularized by Harvard Entomologist Edward O. Wilson through his 1975 book of that title, grew out of the study of social insects and his insight that many of the social behaviors of these insects and other social species could be explained in part by evolutionary adaptation. *See generally* WILSON, *SOCIOBIOLOGY*, *supra* note 32 (explaining a theory of evolutionary change). Modern sociobiologists have generally focused on studies of and evolutionary explanations for animal behavior, while those studying human behavior split into two separate fields. “The ones with strong ties to ecology and ethology . . . joined with ecological anthropologists studying tribal societies and identified themselves as ‘human behavioral ecologists.’ . . . [T]heoretical developments in this companion field paralleled those in animal sociobiology.” HRDY, *supra* note 26, at xix. Others, whose work grew out of the early sociobiological theories, called themselves “evolutionary psychologists” and have focused on human cognition and behaviors. *See id.* Hrdy suggests that this group has continued to rely on outdated assumptions from early sociobiology, while contemporary sociobiologists and human behavioral ecologists have incorporated the newer data and insights and thus have a more accurate and robust explanation of behavior. *See id.* Some evolutionary biologists are skeptical of evolutionary psychology and of what they term “pop-sociobiology” engaged in by nonscientists. Certainly, the relative intellectual accessibility of the basic tenets of sociobiology, combined with their tendency on a simplistic level to coincide with widespread social beliefs, sometimes results in false or misleading information. And because the discussion is so politically charged, critics of one position or the other often assume malign intent and ulterior motives on the part of the messenger. On the other hand, data and conclusions are sometimes presented as “science” to a popular audience when mainstream scientists would seriously question that characterization. 42.

See PINKER, *supra* note 31, at 41 (“One can say that the information-processing activity of the brain *causes* the mind, or one can say that it *is* the mind, but in either case the evidence is overwhelming that every aspect of our mental lives depends entirely on physiological events in the tissues of the brain.”); Cosmides & Tooby, *supra* note 39 (“The brain is a physical system whose operation is governed solely by the laws of chemistry and physics.”). It has been noted that one difficulty humans face in understanding their biology is that the very instrument of understanding is part of that biology, and that instrument (the brain) is sometimes a liar. One fascinating illustration involves a man whose left and right hemispheres were disconnected during surgery. In subsequent experiments, his right side could obey signals given to one side of his brain, and his left side likewise could obey signals, but the two sides could not “communicate” and thus, to use a metaphor that in this instance is literal rather than figurative, the left hand did not know what the right hand was doing. However, each side made up rather convincing stories to explain what the other hand was doing, and the man in question utterly believed these stories to be true. For a more detailed account of this bizarre natural experiment,

might be considered the bridge between the physical body and the higher faculties that we call the “mind,” so the brain is the bridge between the disciplines of evolutionary biology and evolutionary psychology. The brain is a physical part of our biological bodies, and thus is arguably an object of the evolutionist’s scrutiny. But the brain is also the seat of our motives, emotions, thoughts, dreams, desires, plans, aesthetic sense, and morality. To the extent that these intangibles of the human spirit are actually the tangible results of biochemical and bioelectrical processes in the biophysics of the brain, they are potentially a proper subject for evolutionary explanations.⁴² The relatively new field of evolutionary psychology takes up the challenge of proving that certain psychological characteristics are heritable, highly particularized, and the result of Darwinian selection.⁴³

see PINKER, *supra* note 31, at 43. Similarly, humans have an illusion of broadly detailed vision that is actually a lie convincingly created by the brain. There is currently an active conversation in the philosophical and vision science literature regarding the significance of this illusion created by the brain. See, e.g., Alva Noë, *Is the Visual World a Grand Illusion?*, 9 J. CONSCIOUSNESS STUD. 1, 2–3 (2002), and sources cited therein; cf. Lawton et al., *supra* note 36, at 68 (noting Habermas’ argument that “insofar as science is engaged in its own project . . . it cannot examine the social preconditions of its own existence”). This idea that there is distortion inherent in the measurement of the thing that performs the measuring is similar to the Heisenberg uncertainty principle in physics, which posits that the act of measuring changes the properties of the measured. For a discussion of the principle, see AMIR D ACZEL, ENTANGLEMENT 73–81 (2001). For an application of the principle to law, see Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

43. Evolutionary biologists have long sought to explain the adaptive function of human intelligence in general. George C. Williams suggested that “advanced mental qualities might possibly be produced as an incidental effect of selection for the ability to understand and remember simple verbal instructions early in life. . . . Don’t tease the saber-tooth.” WILLIAMS, *supra* note 36, at 15. For a description of the various theories proposed to explain the sudden and rapid expansion in human brain size some three million years ago, see RIDLEY, *supra* note 3, at 309–44; see also GEOFFREY MILLER, *THE MATING MIND: HOW SEXUAL CHOICE SHAPED THE EVOLUTION OF HUMAN NATURE* 3 (2000) (advancing the theory that many qualities of the human mind are more persuasively explained by sexual selection than by natural selection).

Evolutionary psychology thus styles itself “an approach to the psychological sciences in which principles and results drawn from evolutionary biology, cognitive science, anthropology, and neuroscience are integrated with the rest of psychology in order to map⁴⁴ human nature.”⁴⁵ As an approach to understanding the human mind, evolutionary psychology rests upon certain fundamental and fairly uncontroversial assumptions: that human emotions and behavior are a result of certain processes in the brain; that the brain is a part of the biological body; that the body has evolved such that certain heritable traits which were more adaptive were passed down in greater quantities and thus came to predominate in the species. Humans are animals; the genes that exist in the human population represent evolutionary or Darwinian “success.”⁴⁶ According to evolutionary psychologists, behavior is, quite bluntly, nothing more than movement, and movement is initiated by the brain.⁴⁷

It is widely accepted that many species of animals have evolved highly specialized behavior patterns that they regularly exhibit under particular circumstances.⁴⁸ Thus, for example, bears hibernate in winter, squirrels bury nuts, female black widow spiders mate with and then decapitate and cannibalize their unfortunate reproductive partners. The most fundamental disagreement between evolutionary psychologists and the Standard Social

44. The “mapping” metaphor is common in discussions of genetics and evolution. See generally STEVE OLSON, *MAPPING HUMAN HISTORY: DISCOVERING THE PAST THROUGH OUR GENES* (2002); Carl T. Hall, *Genes Generate a Map; Study Tracks Human Evolution, Migration*, S.F. CHRON., June 9, 2003, at A4; Rosie Mestel, *Draft of Chimp Genetic Map Published; Scientists Place the Outline on a Web Site So It Can Be Compared with the Human Genome*, L.A. TIMES, Dec. 11, 2003, at A24; Raja Mishra, *Scientists Hail Completion of Genome Map*, BOSTON GLOBE, Apr. 15, 2003, at A3. The metaphor suggests a process of finding and marking fixed points on an unchanging field. This implication of the term is probably misleading, especially as used to refer to as complex and multifarious a concept as “human nature.” Science writer Matt Ridley, in contrast, has compared the role of genes in building an organism to the use of a recipe in baking a cake. See RIDLEY, *supra* note 31, at 34.

45. Leda Cosmides & John Tooby, *Evolutionary Psychology and the Emotions*, in HANDBOOK OF EMOTIONS 91 (M. Lewis & J. M. Haviland-Jones eds., 2000), available at <http://www.psych.ucsb.edu/research/cep/emotional.html>.

46. The Darwinian notion of “survival of the fittest” is often said to be a tautology. Under Darwinian logic, those organisms that are present in the world today are the descendants of reproductively successful ancestors. “Success” is measured simply by existence. For an argument that this view is overly simplistic and misleading, see PAUL R. EHRLICH, *HUMAN NATURES: GENES, CULTURES, AND THE HUMAN PROSPECT* 16–20 (2000).

47. See Cosmides & Tooby, *supra* note 39. Thus, organisms that do not move do not have brains, and in fact organisms that do not move for portions of their lifecycles do not have brains during those portions. *Id.*

48. See generally WILSON, *SOCIOBIOLOGY*, *supra* note 32.

Science Model (“SSSM”)⁴⁹ as widely accepted in the social sciences for the last century or so, turns on the extent to which humans share these kinds of evolutionarily influenced behaviors with other animals.⁵⁰ According to the SSSM, the human mind is a “blank slate” on which culture is free to inscribe virtually anything. The potentially revolutionary aspect of the paradigm shift proposed by evolutionary psychologists is the extent to which the blank document actually comes preloaded with certain evolved design templates.⁵¹

Evolutionary psychology posits that the brain is composed of many “modules” that have very specific functional purposes that have evolved because they were adaptive for our ancestors in the environment that prevailed during most of human evolutionary history.⁵² Herein lies perhaps

49. Evolutionary psychologists define the SSSM, with which they view their assumptions in direct conflict, as the idea, prevalent over the past century in psychology, sociology, and anthropology, that:

all of the specific content of the human mind originally derives from the ‘outside’—from the environment and the social world—and the evolved architecture of the mind consists solely or predominantly of a small number of general purpose mechanisms that are content-independent, and which sail under names such as ‘learning,’ ‘induction,’ ‘intelligence,’ ‘imitation,’ ‘rationality,’ ‘the capacity for culture,’ or simply ‘culture.’

Cosmides & Tooby, *supra* note 39. For a description and critique of the rise of the SSSM, see PINKER, *supra* note 31, at 67–69; *see also* Paul Rubin, *The State of Nature and the Evolution of Political Preferences*, 3 AM. L. & ECON. REV. 50, 51 (2001) (describing SSSM and arguing that this conception of human behavior is “false and in many respects misleading”).

50. This debate traces back to Descartes, who drew a firm line between humans and animals, and between mind and body. *See* RIDLEY, *supra* note 31, at 10–12 (“René Descartes had decreed firmly in the seventeenth century that people were rational and animals were automata.”). William James proposed early in the twentieth century that humans actually exhibit a wider variety of instinctive behaviors than do other animals, but his theory was soon dwarfed by the behaviorist school of psychology epitomized by B. F. Skinner. *See* PINKER, *supra* note 31, at 19–22 (describing history of debate on this issue).

51. The study of linguistics is an illustration of this more general trend. Professor Stephen Pinker, a language expert at Harvard, has demonstrated in fascinating detail that, although there is great variation among languages, there is at bottom a highly specific “language instinct” that is universal in humans. *See* STEPHEN PINKER, *THE LANGUAGE INSTINCT* 26–27, 31 (1994); STEPHEN PINKER, *WORDS AND RULES: THE INGREDIENTS OF LANGUAGE* 197 (1999). For an explanation of the theory that the human brain is composed of highly specific “modules” that are pre-programmed to solve particular problems that faced our ancestors during much of human prehistory, *see* Cosmides & Tooby, *supra* note 39; Gould/Dennett debate, *supra* notes 17–18 and accompanying text; RIDLEY, *supra* note 3, at 313–44.

52. Evolutionary theorists dub this the “environment of evolutionary adaptedness,” or EEA. On a simplistic level, it can be understood as the environment that faced our hunter-gatherer ancestors for most of the roughly ten million years during which the human brain evolved. However, the more accurate, and complex, definition of the EEA is “the statistical composite of selection pressures that caused the design of an adaptation.” Cosmides & Tooby, *supra* note 39. In other words, different biological traits may be tied to different EEAs. In

the most profound disagreement about the findings and hypotheses of evolutionary psychology: Is the human brain more like a computer with a fairly simple software program containing a general algorithm that says, in effect, “solve this problem any way you see fit,” or does it come pre-loaded with hundreds or thousands of software programs containing detailed algorithms for various environmental challenges?⁵³ Those who stress the “nurture” element in the nature-nurture debate favor the former description; those leaning toward “nature” favor the latter.⁵⁴

essence, the EEA is convenient shorthand for a concept, not a distinct period in historical or evolutionary time.

53. The computer analogy has been widely used in the scientific literature, for example, DAWKINS, *supra* note 36, at 52 (“Brains may be regarded as analogous in function to computers.”); Cosmides & Tooby, *supra* note 39 (“The brain’s function is to process information. In other words, it is a computer that is made of organic (carbon-based) compounds rather than silicon chips.”). The more scientists learn about the brain, and the more sophisticated computer programming becomes, the more apt the analogy seems.

54. As virtually any participant in the debate will quickly insist, this is a false dichotomy. There is no nature without nurture, and vice versa. See RIDLEY, *supra* note 31, at 3:

For more than fifty years sane voices have called for an end to the [nature v. nurture] debate. Nature-versus-nurture has been declared everything from dead and finished to futile and wrong—a false dichotomy. Everybody with an ounce of common sense knows that human beings are a product of a transaction between the two. Yet nobody could stop the argument.

Id.; Browne, *Sex and Temperament*, *supra* note 4, at 982 (“It is easy to view the question [of sex difference] as entailing a choice between ‘nature’ and ‘nurture,’ yet that is a false dichotomy.”); Cosmides & Tooby, *supra* note 39, at 15:

Evolutionary psychology is *not* just another swing of the nature/nurture pendulum. A defining characteristic of the field is the explicit rejection of the usual nature/nurture dichotomies—instinct vs. reasoning, innate vs. learned, biological vs. cultural. What effect the environment will have on an organism depends critically on the details of its evolved cognitive architecture.

Id. As Stephen Jay Gould has pointed out, however, disclaiming a singular reliance on genes as opposed to environment hardly ends the debate—it matters little that the genes necessarily interact with the environment if the proponent continues to claim that the heritable portion of the trait is fixed, and varies depending on some insidious classification. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 34–35 (1981) (discussing author’s debate with Charles Murray, one of the authors of *The Bell Curve*, over this issue). Especially relevant in this regard is the emerging recognition of “epigenetic factors, [which] are the contributions to a cell’s environment by genes in other cells of the same individual.” WEST-EBERHARD, *supra* note 31, at 112. An often-used example of the interaction among genes, and between genes and environment, is the phenotypic expression of genotype in female ants and honeybees. Because of reproductive features unique to social insects, sister ants are more closely related to one another genetically than they are to either their parents or their own offspring. These sisters share, on average, seventy-five percent of their genes. Their phenotypes, however, differ markedly based solely on particular factors in their environment, including especially what they are fed. Those individuals fed a normal diet become workers. Those fed a special diet of “royal jelly” from the queen will themselves become queens and have a drastically different phenotype from those sisters, not fed the jelly, who are otherwise genetically nearly identical to them. See OXFORD DICTIONARY OF BIOLOGY 526 (2000) (definition of “royal jelly”); WILSON,

1. Sex Difference Through an Evolutionary Lens

According to evolutionary theory, sex differences within species are largely the result of sexual selection. Darwin understood sexual selection as a particular application of the principle of natural selection. He viewed male competition for females as the driving force of sexual selection.⁵⁵ If larger, stronger, more aggressive or more dominant males tend to win the contest for access to reproductive females, then those traits, if heritable, will be selected and will become widespread throughout the population. Female choice is part and parcel of this theory: To the extent that females differentially choose males with certain characteristics, over time those characteristics will become prevalent in the population.⁵⁶ According to Darwin,

when the males and females of any animal have the same general habits of life, but differ in structure, colour, or ornament, such differences have been mainly caused by sexual selection; that is, individual males have had, in successive generations, some slight advantage over other males, in their weapons, means of defence, or charms; and have transmitted these advantages to their male offspring.⁵⁷

Contemporary biologists, elaborating upon Darwin's explanation, distinguish two types of sexual selection. Male-male competition for females that takes the form of fighting, dominance and status-seeking behavior, and the like, is referred to as "intrasexual selection." In contrast, selection that is more easily understood as taking place in the context of

SOCIOBIOLOGY, *supra* note 32, at 160; *see also* WEST-EBERHARD, *supra* note 31, at 72–77 (discussing polymorphisms resulting from environmental and developmental factors). A recent experiment that demonstrated a similarly dramatic phenotypic effect involved infant mice, otherwise genetically similar, whose mothers were fed one of two different diets while pregnant. Depending on the maternal diet, the mice were born with either brown or white fur. *See* Sharon Begley, *Diet During Pregnancy Could Have Effects That Last Into Adulthood*, WALL ST. J., Aug. 22, 2003, at B1, (describing study and discussing "epigenetic changes, defined as those having no effect on the sequence of molecules that make up a genome," but which nonetheless affect the phenotypic expression of a trait); Duke University Medical Center, *Common Nutrients Fed to Pregnant Mice Altered Their Offspring's Coat Color*, SCI. DAILY MAG., Aug. 8, 2003, available at <http://www.sciencedaily.com/releases/2003/08/030801081754.htm>.

55. *See* CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX 222 (John Murray ed., 1882) [hereinafter DARWIN, DESCENT OF MAN]; CHARLES DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION 583 (Penguin Classics 1985) (1859) [hereinafter DARWIN, ORIGIN OF SPECIES].

56. A heritable genetic trait conferring a 1% reproductive advantage to an individual will, in only 265 generations, be present in the entire population. *See* Jones, *Rationality*, *supra* note 31, at 1165 n.80 (citing ROBERT TRIVERS, SOCIAL EVOLUTION 28–29 (1985)).

57. DARWIN, ORIGIN OF SPECIES, *supra* note 55, at 137–38.

female choice or preference for certain male characteristics is known as “intersexual selection.”⁵⁸

It is one of the cardinal tenets of Darwinism that where one sex is gaudy, the other must be doing the choosing.⁵⁹ Physiological differences between males and females⁶⁰ stem largely from their differing reproductive

58. See ERNST MAYR, WHAT EVOLUTION IS 138 (2001). Some feminist biologists have noted that intersexual selection resulting from female preference for certain male traits was for many decades ignored or disparaged by evolutionists because it contradicted closely held beliefs about the extent of female agency. See Andreas Paul, *Sexual Selection and Mate Choice*, 23 INT’L J. OF PRIMATOLOGY 877, 878 (2002):

While Darwin’s first mechanism of sexual selection—male-male competition over access to females—‘the law of battle’—was readily accepted by his contemporaries and scientific peers, virtually none of them was convinced by the seemingly strange view of females as active, strategic decision-makers based on a more than dubious aesthetic sense.

Id.; see also Patricia Adair Gowaty, *Sexual Natures: How Feminism Changed Evolutionary Biology*, 28 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 901, 908–12 (2003).

59. E.g., DARWIN, DESCENT OF MAN, *supra* note 55, at 214. Humans thus present a puzzle for Darwinists. The theory posits females as the more choosy sex, yet it is the female who tends to be the more showy. See RIDLEY, *supra* note 3, at 134–69. It may be more accurate to say that, where one sex exhibits a pronounced characteristic that seems to have no particular survival value (and may, like the peacock’s tail, actually appear to have negative survival value), it is fairly safe to assume that the trait comes about through the mechanism of sexual selection. In other words, the trait has evolved either because it has been differentially preferred by the opposite sex or because it has proved effective in intrasexual competition for reproductive partners. Under this view, females attempt to enhance their physical attractiveness because males differentially prefer attractive females. See DAVID M. BUSS, THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING 110–14 (revised ed. 2003). Recent work in evolutionary biology has begun to demonstrate that “choosy males” are more common than the model formerly supposed. See, e.g., Patricia Adair Gowaty et al., *Indiscriminate Females and Choosy Males: Within- and Between-Species Variation in Drosophila*, 57 EVOLUTION 2037, 2037 (2003); Patricia Adair Gowaty et al., *Male House Mice Produce Fewer Offspring with Lower Viability and Poorer Performance When Mated with Females They Do Not Prefer*, 65 ANIMAL BEHAV. 95, 95–96 (2003) [hereinafter *Male House Mice*]. This recent work suggests that mate selection is a dialectic process with significant choice exercised by both males and females, and with significant fitness effects demonstrated when that choice is constrained.

60. Not all species reproduce sexually, and of those that do, not all are divided into two sexes. The question of why sexual reproduction evolved, and why that form of reproduction has come to predominate in the higher vertebrate species, is controversial in biology. Sexual reproduction entails costs, and thus evolutionary biologists have had to advance theories as to what benefits might outweigh those costs. However, division into two sexes wherein one, the “female,” provides a relatively large gamete containing more biological material than the other, the “male,” has been shown through computer simulations to be an evolutionarily stable strategy that could conceivably have evolved from a nonsexually-reproducing species. See RIDLEY, *supra* note 3. In the same vein, speaking of reproductive success as the “goal” of certain physical or psychological characteristics is in no way meant to imply any conscious pursuit on the part of the organism. Cf. RICHARD DAWKINS, THE ANCESTOR’S TALE 5 (2004) (“From our human point of view, the emergence of our remote fish ancestors from water to land was a momentous step, an evolutionary rite of passage. . . . That is not the way it was at the

strategies,⁶¹ which in turn stem largely from their differing ecological environments. Thus, for example, in our closest primate relatives, different environments have resulted in very different reproductive strategies, which have resulted in differing degrees and kinds of sex differences in each species.⁶² It is generally agreed, for example, that the greater the size differential between males and females of a species, the greater must be the male intrasexual competition for access to reproductive females.⁶³

More recently, scientists have discovered that relative testicle size in males of a species seems to be correlated with promiscuity among females. In species in which females are more promiscuous, males have larger testicles relative to their body size.⁶⁴ The evolutionary explanation lies in

time. Those Devonian fish had a living to earn. They were not on a mission to evolve, not on a quest towards the distant future.”).

61. Of course, “strategy” is used here in the biological sense; there is no normative implication. A “strategy” is merely a possible way of passing genes onto the next generation. A “successful” strategy likewise implies only reproductive success. Others have chronicled the misunderstandings that have resulted from biologists’ use of the word in other contexts. *E.g.*, Jones, *Realities*, *supra* note 26, at 1404 n.44 (recounting incident in which authors of a recent book claiming that rape could be understood as a potentially successful reproductive strategy were heckled off stage and spat upon at a university where they were giving an invited lecture).

62. FRANS DE WAAL & FRANS LANTING, *BONOBO: THE FORGOTTEN APE* 140 (1997) (stating that, in determining why chimpanzees and bonobos evolved such distinct social and sexual behaviors, “ecological conditions were a key factor”); RIDLEY, *supra* note 3, at 212–17 (explaining the differing strategies of gorillas, chimpanzees, and gibbons in part by different ecological niches).

63. It is the competition that leads to the size difference, and not the other way around. Larger males will be better at monopolizing females, and thus will disproportionately pass on their genes for large size. However, the logic presumably works both ways, and thus this insight has been used to help scientists determine the human “mating strategy.” *See* RIDLEY, *supra* note 31, at 17–23. It is a hallmark of Darwinist writing that cause and effect are often reversed in order to conform to our normal way of thinking. Scientists understand that this is going on, but in popular writing the convention can lead to misunderstandings. In *The Selfish Gene*, Richard Dawkins frequently adopts purposive or anthropomorphic language conventions, but then continually deconstructs the language and reminds the reader that there is no “purpose” to adaptive design and that genes are not “selfish” in the way we normally understand the word. *See, e.g.*, DAWKINS, *supra* note 36, at 50:

[I]t is often tedious and unnecessary to keep dragging genes in when we discuss the behaviour of survival machines. In practice it is usually convenient, as an approximation, to regard the individual body as an agent ‘trying’ to increase the numbers of all its genes in future generations. I shall use the language of convenience.

64. The testicles of a male chimpanzee weigh four times as much as those of a male gorilla, though a chimpanzee is only one-fourth the gorilla’s absolute size. Male gorillas are twice as large as female; male and female chimps are very close in size. It appears, therefore, that male gorillas do their competing at the organism level, whereas male chimps do theirs at the gamete level. *See* RIDLEY, *supra* note 3, at 219. For a general discussion of sperm competition in birds and primates, see Tim R. Birkhead and Peter M. Kappeler, *Post-Copulatory Sexual*

the concept of “sperm competition.” According to this theory, larger testicles produce more sperm; if females are mating with many males, then those with more sperm swimming for the egg will be at a reproductive advantage. The male-male competition in these species is not for access to reproductive females, but for access to the egg.⁶⁵

What accounts, under evolutionary reasoning, for female promiscuity? For many years the standard line based on evolutionary psychology was that males tend to be promiscuous and females tend to be monogamous. This was “predicted”⁶⁶ in a ground-breaking paper by biologist Robert Trivers.⁶⁷ Trivers’ insight was that, in sexually-reproducing species, the sex that invests more heavily in the offspring will tend to choose quality partners, whereas the sex that invests less will tend to opt for quantity. A female mammal, so the reasoning goes, must bear and nurse offspring. Once pregnant, she cannot reproduce again for a long time. She has a relatively fixed and limited potential number of offspring; this number does not increase if she mates with additional males. A male, on the other hand, need invest nothing but a small amount of time and energy and a few tablespoons of semen. He can potentially father an enormous number of offspring. Thus, in adaptationist terms, males who are promiscuous will be more

Selection in Birds and Primates, in *SEXUAL SELECTION IN PRIMATES: NEW AND COMPARATIVE PERSPECTIVES* (Peter Kappeler & Carel P. van Schaik eds. 2004).

65. This phenomenon is an especially good illustration of coevolution of males and females. Evolutionary Biologist Patricia Adair Gowaty has referred to this process as “sexual dialectics.” See Patricia Adair Gowaty, *Sexual Dialectics, Sexual Selection, and Variation in Reproductive Behavior*, in *FEMINISM AND EVOLUTIONARY BIOLOGY*, *supra* note 30, at 351, 369–78.

66. This is not meant to disparage Trivers or his insights, but only to point out that the fervor with which they were embraced might partly be explained by their snug fit with preexisting ideas about male nature and female nature. The subsequent refinements in the theory, which reveal that things are perhaps not as black and white as they first seemed, have garnered much less media attention. Professor Gowaty notes that parental investment theory has “achieve[d] axiomatic status in sociobiology and evolutionary psychology during the last thirty years . . . [in part because] it has enormous intuitive appeal.” Gowaty, *supra* note 58, at 902. This is true despite a lack of empirical support for some of the theory’s predictions in “typical” (i.e. non role-reversed) species, and despite observational data that “often . . . fails to match its predictions.” *Id.* Gowaty argues that scientific testing of the theory, along with alternative hypotheses, is urgently needed. See *id.* at 903 (“The ‘basic’ natures of males and females remain to be described in the vast majority of species; interesting alternative hypotheses exist to explain sex roles; and these alternative hypotheses offer an empirical challenge to those interested in understanding the causes and consequences of sexual and reproductive behavior.”) (emphasis added).

67. See Robert L. Trivers, *Parental Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN 1871-1971* 136 (Bernard Campbell ed., 1972).

reproductively successful and their “promiscuity” gene⁶⁸ will spread throughout the gene pool, whereas choosy females who pick males with “good genes”⁶⁹ will be successful and will pass on their choosiness gene.

68. It is very unlikely that single genes are correlated with specific characteristics. This is simply a convenient shorthand for the notion that whatever heritable genetic material leads an organism to exhibit a particular trait will be differentially spread throughout the gene pool in proportion to that organism’s reproductive success. *But see* Anthony J. Greenberg et al., *Ecological Adaptation During Incipient Speciation Revealed by Precise Gene Replacement*, 302 SCIENCE 1754 (2003) (reporting study in which manipulation of a single gene in a male population of fruit flies resulted in marked sexual preferences on the part of females).

69. It is unclear exactly what constitutes “good genes” in this scenario. Some writers posit that females are choosing males who are apt to be good providers and to share in childcare investment. *See, e.g.*, DAVID M. BUSS, *EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF THE MIND* 99–122 (1999). However, as a theoretical matter this preference on the part of females arguably is inconsistent with the “promiscuous male/choosy female” scenario and results in an unstable combination of preferences. *See* Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479, 489 n.28 (1992) (reviewing RICHARD A. POSNER, *SEX AND REASON* (1992)); *see also* DAWKINS, *supra* note 37, at 303 (admitting that his assertion in the first edition that there existed in theory a stable equilibrium composed of both “coy” and “fast” females and both “philander” and “faithful” males was incorrect, and that in fact computer simulations had proven that there was no evolutionarily stable strategy (ESS) composed of these four types); John Maynard Smith, *Evolution and the Theory of Games*, 64 AM. SCIENTIST 41 (1976) (applying game theory to evolutionary behavior and articulating the idea of an “evolutionarily stable strategy,” or ESS). Others suggest that females would be choosing males on the basis of characteristics that signal good health, or good reproductive prospects (though this is a somewhat circular argument). *See, e.g.*, R. A. FISHER, *THE GENETICAL THEORY OF NATURAL SELECTION* 146–56 (2d ed. 1958) (“sexy sons” hypothesis); William D. Hamilton and Marlene Zuk, *Heritable True Fitness and Bright Birds: A Role for Parasites?*, 218 SCIENCE 384, 384 (1982) (good genes hypothesis); Gerald S. Wilkinson et al., *Male Eye Span in Stalk-Eyed Flies Indicates Genetic Quality by Meiotic Drive Suppression*, 391 NATURE 276, 277–78 (1998) (good genes). This failure to explain why females have the preferences that they have (e.g. the peacock’s tail; the nightingale’s song) is a major gap in the Darwinian story. One recent series of experiments suggests that individuals, both female and male, choose mates who are particularly suited to them individually. *See* Jerram L. Brown, *A Theory of Mate Choice Based on Heterozygosity*, 8 BEHAV. ECOL. 60 (1997); Jeanne A. Zeh & David W. Zeh, *The Evolution of Polyandry I: Intragenomic Conflict and Genetic Incompatibility*, 263 PROC. BIOLOGICAL SCI. 1711 (1996). One theory is that individuals prefer to mate with those with complementary or dissimilar immune-coating genes, which has the effect of increasing offspring viability. *See id.* For an overview and review of the various theories of mate choice and the data supporting each, see Paul, *supra* note 58.

The model of the promiscuous male and the choosy (or “coy”)⁷⁰ female was accepted as dogma and trotted out to help explain, among other things, male infidelity,⁷¹ sexual harassment,⁷² and rape.⁷³ There is much recent data, however, that does not fit easily with this model and which has demanded further explanation.⁷⁴ For example, DNA testing has revealed, to the shock of many biologists, that supposedly monogamous females of several species have in fact been massively cuckolding⁷⁵ their mates.⁷⁶ In addition, as previously mentioned, biologists have observed in many primate species “extraordinarily aggressive, anything-but-passive-coy-disinterested-discreet” females, as well as males who seemed rather disinterested in these

70. Charles Darwin used this description of female nature, and it is common in writing on evolutionary biology. See DARWIN, DESCENT OF MAN, *supra* note 55, at 225 (“The female, on the other hand, with the rarest exceptions, is less eager than the male. . . . [S]he generally ‘requires to be courted;’ she is coy, and may often be seen endeavouring for a long time to escape from the male.”) (quoting HUNTER, ESSAYS AND OBSERVATIONS 194 (Owen ed., 1861)); DAWKINS, *supra* note 36, at 140–165 (discussing intersexual and intrasexual competition using game theory, and labeling female reproductive strategies “coy” and “fast”).

71. See Cathy Young, *Look Who’s Cheating*, BOSTON GLOBE, Aug. 11, 2003, at A11 (describing recent cross-cultural study published in the *Journal of Personality and Social Psychology*, which found a higher male preference for sexual variety in every society studied, as relied on by many evolutionary psychologists to show that male promiscuity is biological); see also Zoe Williams, *Comment & Analysis: Sex Cells: The ‘Science’ of Sociobiology Exists Only to Explain Why Men Are Within Their Rights to Pursue Young Hotties*, GUARDIAN (London), Mar. 4, 2003, at 24.

72. See Browne, *Seeking Roots*, *supra* note 4, at 5.

73. See RANDY THORNHILL & CRAIG T. PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION 35–36 (2000). This is not to imply that the evolutionary theory was used to *justify* these social phenomena, though sometimes it was. Most scholars are quick to point out that description is not prescription, and that explanation has no normative value. *E.g.*, sources cited *infra* note 89.

74. In addition, even the original data which seemed to support the model might have been seriously flawed. In some cases the conclusions of these studies were later shown to have been biased by the expectations of the observer. For example, instances of female aggression were ignored, or female promiscuity and nonpassivity were reinterpreted in light of the prevailing theory. See Lawton et al., *supra* note 36, at 69–80 (examining data and critiquing explanations in two ornithological studies).

75. The word is derived, in fact, from the behavior of the female cuckoo, which practices what is known as “brood parasitism.” Female cuckoos lay eggs that mimic the eggs of other bird species. They “intimidate or trick the hosts into accepting their eggs” through a variety of adaptive behaviors. Thus, the host bird invests resources in raising offspring to which it is not genetically related. For a discussion of brood parasitism in cuckoos and other bird species, see WILSON, *supra* note 32, at 364–68.

76. For discussion of these data, see RIDLEY, *supra* note 3, at 217–19; Lawton et al., *supra* note 36, at 73–80. Some recently gathered human data evidence similar patterns. See BUSS, *supra* note 59, at 236 (discussing human DNA studies reporting nonpaternity rates averaging about ten percent).

sexual solicitations.⁷⁷ Despite recent refinements in response to new empirical data, however, the theory of sexual selection remains scientifically robust and, at least with respect to nonhuman animals, is the primary scientific model by which sex differences are understood.⁷⁸

2. Female Choice in Biology and Evolution— Emerging Theories

Recent studies of animal behavior in the field of evolutionary biology highlight the role of female choice and agency in the viability and reproductive fitness of offspring. Scientists studying animal behavior have focused on the ways in which constraints on female choice affect coevolution of male and female characteristics and on the reproductive consequences of these constraints.⁷⁹ Experiments have demonstrated that constraints on female choice can have serious consequences for the well-being of females and the fecundity of the group.⁸⁰ Applied to humans,⁸¹ these studies suggest that constraints on female mate choice, whether through direct sexual coercion or indirect coercion through restriction of resources, profoundly affect the health and reproductive success of offspring.

Several behavioral mechanisms by which males constrain female mate choice and reproduction have been identified by evolutionary biologists. These include:

77. See Gowaty, *supra* note 58, at 907–08 (describing empirical observations that conflict with conventional assumptions about aggressive, promiscuous males and passive, coy females).

78. Indeed, the observational data have led to a recent flowering of research and interest in female choice as an important mechanism of sexual selection. This research, and current theories that have grown out of it, are described and discussed *infra* notes 79–87 and accompanying text.

79. See HRDY, *supra* note 30, at 41–42 (discussing the work of evolutionary biologist Patricia Adair Gowaty and geneticist William Rice in evaluating the possibilities of “free female choice”).

80. See *id.* at 41.

81. As a general matter, evolutionary biologists regard such extrapolation as dangerous, and often criticize those, including evolutionary psychologists, who make leaps from animal studies to human behavior. See, e.g., Caitilyn Allen, *Inextricably Entwined: Politics, Biology, and Gender-Dimorphic Behavior*, in FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 30, at 515; Charles T. Snowdon, *The “Nature” of Sex Differences: Myths of Male and Female*, in FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 30, at 276 (noting the great diversity among primates and cautioning that reasoning from particular species to humans is fraught with uncertainty). However, I make such a leap here (albeit with some trepidation) because the results of the animal studies regarding the importance of unconstrained mate choice to reproductive fitness have been replicated across five diverse species, and thus the case for generalizing the results seems fairly strong.

rape or forced copulation, aggressive conditioning of female behavior, which may be what some of mate guarding is, for example—behavior exhibited toward females that restrains females from seeking extrapair fertilizations; priority of access by males to resources females need for survival and/or reproduction; the regulation by males of females' access to resources, so that females are forced into mating choices they would not otherwise make.⁸²

When females are “forced into mating choices they would not otherwise make,” the consequences are serious. In a series of experiments across five different species, females who were able to mate with their “preferred” male had offspring with statistically significant increased rates of viability and reproductive success.⁸³ In addition, the same experiments carried out on males have demonstrated identical results.⁸⁴ Furthermore, these studies demonstrate that the preferred male is different for different females, rather than having some absolute genetic fitness independent of who is doing the choosing. All of these results highlight the importance to females, males, and their offspring of casting a critical eye on both direct and indirect (economic) constraints on mate choice. Indeed, these studies highlight the congruence between libertarian, market analyses of preference, feminist notions of female autonomy, and evolutionary explanations of male and female behavior.

Finally, evolutionary models of the behavior of social primates strongly support arguments in favor of increasing the numbers of women in traditionally male occupations given the goal of decreasing the incidence of sexual harassment and thereby increasing equality of occupational opportunity. Studies involving animals have shown that females are much

82. Gowaty, *supra* note 65, at 366 (citations in quotation omitted) (citing Barbara B. Smuts & Robert W. Smuts, *Male Aggression and Sexual Coercion of Females in Nonhuman Primates and Other Mammals: Evidence and Theoretical Implications*, 22 *ADVANCES STUDY BEHAV.* 1–63 (1993); T.H. Clutton-Brock & G. Parker, *Punishment in Animal Societies*, 373 *NATURE* 209 (1995); Patricia Adair Gowaty & W.C. Bridges, *Behavioral, Demographic, and Environmental Correlates of Extrapair Fertilizations Uncertain Parentage in Eastern Bluebirds, *Sialia sialis**, 2 *BEHAV. ECOLOGY* 339 (1991)).

83. See Cynthia K. Bluhm & Patricia Adair Gowaty, *Social Constraints on Female Mate Preferences in Mallards' *Anas platyrhynchos* Decrease, Offspring Viability and Mother Productivity*, 68 *ANIMAL BEHAV.* 977 (2004); Lee C. Drickamer et al., *Free Female Mate Choice in House Mice Affects Reproductive Success and Offspring Viability and Performance*, 59 *ANIMAL BEHAV.* 371 (2000); Patricia Adair Gowaty et al., *Mutual Interest Between the Sexes and Reproductive Success in *Drosophila pseudoobscura**, 56 *EVOLUTION* 2537 (2002).

84. See Patricia Adair Gowaty et al., *Male House Mice*, *supra* note 59, at 95. This latter result is inconsistent with conventional evolutionary explanations that tend to assume that males of most species do not engage in significant sexual selection of females, and which tend to ignore variation among females.

less vulnerable to harassment and sexual coercion by males when they are able to form bonds with other females.⁸⁵ This animal data is supported by studies in other fields, including anthropology and sociology,⁸⁶ and it coincides with feminist legal arguments that focus on the primary importance of decreasing occupational segregation on the basis of sex.⁸⁷

B. Arguments from Nurture: Theories of Social Construction

Much of the criticism of evolutionary theories of sex difference has, predictably, come from feminists. Because evolutionary models have often been used to explain (and sometimes justify) what many view as oppressive and subordinating social practices and norms, there has been significant resistance to any argument that might be characterized as “biological determinism.”⁸⁸ Critics of evolutionary explanations of behaviors that implicate sex and gender roles have tended both to attack the underlying data and conclusions and to deny the relevance of biology to the behaviors at issue.⁸⁹ In contrast to Neo-Darwinist⁹⁰ behavioral biological theories,

85. See *infra* sources cited note 236; see also Kamini N. Persaud & Bennett G. Galef, Jr., *Female Japanese Quail Aggregate to Avoid Sexual Harassment by Conspecific Males: A Possible Cause of Conspecific Cueing*, 65 ANIMAL BEHAV. 89 (2002); Andrea Pilastro et al., *Female Aggregation and Male Competition Reduce Costs of Sexual Harassment in the Mosquitofish*, 65 ANIMAL BEHAV. 1161 (2003).

86. “Almost without exception, women fare better in a matrilocal system, in which they stay where they were born, are surrounded by their friends and relations, and have their menfolk move in, than they do when they must leave home to join their husband’s domain.” Angier, *infra* note 141, at 306 (citing sources in endnotes).

87. Vicki Schultz’s work is notable in this regard. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2174–75 (2003) (proposing evidentiary scheme whereby employers demonstrating increased integration would be favored, and those whose workplaces were highly segregated by sex would be penalized).

88. Ellen Berscheid, *Forward* to THE PSYCHOLOGY OF GENDER, at xii (Anne E. Beall & Robert J. Sternberg eds., 1993) (discussing sociobiology and noting in connection with biological theories of human behavior that:

[b]iological determinism is sometimes used both as an explanation and as a justification for the current status and power differences between men and women. Sociobiology, in fact, has earned its reputation for being the psychology of sex, violence, and oppression, with the presumed differential biological bases of behavior being both the reason (“it’s only natural”) and the excuse (“they can’t help it”) for male domination and violence toward women.

Id. (citations omitted); see also Gray, *supra* note 31, at 385. For a recent discussion of the politics behind the debate over determinism, see Bailey Kuklin, *Evolution, Politics and Law*, 38 VAL. U. L. REV. 1129 (2004); see also EHRLICH, *supra* note 46, at 5–7.

89. See Gray, *supra* note 31, at 385–87 (citing several examples of feminist criticisms of evolutionary explanations for behavior).

which seek to explain much behavior and sex difference with reference to sexual selection and adaptation, social constructionist theories stress the central importance of culture in shaping behavior. These theories posit that most human behaviors are learned, and that most differences between men and women in behavior, preference, cognition, or psychology are created or greatly magnified by society.⁹¹ Indeed, some proponents argue that the drives or emotions behind behaviors⁹² are similarly culturally constructed.

With respect to sex role differences, feminist constructionist theories hold that “[d]oing gender means creating differences between girls and boys and women and men, differences that are not natural, essential, or biological. Once the differences have been constructed, they are used to reinforce the ‘essentialness’ of gender.”⁹³ In this vein, critical legal theorists in general tend to condemn approaches that they regard as “essentialist.”⁹⁴

90. The term “neo-Darwinism” is generally used to describe evolutionary theory following the “modern synthesis” of Mendelian genetics with Darwinism that began in the 1920s. *E.g.*, OXFORD DICTIONARY OF BIOLOGY, *supra* note 54, at 400. *See generally* EDWARD J. LARSON, EVOLUTION: THE REMARKABLE HISTORY OF A SCIENTIFIC THEORY (2004).

91. Alternatively, cultural feminists tend to regard the differences as real, but argue that the male-biased valuation of these various abilities by society creates and reinforces the social, political, sexual, and economic subordination of women. *E.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 5–23 (1982).

92. For example, some social constructionists have suggested that there exist or have existed societies in which sexual jealousy is unknown. *See Stephen K. Sanderson, The Sociology of Human Sexuality: A Darwinian Alternative to Social Construction and Postmodernism*, unpaginated paper presented at the annual meetings of the American Sociological Association 2003; at <http://www.chss.iup.edu/sociology/Faculty/Sanderson%Articles>, and sources cited therein. In contrast, evolutionary psychologists view jealousy, and in particular male sexual jealousy, as a “human universal” explainable as an evolutionary adaptation. *See* BUSS, *supra* note 69, at 324–25; Martin Daly & Margo Wilson, *Family Violence: An Evolutionary Psychological Perspective*, 8 VA. J. SOC. POL’Y & L. 77, 108–09 (2000).

93. Gray, *supra* note 31, at 406 (quoting Candace West & Don H. Zimmerman, *Doing Gender*, in THE SOCIAL CONSTRUCTION OF GENDER 13, 24 (Judith Lorber & Susan A. Farrell eds., 1991)).

94. Gender essentialism, under this critique, is “the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.” Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Thus, formulations that posit a “male nature” or “female nature” are essentialist. Several critical theorists have argued that much feminism is essentialist and has failed to account for the experiences of diverse women. *See, e.g.*, Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2482–85 (1994) (arguing that individuals inhabit a subjective identity that is composed of a fluid mixture of various social categories); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 95 (1992) (“[F]requently what passes for the whole truth is instead a representation of events from the perspective of those who possess the power to have their version of reality accepted. The search is on for multiple meanings and multiple

To speak of a “female nature” that arises from evolutionary adaptation is, therefore, a form of *biological* essentialism. Though there may be weaker or stronger forms of essentialism, depending on how much of a group’s commonality is presupposed or described,⁹⁵ all categorization is essentialist in some sense.⁹⁶ Accordingly, though the various social constructivisms

perspectives”); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Harris, *supra*, at 585–86. As Professor Janet Halley has noted, however, much of the critique of feminist essentialism is more accurately viewed as a criticism not of essentialism as such, but of racism. See Halley, *supra* note 32, at 550 n.186 (discussing critical race theory scholarship that criticizes “feminism’s use of the category ‘woman’”). But see Harris, *supra*, at 585 (making clear she does not mean to accuse Catharine MacKinnon and Robin West, whose feminist theories she critiques in the article, individually of racism). Indeed, the feminist movement itself has largely been reaction against the “androcentric” essentialism of mainstream thought that conceptualized “human” as “male.” E.g., FINEMAN, *supra* note 15, at 12–13 (“Men (and therefore, men’s experiences) cannot continue to be considered the universal norm, the omnipotent rule makers and law givers. Women’s experiences must also be incorporated into the law, made central to the rules that govern our lives.”); West, *supra* note 5, at 2 (arguing that “all of our modern legal theory—by which I mean ‘liberal legalism’ and ‘critical legal theory’ collectively—is essentially and irretrievably masculine” because its descriptions and definitions of human value, fear, aspiration, and harm define and describe the experience of men but not of women). Professor Abrams’s critique of Title VII essentialism takes the essentialist critique a step further in that she also focuses on what might be seen as the negative synergies created by the intersection of several, sometimes seemingly contradictory, identities in a particular individual. In addition to a straightforward criticism of judicial essentialism as using the white, middle class woman as the model for Woman, she also points out the problems inherent in the judicial tendency to take an aggregative approach when courts do recognize the existence of more than one salient trait. See, e.g., Abrams, *supra*, at 2497.

95. For an analysis of the “spectrum” of constructivisms, see Halley, *supra* note 32, at 556–60 (citing Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, in *HOMOSEXUALITY, WHICH HOMOSEXUALITY?* 13, 21 (Dennis Altman et al. eds., 1989)).

96. Professor Angela Harris, in her critique of the essentialism of feminist legal theory, notes that “[e]ven a jurisprudence based on multiple consciousness must categorize; without categorization . . . there can be no moral responsibility or social change.” Harris, *supra* note 94, at 586. She argues for more fluidity and instability in categories, and not against all categorization as such. See *id.*; see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (relying on social cognition theory understanding of intergroup bias, which assumes that mental categorization, and cognitive biases that tend to result therefrom, are inevitable outgrowths of the way that the human mind works); Stephen Jay Gould, *Triumph of a Naturalist*, NEW YORK REVIEW OF BOOKS, March 29, 1984, at 58–71 (reviewing EVELYN FOX KELLER, *A FEELING FOR THE ORGANISM: THE LIFE AND WORK OF BARBARA MCCLINTOCK* (1983) (“[W]e must categorize and simplify in order to comprehend. But the reduction of complexity entails a great danger”), *quoted in* CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* (1988). There are interesting parallels between what might be thought of as the human psychological “categorical imperative” (that is, the cognitive necessity of categorization) and the process of classification

might be more or less essentialist, all share ultimately in elevating culture over biology in the explanation of gender roles, behavior, and psychology.⁹⁷

In its starkest form, the social constructionist understanding of gender difference posits that observed differences do not have any objective or biological basis⁹⁸ but rather are created by the dominant power group (men) in order to perpetuate political, social, and economic inequality and power hierarchy over the subordinate group (women).⁹⁹ Although short-term tactical realities might make it necessary to think of and treat “women” as a group in order to gain equal political power, or to elevate “feminine” characteristics and values in order to compensate for their undervaluation by patriarchal society, “[t]he long-term goal of feminism must be no less than the eradication of gender as an organizing principle of post-industrial society.”¹⁰⁰

so central to legal analysis. *See* FINEMAN, *supra* note 15, at 18–19 (discussing the necessity, problems, and politics inherent in legal classification both generally and in application to particular cases). In some sense the human cognitive process is writ large in the legal process. One might wonder whether the human cognitive biases and defects elucidated by social cognition theory have analogues in legal categorization processes.

97. One response to the essentialist critique is to recognize that, regardless of the cause of sex differences in society, these differences do in fact exist and operate in practice to constrain women’s lives. Martha Fineman, in her articulation of the concept of “a gendered life,” suggests that the cause of difference is largely irrelevant, and that a focus on the ideological constructs surrounding sex role differences:

can . . . be useful in forging (temporary) alliances among women across our differences. All women are, at least to some extent, judged as “Woman” (according to gendered expectations) in our society. Therefore, we have an interest in working together on issues such as motherhood, domestic violence, sexual harassment, and rape that affect us all.

FINEMAN, *supra* note 15, at 13. This perspective turns the essentialist critique on its head to suggest that the essentialist construct “Woman” is created and exists in society in general and that feminists should recognize that reality rather than emphasizing differences between women.

98. “In the social construction perspective, both *sex* and *gender* are socially developed statuses. Biologists and endocrinologists who study hormones now have a much more complicated picture of ‘sex.’ Female and male sex are no longer seen as two opposite, mutually exclusive categories.” Judith Lorber & Susan A. Farrell, *Principles of Gender Construction*, in *THE SOCIAL CONSTRUCTION OF GENDER* 7 (Judith Lorber & Susan A. Farrell eds., 1991).

99. *See, e.g.*, CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515 (1982); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983); *see also* Lorber, *supra* note 32, at 569 (“I am arguing that bodies differ in many ways physiologically, but they are completely transformed by social practices to fit into the salient categories of a society, the most pervasive of which are ‘female’ and ‘male’ and ‘women’ and ‘men.’”).

100. Judith Lorber, *Dismantling Noah’s Ark*, in *THE SOCIAL CONSTRUCTION OF GENDER*, *supra* note 98, at 355. It should be noted that many feminists do not agree with this statement of the long-term goal of feminism. For example, some “cultural feminists” in the tradition of Carol

There is no doubt that social influences play a role in the creation of gender roles and that differences related to differential adaptive pressures do not result solely from genes. Though reports of socially egalitarian or even matriarchal¹⁰¹ societies have never been fully substantiated,¹⁰² it is apparent that there is a diversity of possibility with respect to social organization in general, and with respect to both the content and status associated with gender in particular. Though it *might* be true, as some insist, that patriarchy (in the sense of gender hierarchy dominated by males) is a “human universal,”¹⁰³ it is also the case that some societies are more equal than

Gilligan see in the values expressed by the female voice the key to the future of the human race. *See generally* CHARLOTTE PERKINS GILMAN, HERLAND (1979) (describing a fictional utopian society of women in which social ills are nonexistent); MARLENE ZUK, SEXUAL SELECTIONS: WHAT WE CAN AND CAN'T LEARN ABOUT SEX FROM ANIMALS 34 (2002) (discussing ecofeminism, “which draws a connection between ending inequality between the sexes and solving environmental problems by changing the human relationship to the natural world”); West, *supra* note 5, at 72:

Feminism must envision a postpatriarchal world [I]n a utopian world, all forms of life will be recognized, respected and honored. A perfect legal system will protect against harms sustained by all forms of life, and will recognize life affirming values generated by all forms of being. . . . Masculine jurisprudence must become humanist jurisprudence, and humanist jurisprudence must become a jurisprudence unmodified.

Id. Though it is often unclear whether these cultural feminists ground sex differences in biology, culture, experience, or some combination of these forces, at least some feminist legal scholars appear to ground women's distinct value structure upon biology. *See id.* at 29–36 (explaining female “connectivity” and nurturance by virtue of the women's potential or actual experience of pregnancy and breastfeeding, and explaining female perception of harm and aspiration for individuation by virtue of women's actual or potential experience of unwanted pregnancy and penetration during heterosexual sex).

101. I use the term here as the converse of “patriarchal” as used to describe overall power, status, and dominance structures and not simply to describe patterns of out-marriage or property inheritance. Matrilineal societies, though less common than patrilineal, are not unknown. Sociologist Steven Goldberg argues that every society that has ever been identified has been characterized by these three institutions: “[P]atriarchy (males fill the overwhelming [number] of hierarchical positions, . . .) [M]ale [A]ttainment (males attain the high-status roles, whatever these may be in a given society), and [M]ale [D]ominance (both males and females feel that [males dominate] in male-female [relations]. . . .)” STEVEN GOLDBERG, WHY MEN RULE: A THEORY OF MALE DOMINANCE 63 (1993).

102. *See generally* Steven Goldberg, *The Logic of Patriarchy*, 17 GENDER ISSUES 53 (1999); Judy L. Ledgerwood, *Khmer Kinship: The Matriliney/Matriarchy Myth*, 51 J. ANTHROPOLOGICAL RESEARCH 247 (1995).

103. *See* STEVEN GOLDBERG, THE INEVITABILITY OF PATRIARCHY 30–31 (1973); GOLDBERG, *supra* note 101 at 15–16. There has been a lively scholarly debate over the issue whether patriarchy as defined by Professor Goldberg is truly inevitable. In 1986, *Society* published Goldberg's then most recent reiteration of his theory alongside the counter-arguments of several of his critics in a feature entitled *Controversies: Patriarchy and Power*. There, Goldberg summarized his view that “not one of the thousands of societies (past and present) on which we have any sort of evidence lacks any of three institutions: patriarchy, male attainment,

others.¹⁰⁴ If there are and have been some human societies that are vastly more egalitarian than others, then the arguments about the force of social construction in shaping gender roles and hierarchies must be at least partly correct.

In fact, some studies suggest that male and female infants and children are treated differently by parents, peers, and teachers, making it difficult or impossible to disentangle cultural from biological determinants of gendered behavior.¹⁰⁵ “Social role theory [holds that] the differences in the behavior of women and men that are observed in psychological studies of social behavior and personality originate in the contrasting distributions of men and women into social roles.”¹⁰⁶ Scholars who advance this theory accept that certain biological differences exist between human males and females; their disagreement with evolutionary theories of behavioral difference turns primarily on the degree and kind of these biological differences. The social role theorists suggest that the male-female divisions of labor in every

and male dominance.” Steven Goldberg, *Reaffirming the Obvious*, 23 SOCIETY 4, 4 (1986). For criticisms of Goldberg’s thesis, primarily from feminists, see Susan Abbott et al., *Three Voices in Opposition*, 23 SOCIETY 15 (1986) (arguing that differential socialization of the sexes is a more convincing explanation of patriarchal social institutions than Goldberg’s theory); Cynthia Fuchs Epstein, *Inevitabilities of Prejudice*, 23 SOCIETY 7 (1986) (arguing that change, rather than patriarchy, is the only true societal inevitability, and that change in the hierarchical status of women is a slow process beset by artificially paternalistic, socially constructed gender roles); Alice Schlegel, *Logic, Gender and Power*, 23 SOCIETY 21 (1986) (ultimately conceding that most societies are in fact patriarchal, but attributing the phenomenon not solely to biology, but rather to the centrality of women to reproduction in most preindustrial societies).

104. Cf. GEORGE ORWELL, *ANIMAL FARM* (1945) (some animals are more equal than others). In general, “relatively egalitarian relations [have tended most often to be] found in decentralized, nonhierarchical societies with limited technology and especially in simple economies that derive subsistence from foraging.” Alice H. Eagly et al., *Social Role Theory of Sex Differences and Similarities: A Current Appraisal*, in *THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER* 123, 129 (Thomas Eckes & Hanns M. Trautner eds., 2000) (citing several anthropological and historical studies); see also Susan Abbott et al., *supra* note 103, at 19 (arguing that societies may be divided into three levels of gender egalitarianism: clearly male dominated; “equalitarian,” with men and women sharing essentially equal power; and pseudo-male dominant, where socio-cultural ideology honors males, but in reality reflects a female stronghold of power) (citing generally PEGGY REEVES SANDAY, *FEMALE POWER AND MALE DOMINANCE: ON THE ORIGINS OF SEXUAL INEQUALITY* (1981)).

105. For a meta-analysis of the studies of parental treatment conducted through the late 1980s, see Hugh Lytton & David M. Romney, *Parents’ Differential Socialization of Boys and Girls: A Meta-Analysis*, 109 PSYCH. BULLETIN 267 (1991). A more recent summary of the empirical data, from the perspective of social role theory, can be found in Eagly, *supra* note 104, at 123–25. In general, the studies of parental treatment have found few gender differences in treatment, with the notable exception that fathers show a measurable difference in their reactions to and suggestions regarding gender-stereotyped play in younger children. The effect is greater with respect to fathers’ treatment of sons than of daughters. See Eagly, *supra*, at 146 (citing the Lytton and Romney study, as well as two 1998 studies that showed similar results).

106. Eagly, *supra* note 104, at 125.

known society stem originally from the biological reproductive role of women (gestation and lactation) and the greater size and upper body strength of men. However, they challenge the notion that underlying biological sex differences are psychological or cognitive in nature. Rather, these scholars argue that “in more complex societies, the physical attributes of the sexes generally interact with economic and technological developments to enhance men’s power and status,”¹⁰⁷ and that the resulting social gender roles are reinforced and entrenched by social descriptive and injunctive norms.¹⁰⁸

This school of social psychology thus explains empirical differences in men’s and women’s behavior as the end result of a complex psychological-social process that involves an initial sexual division of labor into male and female gender roles, creation of stereotypes based upon that division, and then conscious and unconscious regulation and reinforcement by both the individual actor and observers.¹⁰⁹ In principle, according to this view, statistical behavioral and cognitive differences between men and women might disappear if the sexual division of labor were reduced or eliminated.¹¹⁰

C. Nature and Nurture in the Law of Sexual Harassment

Evolutionary psychologists, and the legal academics whose work incorporates evolutionary theories, generally take pains to make clear that in describing biologically influenced traits, they do not intend to be prescriptive.¹¹¹ The so-called “naturalistic fallacy” lies in the tendency to

107. *Id.* at 129.

108. *See id.* at 130–36. Descriptive norms are expectations held by members of a given society “about what people actually do,” whereas injunctive norms are “expectations about what people ought to do or ideally would do.” *Id.* at 131 (citing R.B. Cialdini & M.R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151 (4th ed.) (D.T. Gilbert et al. eds., 1998)).

109. *See generally id.* at 125–54.

110. *See id.* at 159–60 (“The demise of most sex differences with increasing gender equality, a proposition that thus fits popular beliefs about the characteristics of women and men, is a prediction of social role theory that will be more adequately be tested as more societies produce conditions of equality or near equality.”).

111. *See, e.g.,* Browne, *Biology, Equality*, *supra* note 4, at 654:

A recognition that certain behavioral sex differences have their origins in biology does not in any way answer the question of whether the differences are good and to be fostered by society, or bad and to be suppressed. A large gap may exist between the descriptive is and the prescriptive ought.

Id.; John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 451–52 (2003); *see also* RIDLEY, *supra* note 3, at 180–81 (“[N]o moral conclusions of any kind can be drawn from evolution. . . . It is terribly tempting, as human beings, to embrace such an

equate description with prescription—to assume that the way that something is suggests the way that it should be.¹¹² Scientists are in the business of describing the natural world. Policy, they insist, is for others to determine. Scientists split the atom; politicians drop the bomb.

However, in legal discussions of biology and sex difference, description and prescription are sometimes conflated, both by those who offer evolutionary or other biological explanations of difference and by their critics. Explanations of sex difference, by their nature, tend to employ a particular methodology that is distinct from that used in other legal analyses invoking evolutionary explanation of human behavior. This section describes the law and evolution scholarship on sex difference, and highlights the assumptions and implications of its evolutionary and biological approach to explaining human behavior generally and male and female behavior specifically.

Legal scholars have offered evolutionary explanations for a variety of “law-relevant” human behaviors¹¹³ and for male-female differences in a number of contexts. Evolutionary theory has been employed to aid in

evolutionary scenario [of asymmetrical parental investment] because it ‘justifies’ a prejudice in favor of male philandering, or to reject it because it ‘undermines’ the pressure for sexual equality. But it does neither. It says absolutely nothing about what is right and wrong.”); Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 479 (2003) (noting the likely operation of the “is-ought fallacy” in public misunderstanding of the workings of the patent system). The articulation of the naturalistic fallacy as such is generally attributed to David Hume, for example, Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 775 (2001), but others suggest that it was the philosopher G.E. Moore who first used the term and systematically criticized “the idea of drawing values from evolution or, for that matter, from any aspect of observed nature.” ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE* 330 (1994) (citing Glossup (1967) at 533 for the proposition that the claim that the fallacy was first identified by Hume is debatable); Jones, *Realities*, *supra* note 26, at 1398 n.26. As Wright points out, John Stuart Mill had earlier made a searing case against the common tendency to deduce moral “oughts” from nature on the theory that nature is created by God and therefore that what “is” must reflect divine value. Mill “wrote that nature ‘impales men, breaks them as if on the wheel, casts them to be devoured by wild beasts, burns them to death, crushes them with stones like the first Christian martyr, starves them with hunger, freezes them with cold, poisons them by the quick or slow venom of her exhalations, and has hundreds of other hideous deaths in reserve.’” WRIGHT, *supra*, at 331 (quoting John Stuart Mill, “Nature,” in 10 COLLECTED WORKS OF JOHN STUART MILL 385 (J.M. Robson ed., 1969)).

112. Peter M. Cicchino, *Building on Foundational Myths: Feminism and the Recovery of “Human Nature”: A Response to Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & L. 73, 76–77 & n.9 (2000) (citing DAVID HUME, *A TREATISE ON HUMAN NATURE* I, iv, 6 (1904); WILLIAM K. FRANKENA, *ETHICS* 99–100 (2d ed. 1973)).

113. Professor Owen Jones has used this phrase when describing the need for a robust theory of human behavior in order that law can most effectively influence such behavior in whatever direction desired by policymakers. *See, e.g.*, Jones, *Rape*, *supra* note 4, at 833.

fashioning legal analyses related to child abuse,¹¹⁴ rape,¹¹⁵ certain perceived irrationalities in behaviors under economic models,¹¹⁶ wage and gender gaps in employment,¹¹⁷ the “glass ceiling,”¹¹⁸ workplace sexual harassment,¹¹⁹ and the issues surrounding women in combat.¹²⁰ Scholarship in other legal areas, as diverse as First Amendment theory and the basis of morality, has recently seen arguments based on evolutionary models.¹²¹ Some of these explanations rely on the differential adaptive pressures caused by sexual selection. Thus, in the context of Title VII—a law that expressly prohibits sex discrimination in the workplace—explanations of behavior that are based on a theory of sexual selection have obvious relevance.

Evolutionary explanations can be divided into two broad categories for purposes of assessing their contributions to legal policy arguments.¹²² First,

114. See Jones, *Child Abuse*, *supra* note 4 at 1231–36.

115. See Jones, *Rape*, *supra* note 4, at 838–72; see also THORNHILL & PALMER, *supra* note 73.

116. See Owen D. Jones, *The Evolution of Irrationality*, 41 JURIMETRICS J. 289, 304–08 (2001) [hereinafter Jones, *Irrationality*]; Jones, *Rationality*, *supra* note 31, at 1190–96.

117. See Richard A. Epstein, *The Varieties of Self-Interest*, 8 SOC. PHIL. & POL’Y 102 (1990) (arguing that sociobiological theories of sex difference predict that men and women will specialize in certain “sex roles within the firm,” and that certain asymmetries will emerge in labor and capital markets); Browne, *Sex and Temperament*, *supra* note 4, at 1075–83; Browne, *Seeking Roots*, *supra* note 4, at 74.

118. See Browne, *Sex and Temperament*, *supra* note 4, at 1064–75.

119. See Browne, *Seeking Roots*, *supra* note 4, at 9–12; Fremling & Posner, *supra* note 4.

120. See Browne, *Women at War*, *supra* note 4, at 58–64.

121. See Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213 (2001); Theodore P. Seto, *A General Theory of Normativity*, Loyola Law School (Los Angeles) Public Law Research Paper No. 2003-26 (Oct. 2003), at <http://ssrn.com/abstract=458261> (last visited Feb. 5, 2005).

122. A third category of evolutionary argument in law, qualitatively distinct from the others, consists of the use of the concept of evolution as a metaphor or model for legal change over time. See, e.g., Roberta C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1242–56 (1981); E. Donald Elliott, *Law and Biology: The New Synthesis?*, 41 ST. LOUIS U. L.J. 595, 600–604 (1997) (stating that “the claim is that any system that exhibits the three features of reproduction, variation and selection by the environment will evolve in the direction of greater fit with its environment” and that the law as an “open system” satisfies these criteria); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 55–90 (1985); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 651–56 (1985); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 55–57 (1977) (arguing that legal rules that are not generally accepted in a community are more likely to be repeatedly litigated and eventually discarded or modified); Jeffrey Evans Stake, *Pushing Evolutionary Analysis of Law or Evolving Law: Design Without a Designer*, 53 FLA. L. REV. 875, 877 (2001) (“If we can see law as an organically developing set of legal ideas, we can apply evolutionary theory directly.”). Oliver Wendell Holmes often used evolutionary metaphor when describing the development of law. See generally OLIVER WENDALL HOLMES, JR., *THE COMMON LAW* (1881); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899). Though the metaphor is often apt and though I employ it myself through

there are those theories that attempt to explain physical or behavioral features common to all members of a particular species. Thus, the giraffe's long neck can be understood as an adaptation that was so useful to those individuals who possessed it that, in relatively short measure,¹²³ it came to be a giraffe universal. Evolutionary psychologists and behavioral biologists likewise focus on "human universals."¹²⁴ That there is some disagreement about the true universality of certain traits should not obscure the fact that there are *some* things that are universal in our species.¹²⁵ Law and evolution arguments that posit the ultimate reasons for these species-typical behaviors are potentially useful in fashioning effective legal levers with which to regulate them.¹²⁶ This method of evolutionary analysis does not supply a goal; rather, it looks to norms or policies supplied from an outside source (the legislature, for example), and then examines evolutionary explanations of behavior in order to explore their potential usefulness in shaping such behavior to further the given goal.¹²⁷

Gould's concept of evolutionary spandrels, the evolutionary analysis in law with which I am primarily concerned in this Part is not metaphorical. It is, rather, the reliance on evolutionary explanations for various human traits as a basis for making concrete legal or policy proposals.

123. As noted *supra* note 56, a trait that provides a relatively small advantage will, all else being equal, come to predominate in a population in fairly rapid measure.

124. See DONALD E. BROWN, HUMAN UNIVERSALS 130–41 (1991). Some evolutionary biologists criticize what they regard as the "gene for" arguments of the evolutionary psychologists on the ground that there are not enough genes in the human genome to account for all of the universals that have been catalogued.

125. For example, basic anatomical structures (four-chamber hearts, large brains), drives (thirst, hunger), emotions (anger, love, jealousy), and social interaction. According to Steven Pinker, there exists:

[A]n astonishingly detailed set of aptitudes and tastes that all cultures have in common. This shared way of thinking, feeling, and living makes us look like a single tribe, which the anthropologist Donald Brown has called the Universal People Hundreds of traits, from fear of snakes to logical operators, from romantic love to humorous insults, from poetry to food taboos, from exchange of goods to mourning the dead, can be found in every society ever documented.

PINKER, *supra* note 31, at 55; see also *id.* at 435–39 (reprinting Donald E. Brown's List of Human Universals). Even biologists suspicious of genetic explanations for human behavior and critical of "genetic determinism" concede that certain broad features of human nature are shared generally in the species. See EHRLICH, *supra* note 46, at 12.

126. See Jones, *Rationality*, *supra* note 31 (invoking metaphor of a fulcrum and lever to explain the possibilities of evolutionary explanations of law-relevant behavior).

127. A related but distinct use of evolutionary models in legal scholarship has been to complement and reinforce theoretical models of law and/or human behavior. In the context of law and economics, evolutionary psychology has been the basis of the suggestion that perceived irrationalities in preference or behavior are actually predictable patterns that one would expect to find based on Darwinian theory. See Jones, *Irrationality*, *supra* note 116; Jones, *Rationality*, *supra* note 31. It has been noted that economic and evolutionary approaches are sympathetic and complementary to one another. See Katharine K. Baker, *Gender, Genes, and Choice: A*

For example, evolutionary theory posits that individuals will treat kin and nonkin differently, and will do so in nonrandom ways.¹²⁸ This insight from evolutionary biology has implications for laws related to child abuse¹²⁹ and inheritance,¹³⁰ among others. Similarly, evolutionary theory suggests hypotheses about the ecological and social conditions that are likely to lead to sexual aggression and coercion.¹³¹ Some of these hypotheses are either counterintuitive or not readily apparent and arguably have been born out by the data in some studies of sexual aggression and rape in humans.¹³² Law and evolution scholarship analyzing these legal issues in light of evolutionary explanations of the relevant behavior patterns takes a social policy goal generated from outside the realm of biology (protect children from abuse; reduce the incidence of rape), and asks how law and policy might better be structured to reach that goal in light of behavioral insights gleaned from evolutionary theory.

The proposition that certain broad patterns of behavior might be grounded in genetics or biology has several implications for law and policy. Though the point is often lost in the translation from scientific paper to newspaper, evolutionary biologists do not believe that genetically-influenced behaviors are rigidly determined by genes.¹³³ Rather, expression

Comparative Look at Feminism, Evolution, and Economics, 80 N.C. L. REV. 465 (2002) (noting that the methodologies and assumptions of the two approaches are similar). It is not unusual to find law and economics scholars relying on evolutionary theory. *E.g.*, POSNER, *supra* note 4; Epstein, *supra* note 117, at 102; Fremling & Posner, *supra* note 4; Rubin, *supra* note 49.

128. The theory of “kin selection” is generally associated with William Hamilton of Oxford. It holds “that much of animal cooperation and altruism is explained by the success of genes that cause animals to look after close relatives because they share many of the same genes.” RIDLEY, *supra* note 3, at 77. See William D. Hamilton, *The Genetical Evolution of Social Behavior (I & II)*, 7 J. THEORETICAL BIOL. 1 (1964).

129. See Jones, *Child Abuse*, *supra* note 4.

130. See JOHN H. BECKSTROM, *SOCIOBIOLOGY AND THE LAW: THE BIOLOGY OF ALTRUISM IN THE COURTROOM OF THE FUTURE* 58–59 (1985); Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705 (1990).

131. See THORNHILL & PALMER, *supra* note 73; Margo Wilson & Martin Daly, *The Man Who Mistook His Wife for a Chattel*, in *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* 289 (Jerome H. Barkow et al. eds., 1992); Jones, *Rape*, *supra* note 4, at 909–30. *But see* *EVOLUTION, GENDER, AND RAPE* (Cheryl Brown Travis ed., 2003) (collection of scholarly papers critical of the methodology and conclusions of Thornhill & Palmer’s book).

132. For example, evolutionary psychological theories of rape causation would predict that “[t]he ages of victims of attempted and completed rape will be overwhelmingly concentrated into the part of the female lifespan that is reproductive.” Jones, *Rape*, *supra* note 4, at 865. This prediction is, in fact, born out by the data (contrary to the received wisdom, which holds that women and girls of all ages are equally likely to be victimized by sexual violence). *Id.* at 865–67.

133. Neither do they believe that the predispositions cannot be overridden by free will, even under circumstances in which they might be said to be “triggered.” The evolutionary argument

of the behavioral tendencies is closely tied to ecological conditions under which the behavior might have been adaptive in the so-called “environment of evolutionary adaptedness,” or EEA.¹³⁴ Thus, a tendency toward promiscuity would have been more likely to be triggered in a context in which promiscuity would result in greater average reproductive success than would long-term pairing. In the context of rape law, for example, the suggestion that many males might have behavioral predispositions toward sexual aggression and coercion under certain ecological circumstances implies specific avenues of prevention.¹³⁵ The potential profit of the evolutionary explanation over the simple empirical observation lies in the ability of the former to predict the circumstances under which these socially harmful behaviors are more likely to occur and thus the potential to structure law and social policy in ways that could have greater impact on the behavior.

does not imply an absence of free will; rather, the model speaks only of average patterns and of probabilities. These arguments do suggest that on average it will be more difficult, and thus more costly, to prevent certain behaviors under circumstances in which they are likely to emerge. *E.g.*, Epstein, *supra* note 117, at 113 (“A rule that mandated an equal number or fraction of men or women in particular trades or professions . . . cannot be achieved without some substantial social costs.”); Jones, *Rationality*, *supra* note 31, at 1145 (“[The] law of law’s leverage can therefore afford us new, coherent, and systematic power in predicting the comparative costs to society of attempting to change behaviors through legal means.”); Douglas A. Terry, *Don’t Forget About Reciprocal Altruism: Critical Review of the Evolutionary Jurisprudence Movement*, 34 CONN. L. REV. 477, 485–87 (2002) (“The import of Beckstrom’s conclusion is that laws may become too costly, and thus undesirable, when they prescribe behavior that is contrary to natural human behavior.”); *see also* MARGARET GRUTER, LAW AND THE MIND: BIOLOGICAL ORIGINS OF HUMAN BEHAVIOR 6 (1991) (“Rules that are at cross-purposes with strong biological predispositions . . . are either short-lived, disregarded, or both.”). However, it has been suggested that the deeper implications of behavioral biology upon human autonomy and free will have not thus far sufficiently been explored. *See* Steven Goldberg, *Evolutionary Biology Meets Determinism: Learning from Philosophy, Freud, and Spinoza*, 53 FLA. L. REV. 893, 895–96 (2001), which states:

The starting point for many discussions of morality is that for people to be held morally responsible they must have free will. To put it another way, if determinism is true, that is, if human choices are the result of antecedent causes, then morality is impossible. . . . Nor can free will be rescued by saying that human behavior is caused by multiple factors. Thus, the fact that Jones does not attribute all human behavior to evolutionary biology does not take determinism off the table. If my choices are caused by subatomic particles, the environment, the weather, my upbringing, and evolutionary biology, those choices, however impossible to predict or understand, are still not free, and it will be difficult to hold me morally accountable for them.

Id.

134. For an explanation of the term EEA, see *supra* note 52.

135. THORNHILL & PALMER, *supra* note 73; Jones, *Rape*, *supra* note 4.

The above examples employ evolutionary theory to help explain general patterns of behavior irrespective of average differences between the sexes in the expression of those behaviors.¹³⁶ These scholars argue that the evolutionary piece of the puzzle of human behavior heretofore has been neglected in legal analysis and that it should be considered as one among many useful models that decision-makers might employ in fashioning and applying legal rules regulating behavior.¹³⁷

When it comes to describing and explaining differences between the sexes, as noted above, another kind of human universal is often invoked: the universal of difference. Thus, for example, Professor Kingsley Browne has noted that “[t]he sexual division of labor is a human universal.”¹³⁸ Much of

136. Though rape patterns demonstrate a marked sex difference in behavior patterns, the evolutionary analyses of these patterns are not concerned with differences per se, but rather with how best to shape ecological conditions so as to prevent the expression of the behavior. Although sexual selection and differential male and female reproductive strategies are a part of the explanation for the behavior, the focus of the analysis is on using the insights gained through evolutionary analysis to prevent or deter the (already determined to be) socially harmful behavior rather than to support normative arguments regarding what the appropriate social policy should be.

137. *E.g.*, Jones, *Law and Biology*, *supra* note 4, at 206 (arguing that laws, to be effective, should “be leveraging against an integrated model of human behavior . . . that . . . reflects the most complete understanding available of the multiple and complex influences on behavior . . . incorporating the most rigorously tested developments of the behavioral sciences with the most careful empirical observations of the social sciences”).

138. Browne, *Seeking Roots*, *supra* note 4, at 5. According to classical evolutionary theory, the sexual division of labor stems originally from the phenomenon of “anisogamy,” or the difference between the male and female gametes (sex cells). *See, e.g.*, Trivers, *supra* note 67, at 144 (“The parental investment pattern that today governs the operation of sexual selection apparently resulted from an evolutionarily very early differentiation into relatively immobile sex cells (eggs) fertilized by mobile ones (spermatozoa).”). Because the female gamete (the egg) is relatively large and relatively expensive for the organism to produce, the female tends to be “choosy” about who will fertilize it. The male gamete (the sperm), in contrast, is relatively tiny and cheap to produce because it contains no extra energy in the form of cytoplasmic nutrients. The male, therefore, need not be choosy and in fact has an incentive to be relatively sexually indiscriminate. This differential investment in gametes, and in mammals the further differentials entailed by internal gestation and maternal nursing of infants, is the original division of labor. It leads, in turn, to further divisions based on the male’s relative mobility and the female’s relative immobility due to the demands of pregnancy and nursing. These differences in parental investment, which both lead to and combine with the sharp asymmetry in the potential number of offspring an individual of either sex could have, produce sexual dimorphism in behavior according to Darwinian theory. *See, e.g.*, David M. Buss, *Sex Differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, 12 BEHAV. & BRAIN SCI. 1, 1 (1989). In recent years, several “Darwinian feminists” have questioned some of the premises of Trivers’s theory of differential parental investment in general, and also as applied to humans and other primates in particular. *See generally* Gowaty, *supra* note 58 (describing history of parental investment theory and citing numerous critiques and refinements of Trivers’s original ideas).

the legal argumentation grounded in, or informed by, evolutionary theory focuses on this asserted human universal of male-female difference. Indeed, because the question of biological sex difference is central both to sex discrimination law and to evolutionary biology, it is hardly surprising that legal arguments grounded in evolutionary biology and psychology would be focused on this area of law.

1. Sex Differences in Cognitive Ability and Preferences

Evolutionary psychology posits that average differences between men and women in cognitive abilities and preferences will result from sexual selection. By imagining the environment in which humans and their primate and mammal ancestors lived for most of their evolutionary history, evolutionary psychologists predict the kinds of traits that would have been adaptive in males as opposed to females, based in large part on the different reproductive strategies of males and females.¹³⁹ They then “test” these hypotheses against empirical data,¹⁴⁰ including observed animal behaviors (especially of those species most closely related to humans) and measurable human behaviors.¹⁴¹ If the data match the predictions, a difference is considered an evolutionary adaptation.¹⁴²

139. The difference in male and female reproductive strategy is based primarily on Trivers’s theory of differential parental investment. *See supra* note 67 and accompanying text; *infra* notes 143, 144 and accompanying text.

140. It has been noted that behaviors leave no fossils, so speculation about human behavior in pre-historical times is just that—speculation. *See generally* ROGERS, *supra* note 33 (critiquing sociobiology on this ground, among others). *See also* Gould & Lewontin, *supra* note 1, at 583–89 (criticizing mainstream evolutionary biologists for their tendency to ignore, disregard, or discard data inconsistent with the adaptationist explanation for a particular trait).

141. Human societies that are most closely analogous to those assumed to have existed in the EEA are especially studied in this regard. Thus, sex role differences in hunter-gatherer societies are particularly emphasized. Of course, data from traditional hunter-gatherer societies is neither easy to gather nor especially abundant, and it is often subject to serious methodological limitations. Evolutionary psychologists therefore tend to rely heavily on self-reported data, including surveys, and studies of insular populations such as university students. The dangers of extrapolating from such data have been well canvassed. *See, e.g.*, NATALIE ANGIER, *WOMAN: AN INTIMATE GEOGRAPHY* 322–54 (1999).

142. The question of when a trait should be considered an adaptation is one of the most controversial in biology. In his classic book *ADAPTATION AND NATURAL SELECTION*, biologist George C. Williams suggested that when “a presumed function is served with sufficient precision, economy, [and] efficiency” so as to “rule out pure chance as an adequate explanation,” this should be viewed as at least *prima facie* evidence that the trait is an evolutionary adaptation. WILLIAMS, *supra* note 36, at 9–10. Stephen Jay Gould has criticized evolutionary psychology for seeing adaptation in every behavioral and psychological trait. *See, e.g.*, Gould & Lewontin, *supra* note 1. Scientists generally prefer explanations that are “parsimonious,” that is to say they prefer simpler to more complex explanations. Evolutionary

There is a growing body of evidence demonstrating that there exist measurable, though not large,¹⁴³ statistical differences between men and women in certain areas of cognition, preference, and ability.¹⁴⁴ These statistical sex differences have been relied on by some legal scholars employing a particular genre of evolutionary analysis in law. Professors Kingsley Browne and Richard Epstein, among others, suggest that men and women exhibit certain measurable average differences in cognition.¹⁴⁵ These differences, they argue, can (and should) be understood as adaptations resulting from the process of sexual selection. For example, some studies have revealed statistical differences between women and men

psychologists assert that their explanations of many human sex differences satisfy this criterion. See, e.g., BUSS, *supra* note 59, at 211 (“Given the power of sexual selection . . . it would be astonishing to find that men and women were psychologically identical in aspects of mating about which they have faced different problems of reproduction for millions of years.”).

143. Though the absolute differences are very small, and though there is much greater within-sex than between-sex variation in all of the studied traits, Professor Browne demonstrates that, for certain sex-differentiated traits, when the male mean is higher and male variability is greater (which it is for many of these traits), the result is a much larger percentage of males than females at the far right of the bell curve. See Browne, *Sex and Temperament*, *supra* note 4, at 1016 n.256 (offering statistical explanation).

144. For a detailed discussion of differences in cognitive abilities and an overview of recent studies, see BROWNE, *BIOLOGY AT WORK*, *supra* note 4, at 25–32 and sources cited therein (offering examples of average differences suggested by these authors, and citing studies). Note, however, that biology predicts (and research in fact finds) that the vast bulk of human intellectual ability shows no statistical difference between the sexes. For arguments that these findings of sex difference in cognitive ability are flawed, see ANGIER, *supra* note 141, at 322–67; CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 52–56 (1988); ANNE FAUSTO-STERLING, *SEXING THE BODY* 3–5 (2000); CAROL TAVRIS, *THE MISMEASURE OF WOMAN* 43–56 (1992); Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL’Y 369, 388 n.73 (1995) (“To catalogue all the errors Epstein makes in his discussion of sociobiology, I would need to be far better trained in the natural sciences and to write a book.”); Strauss, *supra* note 32, at 1008 n.2 (“I do not address Professor Epstein’s claims about sociobiology and neurophysiology, other than to note that the sociobiological models he relied upon, at least, have been tellingly criticized.”).

145. See, e.g., BROWNE, *BIOLOGY AT WORK*, *supra* note 4, at 25 (“The sexes differ in performance on many cognitive tasks, although they differ little, if any, in general cognitive ability. Many tests of spatial ability, especially mental rotation, show a consistent male advantage, while others, such as object location, show a female advantage.”); Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 988–89 (1992) [hereinafter Epstein, *Nouns*] (describing “incontrovertible” evidence that “[t]he division of functions across different parts of the brain are not the same for men and for women, which in part accounts for why men, for example, have superior skills in dealing with spacial relations, and women superior language skills”); Epstein, *Two Challenges*, *supra* note 4, at 338. (“The differences between men and women, then, are not simply matters of size, or even matters of size and strength . . . They are also matters of psychology and behavior” that include “giv[ing] directions in different ways” and “interact[ing] with computers in fundamentally different ways.”).

in certain spatial abilities.¹⁴⁶ Evolutionary psychologists suggest that men, who are presumed to have been hunters in the EEA, would have been served by a heightened ability to locate objects in space in order to target animals the better to hit them with spear or rocks. Those men who were better hunters would have been reproductively more successful,¹⁴⁷ both because they would have been preferred by choosy females (sexual selection) and because they would have been more likely to survive (natural selection) and reproduce for longer periods of time. Thus, selection pressures would have led to the spread of the gene “for” spatial ability in the male gene pool.¹⁴⁸

In addition to cognitive differences, Richard Posner, Richard Epstein, Kingsley Browne and others focus on data implying statistical differences in preferences and other psychological tendencies between women and men.¹⁴⁹ Thus, for example, evolutionary theories of sexual selection predict that men will differentially prefer certain traits in short- and long-term potential mates, while females will differentially prefer other traits. In fact, there are data which are consistent with these predictions. For example, some studies show that men on average prefer mates who are young and beautiful,¹⁵⁰ while females on average prefer mates who are rich and high-

146. *But see* ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT MEN AND WOMEN 26–36 (1992) (questioning the results of many of these studies, and arguing that any difference in spatial ability is minuscule at best).

147. In evolutionary biology, “success” refers to reproductive fitness, which in turn refers to both direct (offspring) and indirect (kin) reproduction. Thus, the most successful individuals are those which produce the most offspring, which themselves go on to reproduce, as well as help to ensure the success of close kin who share many of their genes. The sum total of this direct and indirect success is referred to as “inclusive fitness.” *E.g.*, Jones, *Child Abuse*, *supra* note 4, at 1133–36 & nn. 43–45 (and sources cited therein).

148. This is a necessary simplification that tends to obscure some real questions about evolutionary explanations of average differences. Because the only genetic difference between a male and a female human being is that the male has a single Y chromosome that the female lacks, any gene “for” a particular trait would either have to be located on the Y chromosome or be expressed as a recessive sex-linked trait. This puzzle is usually explained with reference to male and female sex hormones. *See, e.g.*, SIMON BARON-COHEN, THE ESSENTIAL DIFFERENCE: THE TRUTH ABOUT THE MALE AND FEMALE BRAIN 98–109 (2003) (discussing the effects of pre- and post-natal testosterone on the brain and on behavior).

149. *See* BROWNE, BIOLOGY AT WORK, *supra* note 4, at 53–67; POSNER, *supra* note 4, at 93; Browne, *Sex and Temperament*, *supra* note 4, at 1016–50 (asserting that data supports the existence of sex differences in the traits of risk-taking, status-seeking, aggressiveness, nurturance, competitiveness, achievement-motivation, and dominance-assertion); Browne, *Women at War*, *supra* note 4, at 80–88; Epstein, *Nouns*, *supra* note 145, at 990 (nurturing instinct of women); *id.* at 992–93 (risk-taking preferences and competition).

150. The theory is that youth in females (but not as much in males) is a proxy for lifetime reproductive potential and fertility, and that “beauty” consists of features that are correlated with youth and health. *See* Buss, *supra* note 138, at 2 (“Features of physical appearance [of women] associated with youth—such as smooth skin, good muscle tone, lustrous hair, and full lips—and

status.¹⁵¹ And, especially relevant to employment law, men tend to be less risk-averse, on average, and more competitive than are women.¹⁵² Finally, according to evolutionary analyses, woman on average would be expected to prefer to devote resources to childrearing and to domestic tasks, whereas men's average preferences would be weighted toward resource-gathering. These average differences have in fact been found by some psychological studies.¹⁵³

Based upon these observed average differences, the legal analysis in this genre generally proceeds as follows: (1) a certain empirical reality—for example, occupational segregation by gender—has been observed and documented; (2) this observed state of affairs can be explained, at least in

behavioral indicators of youth—such as high energy level and sprightly gait—have been hypothesized to provide the strongest cues to female reproductive capacity”). It is often posited that, for example, nice skin is a reasonable proxy for youth and good health (for example, lack of infection and low parasite load), and that this is the evolutionary reason that men tend not to find wrinkles or facial sores attractive in a mate. On the other hand, *bad skin* is rather more often associated with reproductive age and raging hormones, and I have never heard an evolutionary biologist to posit that acne is beautiful. For peer criticism and discussion of Buss's data and conclusions, see *Open Peer Commentary*, 12 BEHAV. & BRAIN SCI. 14–39 (1989) (twenty-seven responses to Buss cross-cultural mate preference study). In addition, the use of self-reported data in evolutionary science has been seriously challenged by biologists and others. See Stephanie A. Shields & Pamela Steinke, *Does Self-Report Make Sense as an Investigative Method in Evolutionary Psychology?*, in EVOLUTION, GENDER, AND RAPE 87 (Cheryl Brown Travis ed., 2003).

151. See Buss, *supra* note 138, at 12 (concluding that, in all of the cultures studied, females rated the traits of ambitiousness, industriousness and high earning capacity in a mate more highly than did males, and that for males, relative youth in a mate was more important than for female selection of males); Fremling & Posner, *supra* note 4, at 1078 (“[M]en compete to acquire resources, and success in that competition greatly influences their rank in the male status hierarchy. Women compete for the high-status men, and the women who are successful in this competition will have a high female status.”).

152. See BROWNE, BIOLOGY AT WORK, *supra* note 4, at 19–21. The average difference in risk-aversion is said to partially explain the overrepresentation of men at both the highest and lowest levels of social hierarchy. If employment (or political) success at the highest levels often depends on a willingness to take risks, and if men as a group tend to be more willing to take such risks, then one would expect more men than women to be corporate (or political) leaders. *Id.* at 40–42. Likewise, the theory predicts that men are more likely than women to crash and burn, both figuratively and literally. See *id.* at 20 (noting that young men, who show the greatest risk-taking behavior, are disproportionately likely to die in traffic accidents).

153. See generally BUSS, *supra* note 59, at 19–72. These average differences have been measured in studies that some critics describe as methodologically flawed. They also, however, conform very closely to cultural gender ideals and myths. Asserted empirical differences, and the cause of these differences, are of course analytically distinct issues. *But see id.* at 17–18 (arguing that there is an evolved human psychology that explains the universality of certain gender stereotypes); STEPHEN E. RHOADS, TAKING SEX DIFFERENCES SERIOUSLY 21 (2004) (describing studies by feminist researchers who “began their studies convinced that sex differences were minimal and that societal forces caused those that existed,” but who changed their views after examining the data).

part, as a result of the differential adaptive pressures that have acted to shape the psychologies of males and females; (3) as a necessary corollary, it is *not* best explained solely¹⁵⁴ by other factors, such as discrimination or the social construction of gender. To this point, the analysis remains descriptive. The next step, however, is often normative: (4) because the most parsimonious explanation for the particular state of affairs is evolved average differences between men and women, society should refrain from engineering an alternative result through legal rules.¹⁵⁵

As an example, consider the explanation for the persistence of occupational segregation by sex and the dearth of women in the highest reaches of corporate leadership.¹⁵⁶ Given the empirical reality of occupational segregation by sex, how have some legal scholars brought evolutionary analysis to bear? Both Kingsley Browne and Richard Epstein have argued that such occupational segregation can in some significant measure be explained by different average preferences and abilities in men and women that are the result of sexual selection.¹⁵⁷ Consequently, they argue that neither illegitimate discrimination nor social construction of gender necessarily or even best accounts for the data. Then, taking the normative step, these scholars argue that legislation and policy designed to correct these gender imbalances in the workforce might be misguided.¹⁵⁸

154. The most thoughtful of these analyses do not take an either-or approach to biology and environment; they recognize that the two are interactive. In critiquing the social constructivist position, for example, Professor Browne argues not that culture is irrelevant, but rather that it cannot explain everything. He offers instead “a biology that creates predispositions in individuals that incline them more strongly in some directions than in others;” a biology on which social and cultural forces then operate. See BROWNE, *BIOLOGY AT WORK*, *supra* note 4, at 107.

155. See Browne, *Biology, Equality*, *supra* note 4, at 619–20 (arguing that, although “recognition of sex differences does not compel an acceptance of all forms of sex discrimination,” such recognition “does mean . . . that not all discrimination is invidious”). Moreover, these arguments tend to stress the difficulty and the cost to human freedom of attempting to alter “human nature.” See *id.* at 620 (“attempts to impose a sex-blind legal order on a two-sexed species may not be successful without considerable coercion by the state” which would “pose significant dangers to a free society”).

156. See GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL: FACT FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION (Mar. 16, 1995).

157. See Browne, *Sex and Temperament*, *supra* note 4, at 984 (arguing that the glass ceiling is in large part “the product of basic biological sex differences in personality and temperament,” and that “[t]hese differences have resulted from differential reproductive strategies that have been adopted by the two sexes during human history”); Epstein, *Nouns*, *supra* note 145, at 992 (discussing sex differences in brain function caused by differential evolutionary payoffs).

158. See Browne, *Biology, Equality*, *supra* note 4, at 619 (stating that “[t]he existence of sex differences in temperament suggests that the policy of attempting to achieve an androgynous society through anti-discrimination laws, affirmative action programs, and constitutional interpretation may be misguided.”). In other work, however, Professor Browne

Here, as in much legal discussion which relies on evolutionary analysis of sex difference, there has been a sharp focus on pinpointing and quantifying distinctions between males and females at the expense of a broader view of male and female behavior patterns. Yet it is precisely when the more diffuse view is taken that evolutionary analysis can become an extremely useful tool in understanding the conditions under which certain behaviors are more likely to occur. Where, on the other hand, the focus is not on context but rather on describing differences per se, there is a danger that naturalistic assumptions will creep into the analysis. When an economic perspective is combined with the evolutionary perspective, as is often the case in legal analyses of biological sex difference,¹⁵⁹ the naturalistic fallacy is in danger of becoming more akin to a naturalistic imperative.

Others have noted the methodological and theoretical affinities between evolutionary biology and economics.¹⁶⁰ In particular, insofar as economic theory holds that labor specialization and comparative advantage are expected to lead to increased overall utility, sexual dimorphism might be viewed as the ultimate efficient division of labor. Indeed, the phenomenon of anisogamy (the difference between male and female gametes) is the original division of labor from which all other sexual divisions ultimately flow.¹⁶¹ The female and male sex cells are specialized to the functions of nurturing and seeking, respectively.¹⁶² Once this specialization occurs,

has stressed that the policy decision regarding how society should treat sex difference is an issue that is distinct from the questions whether those differences exist and, if they do exist, what the cause(s) of those differences might be. *E.g.*, BROWNE, *BIOLOGY AT WORK*, *supra* note 4, at 215.

159. Richard Posner and Richard Epstein, both noted law and economics scholars, are emblematic of this approach.

160. *See* Baker, *supra* note 127 (discussing the affinities between economics and evolutionary biology and highlighting especially the methodological similarities between the two approaches).

161. In the usual account of how sexual reproduction between two sexes evolved and was adaptive, in the beginning there was only one undifferentiated type of sexually reproducing cell. Through random mutation and variation, some cells were larger and contained slightly more nutrients, and some were smaller and faster but contained fewer nutrients. Once this differentiation began, it would have tended to magnify so that eventually the sex cells evolved into two types, one large and nutrient-rich, the other small and fast and containing only the necessary genetic material. These two types are what we now refer to as the female sex cell (egg) and the male sex cell (sperm): they are supremely specialized to their respective tasks. The egg is specialized to nourishment; the sperm is specialized to locate eggs. *See generally* BOBBI S. LOW, *WHY SEX MATTERS: A DARWINIAN LOOK AT HUMAN BEHAVIOR* 38–44 (2000) (describing sex and strategies in reproduction).

162. *See id.* at 43. It should be noted that this rather uncontroversial observation about eggs and sperm has often been extrapolated to describe women as passive and men as active, as well as to create and reinforce separate spheres ideologies. Besides ignoring the relativity of these role specializations, such assumptions also ignore a host of theoretical refinements and observational data.

“subsequent changes in *either gamete or carrier that enhance[] these specific advantages will be favored by natural selection.*”¹⁶³ This role specialization is fueled by natural selection because it confers a comparative reproductive advantage upon those organisms which embody it: the specialization is efficient, where efficiency is defined as the increased ability to get a particular job done with the least investment. Those organisms that fail to specialize (in relative terms) might be competent at both nurturing and seeking, but will be less competent at either of those tasks than those who have specialized. Pairs of nonspecialized organisms would be expected to lose the sexual reproduction contest where they are pitted against pairs of specialized nurturers and seekers.¹⁶⁴

Economists as a rule prefer efficient outcomes; as a normative matter, efficiency is the goal.¹⁶⁵ Under economic reasoning, division of labor based on role specialization is efficient. It follows, then, that such division of labor would, all else being equal, be desirable. Unless it rests on coercion, such specialization poses no normative problem. Role specialization, including gender role specialization and labor role specialization, would be expected to lead to greater total societal wealth and utility—to satisfy the conditions of potential pareto optimality. And, if the roles¹⁶⁶ are freely chosen, they will lead to greater individual utility as well—they will satisfy the conditions of actual pareto optimality.

This approach, while perhaps useful for examining certain kinds of questions about efficiency, has several drawbacks. First, as noted, it tends to lead to an assumption that what is evolved is efficient and therefore good, if what has evolved is sex differentiation and role specialization. In addition, this reasoning ignores more general patterns of male and female behavior as

163. *Id.* at 41.

164. For a graphic illustration of this dynamic as it plays out in the case of gamete specialization, see *id.* at 40.

165. Economists define an outcome as efficient if it is pareto optimal, such that at least one individual is better off and nobody is worse off. However, Pareto optimality is an elusive goal, and many economists would agree that an outcome is desirable if it satisfies the conditions of potential pareto optimality (or “Kaldor-Hicks” efficiency) “if the winners from the move benefit more than the losers lose,” such that gainers could (though they generally do not) compensate losers. See Howard E. Abrams, *Economic Analysis and Unconstitutional Conditions: A Reply to Professor Epstein*, 27 SAN DIEGO L. REV. 359, 365 n.33 (1990). Though efficiency, in economics, is a technical and not a normative concept, as a practical matter one would probably be hard-pressed to find many economists who would not agree that the efficient outcome is “good.” I thank Paul Rubin and Bill Carney for helpful comments on this point (though I do not mean to suggest that either agrees with my conclusion).

166. I use labor in a broad sense to include women’s traditional labor inside the home which is generally uncompensated. Both feminists and nonfeminist economists would, I believe, concur in this usage.

well as contextual variables that are crucial to a complete understanding of both male and female preferences.

Thus far, law and evolution scholars who have analyzed Title VII sex discrimination law have focused on the measurable differences between men and women and have examined the issue from the perspective of economic efficiency. However, the basic underlying assumptions of evolutionary theory, and data regarding male manipulation-control behavior toward females, have generally been overlooked or ignored. The larger picture reveals that males might be expected to try to restrict female access to economic resources as a method of constraining their mating choices. Certainly one would expect the workplace to be a likely forum for this behavior to be expressed. Preventing or restricting it would, arguably, serve both libertarian free-market ideals and feminist notions of autonomy and nonsubordination.

2. Evolutionary Arguments and Hostile Work Environment Sexual Harassment Law

This section considers the relevance of biological sex differences and sexual selection theory to one particular manifestation of sex discrimination in employment: that occurring when a person is subjected to a hostile working environment based on sex. In this context, the average sex differences in preferences and cognitive ability which might be relevant to statistical proof of intentional discrimination or disparate impact are of no moment, because hostile environment cases are not concerned with assigning reasons for gender imbalances in the workplace. Instead, evolutionary arguments about sex differences sometimes are relied on to question the propriety of holding a defendant liable for behavior that, it is argued, stems more from miscommunication¹⁶⁷ than from blameworthy intent. In an article applying evolutionary psychology to hostile work

167. See Browne, *Seeking Roots*, *supra* note 4, at 24–25 (stating that “there is substantial evidence that aspects of a woman’s appearance may lead to miscommunication”; “there is much room for misunderstanding in individual encounters”; “differences in perception that lead to miscommunication are easily understood from an evolutionary perspective”; and “risk of miscommunication is enhanced by the perception of many men that women often are just ‘playing hard to get’ and often mean ‘yes’ even if they say ‘no’”). Some feminists agree with this description of the difference in the way that most men and most women perceive sexual situations. See, e.g., Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149 (2000) (describing women’s lived experience of the fear of male sexual aggression and acquisitiveness, and arguing that this difference in hedonic experience shapes a different reaction to sexual encounters which men cannot understand).

environment sexual harassment law, Professor Kingsley Browne suggests that “[m]uch of the conflict that is labeled ‘sexual harassment’ is traceable in part to the fact that evolution has resulted in conflicting interests between the sexes, which in turn have resulted in different sexual psychologies in men and women.”¹⁶⁸

These arguments frequently suggest a point that is the converse of that made by courts and commentators about the issue of gender stereotyping. Rather than regarding stereotypes as invidious or factually unsupported, there is an implication that the stereotypes are accurate.¹⁶⁹ Thus, with respect to the potential miscommunication arising from a male harasser’s perception that the victim is “playing hard to get,” Professor Browne notes that “[a]lthough this notion is often referred to as a ‘myth,’ there is

168. Browne, *Seeking Roots*, *supra* note 4, at 8–9.

169. The Supreme Court has defined stereotype as a “frame of mind resulting from irrational or uncritical analysis.” *Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001). The dissent in *Nguyen* criticized the majority’s definition, noting that the Court has recognized that “an impermissible stereotype may enjoy empirical support and thus be in a sense ‘rational.’” *Id.* at 89 (Bryer, J., dissenting). For various formulations of the concept of stereotype, see Krieger, *supra* note 96, at 1199 (relying on social cognition theory to define a stereotype as “a person’s accumulated knowledge, beliefs, experiences (both direct and vicarious), and expectancies regarding the schematized construct”); Michael S. Shin, *Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2069 (2002) (defining stereotypes as “beliefs about particular groups,” and stating that “implicit stereotypes are subconscious mental representations of social categories—representations which involve knowledge, beliefs, and expectations about social groups”) (citations omitted); Lis Wiehl, “*Sounding Black*” in the Courtroom: Court-Sanctioned Racial Stereotyping, 18 HARV. BLACKLETTER L.J. 185, 203 (2002) (defining stereotype as “a conformance to a group of ‘unvarying pattern . . . lacking any individuality’”) (quoting WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1st ed. 1984)); see also Bem P. Allen, *African Americans’ and European Americans’ Mutual Attributions: Adjective Generation Technique (AGT) Stereotyping*, 26 J. APPLIED SOC. PSYCHOL. 884, 890 (1996); Jennifer L. Levi & Mary L. Bonauto, *Brief for Plaintiff-Appellant Lucas Rosa in the United States Court of Appeals for the First Circuit Lucas Rosa v. Park West Bank and Trust Company on Appeal from the United States District Court for the District of Massachusetts*, 7 MICH. J. GENDER & L. 147, 155 (2001).

substantial evidence that women do sometimes employ this tactic”¹⁷⁰ and that it is based on evolutionarily adaptive behavior patterns.¹⁷¹

It is apparent that many of the hypotheses of evolutionary psychology conform to traditional social stereotypes regarding the proper roles of men and women, the respective talents and abilities of men and women, and the different psychologies of men and women.¹⁷² Indeed, critics often attack evolutionary psychology on precisely this ground.¹⁷³ In their view, the congruence of theory with traditional social stereotypes reveals discrimination behind the mask of science. On the other hand, proponents of evolutionary psychology look at the convergence of the data, social expectations, and their hypotheses and conclude that the theory is thus supported. Social science explanations that discount the role of genetics and biology are thus contrasted with “the common-sense intuition of the

170. Browne, *Seeking Roots*, *supra* note 4, at 25 n.118 (citing studies indicating that a significant proportion of female college students have said that they did not want to engage in sexual relations under circumstances in which they in fact were willing to do so); *see also* PINKER, *supra* note 31, at 201–07 (discussing the concept of stereotyping, and arguing that many stereotypes are based in fact and are a legitimate basis on which to make decisions absent more individualized information); Browne, *Women at War*, *supra* note 4 (suggesting that stereotypes about men and women could be a legitimate basis on which to bar all women from military combat positions). For an explanation of stereotyping from a cognitive psychological perspective, *see* Krieger, *supra* note 96.

171. Browne, *Seeking Roots*, *supra* note 4, at 25 n.118 (citing and quoting Linda Mealey, *Alternative Adaptive Models of Rape*, 15 *BEHAV. & BRAIN SCI.* 397, 397 (1992) for the proposition that “females are selected to be coy [so] that sometimes ‘no’ really does mean ‘try a little harder’”).

172. Professor Browne states, in relation to his description of male-female differences in temperament and ability:

[n]o doubt this sounds terribly sexist to some. The reader is asked to assume that men are more competitive, more driven toward acquisition of status and resources, and more inclined to take risks; women are more nurturant, risk averse, less greedy, and less single-minded. These are familiar stereotypes to us and to people around the world.

Browne, *Sex and Temperament*, *supra* note 4, at 981.

173. *See, e.g.*, HRDY, *supra* note 26; Peggy Reeves Sanday, *Rape-Free versus Rape-Prone: How Culture Makes a Difference*, in *EVOLUTION, GENDER, AND RAPE* 337, 342 (Cheryl Brown Travis ed., 2003) (arguing that “the evolutionary argument provides scientific support for the well-known popular belief in U.S. society that ‘boys will be boys’ and ‘girls ask for it’”); MEREDITH F. SMALL, *FEMALE CHOICES: SEXUAL BEHAVIOR OF FEMALE PRIMATES* 10–11 (1993) (criticizing mainstream sociobiology because it assumed, incorrectly in many cases, certain roles of males and females, specifically, that men are promiscuous and aggressive and that females are choosy and coy); Linda C. McClain, *Symposium: Emerging Issues: Toward a Formative Project of Securing Freedom and Equality*, 85 *CORNELL L. REV.* 1221, 1230–31 (2000) (looking to evolutionary biology for enlightenment is problematic because “gender-role expectations will color scientists’ ‘findings’ about the sexes”).

untutored that there is a fundamental difference between male and female.”¹⁷⁴

It is this intuitive sense on the part of many people that the stereotypes are “right” in some general way that accounts for the appeal of the arguments of evolutionary psychology and which make it all the more important that its claims be subject to critical analysis.¹⁷⁵ At the same time, outright rejection of all biological explanation as either irrelevant or incorrect risks winning some battles but losing the war.¹⁷⁶ An engagement with scientific theory and data offers the prospect of beginning a conversation that might have much to offer women in the long run.¹⁷⁷

3. Summary

From the foregoing discussion of the application of evolutionary theories to law, it is clear that only a narrow subset of the biological data offered by the opponents of Title VII is specifically relevant to the issue of sexual harassment in the workplace. Average statistical differences between men and women in cognition, preference, and psychology, even if these do exist, cannot support different treatment of *individuals*. Insofar as sexual harassment sex discrimination based on the creation and maintenance of an abusive working environment consists of disparate treatment discrimination,¹⁷⁸ average statistical differences between men and women in

174. Browne, *Women at War*, *supra* note 4, at 54 (“[T]here are some ideas so preposterous that only an intellectual could believe them . . .”).

175. Critiques of science have revealed, in many cases, the myriad ways in which the preexisting cultural and social biases of the scientist can influence the questions that are asked, the data that are observed or ignored, and the interpretation of those data. *See generally* articles collected in *FEMINISM AND EVOLUTIONARY BIOLOGY*, *supra* note 30. However, these criticisms need not, and should not, lead to a rejection of science. Rather, many scientists remain committed to the scientific method and the ideals of objective fact and objective truth, but strive to recognize and control their biases in designing their studies. Darwinian feminists Patricia Adair Gowaty, Sarah Blaffer Hrdy, and Meredith Small are particularly notable in this regard. *See, e.g.*, Gowaty, *supra* note 58, at 917 (“Feminism made the experimental designs better. Being self-conscious about my politics has helped to make my experiments better than they might otherwise be, because I institute a variety of controls that others might also use, and would no doubt use, if they were more aware of their own biases.”).

176. In addition, as Buss and others have pointed out, it begs the question of why such patterns repeatedly occur across so many varied cultures.

177. *Cf. Real Reform?*, *supra* note 15, at 1982–83 (discussing the dilemma faced by “a social reformer who realizes that the public threatened by her reform holds the power to prevent that reform from occurring,” and suggesting an approach that would allow people honestly to confront their biases).

178. Neither the disparate impact nor the disparate treatment theories of discrimination apply very easily to the hostile work environment scenario. Because it is not necessary, in order to prevail on a claim of hostile work environment discrimination, to prove any tangible job

physical or mental ability and in preference patterns are irrelevant to the treatment of individual plaintiffs.¹⁷⁹ The only asserted average difference that is potentially relevant to the hostile environment context is the difference in the way that men and women initiate, perceive, and respond to sexual overtures. Here, according to Professor Browne, a man might reasonably believe that he is “flirting,” whereas a woman might reasonably understand the same behavior as “abuse” or “harassment.”¹⁸⁰ Even assuming

action or tangible psychological harm to the plaintiff, the *McDonnell Douglas/Burdine* disparate treatment evidentiary framework does not comfortably apply to these claims. See *Tex. Dep’t of Commercial Affairs v. Burdine*, 450 U.S. 248 (1981) (requiring, as part of plaintiff’s prima facie case, proof of what amounts to a tangible employment action); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (same). Unlike disparate treatment claims subject to the *McDonnell Douglas/Burdine* burden-shifting formula, harassment claims typically involve conduct that is admittedly illegitimate. The critical questions in these cases therefore are not whether an otherwise lawful employment decision was made for an illegitimate reason, but rather whether harmful behavior occurred “because of” the sex of the plaintiff, whether it was unwelcome, and whether it rose to the required level of abusiveness and pervasiveness. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Likewise, hostile environment scenarios do not fit straightforwardly the disparate impact framework, because they do not involve a neutral or otherwise legitimate employment practice that only incidentally has disproportionate effects upon members of the protected class. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (“[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (holding that Title VII prohibits “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, . . . [which] operate to ‘freeze’ the status quo of prior discriminatory employment practices”). But see L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. (forthcoming 2004), available at <http://ssrn.com/abstract=555341> (last visited Feb. 16, 2005) (proposing a reconceptualization of sexual harassment as disparate impact discrimination, in addition to the more common understanding of sexual harassment as disparate treatment discrimination); Kearney, *supra* note 11, at 122 (arguing that “the phrase ‘facially neutral,’ though it appears as boilerplate in hundreds of cases on the subject, does not appear anywhere in the statute” and should not be read only to apply to “a policy or practice that an employer would acknowledge or even claim pride in”); Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1155 (2003) (arguing that nontargeted sexualized atmospheres are actionable only under a disparate impact theory, and then “only if the conduct’s disproportionate impact on women is great”).

179. These average differences are relevant, however, when statistical evidence is permissible as proof of discrimination. The implications of the evolutionary argument in cases utilizing statistical disparities as proof of discrimination are merely touched on here; a deeper analysis of these questions is beyond the scope of this article, and will be addressed in a forthcoming article.

180. Browne, *Seeking Roots*, *supra* note 4, at 24–28; see also BUSS, *supra* note 59, at 144–48 (discussing studies demonstrating that men tend to infer sexual interest on the part of women when it may not exist, and arguing that “[i]f over evolutionary history even a tiny fraction of

that such differences in perception exist, their cause is a matter of dispute. Some would argue that such differences are the result of a sexist “double standard” that penalizes female sexuality and encourages aggressive, acquisitive male sexuality. Evolutionary psychologists, on the other hand, explain these differences primarily as adaptations resulting from natural and sexual selection.

The male-female differences advanced by evolutionary psychologists might be relevant to hostile environment sexual harassment in this narrow sense of measuring the moral blameworthiness of behavior that a man arguably intends as flirtation and courtship but which a woman perceives as threatening. However, as I argue in Part IV, the moral blameworthiness of the individual harasser should not properly be considered from either a policy or a doctrinal standpoint.¹⁸¹ Rather, the blameworthiness of the *employer*, and not that of the individual *harasser*, logically should be the focus of the liability inquiry in sexual harassment cases. Because persistent “courting” behavior is often, and reasonably, perceived by some women as threatening or abusive, the employer becomes blameworthy from a moral standpoint once it has reason to know of the behavior and fails to prevent or correct it.¹⁸² The argument, such as that advanced by Professor Browne, that employers should not be held liable for “innocent” behaviors fails to consider that the blameworthy act consists in failing to respond to a foreseeable harm.

There is a final category of hostile environment cases in which the asserted difference between men and women in the way that sexual language, behavior, and innuendo is experienced might be relevant. That category consists of those cases in which a sexually-charged environment is alleged to be abusive, though not directed at any particular person and indeed even if the identical environment existed before the person came to work there.¹⁸³ In such cases, the teachings of evolutionary psychology

these ‘misperceptions’ led to sex, then men would have evolved lower thresholds for inferring women’s sexual interest”).

181. See *infra* text and notes 204, 206, 225.

182. In addition, this discrepancy in the way that males and females reasonably perceive sexual situations highlights the importance of worker education about harassment: once coworkers and supervisors learn that certain behaviors are often perceived by women as threatening or abusive, they become blameworthy if they nonetheless continue to engage in them.

183. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522–1523 (M.D. Fla. 1991). *But see Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986) (finding that a sexual poster had a de minimis effect on the workplace, especially when considered in light of

suggest that on average women would be differentially impacted by the sexually-charged atmosphere of the workplace because of evolved sex differences in psychology.¹⁸⁴ This argument supports rather than undermines the claim that the behavior constitutes harassment.¹⁸⁵

For their part, legal feminists have often adhered to an equality model in the realm of sex discrimination law.¹⁸⁶ “Title VII was enacted, and was originally litigated, under an equality-based account of discrimination . . . [under which] protected groups . . . were understood to be substantially similar to the normative group—white men—for all purposes related to employment.”¹⁸⁷ The equality model is highly individualistic—it aims at the injustice of treating an individual woman with a particular set of relevant characteristics differently than a man with those same characteristics would be treated.¹⁸⁸ However, there are several areas in which Title VII doctrine and theory have diverged from a strict equality model.¹⁸⁹ In these areas,

what society condones and features “[in] newsstands, on prime-time television, at the movies and other public [fora]”). For an extended discussion and analysis of this class of cases, see Timmons, *supra* note 178, at 1207–35. I treat this category of cases *supra* in Part IV.A.

184. There is some support for the proposition that “bad language” (which includes words with sexual connotations as well as words that describe bodily functions in a vulgar manner) is more offensive, on average, to women than to men. See TIMOTHY JAY, CURSING IN AMERICA: A PSYCHOLINGUISTIC STUDY OF DIRTY LANGUAGE IN THE COURTS, IN THE MOVIES, IN THE SCHOOLS AND ON THE STREETS 186–88 (1992).

185. That it supports or strengthens existing protections for women in the workplace is not necessarily a reason to embrace this account of sex differences, and many would reject its paternalism, reinforcement of the sexual double standard, and denial of women’s sexual agency. See, e.g., Franke, *supra* note 6, at 746 (“Shutting down all sexual behavior seems like an overreaction to the problem of sexual harassment, and requires some very disturbing assumptions about the possibility of female sexual agency . . .”).

186. For a discussion of the various strands of legal feminism, and a critique of a strict adherence to the equality model, see FINEMAN, *supra* note 15, at 34–47.

187. Abrams, *supra* note 94, at 2518.

188. This individualistic focus has interesting parallels both in classical economics and in mainstream evolutionary biology. The scientific biases that have resulted from a cultural preoccupation with selfish individualism have been noted by biologists, see Lawton, et al., *supra* note 36, at 65–69, as well as by feminist legal theorists, see Baker, *supra* note 127, at 471–84. The symmetry between both of these areas of thought and the “rights” talk prevalent in antidiscrimination jurisprudence is also striking. Over several areas of thought, there is a theoretical tension between a focus on individuals and on groups; thus, in political theory, communitarianism and liberalism; in discrimination theory, disparate treatment and disparate impact; in evolutionary biology, gene selection and group selection.

189. For example, the treatment of pregnancy discrimination under Title VII recognizes the relevance of perhaps the paradigmatic biological sex difference to claims of employment discrimination. See 42 U.S.C. § 2000e(k) (2004) (defining the term “because of sex” in Title VII to include “pregnancy, childbirth, or related medical conditions”). Note, however, that Title VII’s treatment of pregnancy and childbirth generally tracks an equality model by analogizing pregnancy to medical conditions faced by men and then comparing treatment by the employer. In addition, sexual harassment discrimination has often been conceived, both in the case law

which include some forms of sexual harassment, one can discern as a “*minor theme*”¹⁹⁰ the notion that women and men are differently situated with respect to the relevant treatment.

Even where these minor themes can be said to be operating, however, feminist legal theorists often describe the relevant differences, or more significantly the response to those differences, as socially constructed.¹⁹¹ The differences between a critical emphasis on the social creation of the *significance* of sex on the one hand, and the evolutionists’ focus on the adaptiveness of the social traits on the other, might seem a distinction more of degree than of kind. Both groups, broadly speaking, agree that there are certain basic biological differences between males and females. Both groups, broadly speaking, view environmental factors as significant. It is rather the way that biology and social constructs interact that is the subject of disagreement.

First, for many critical scholars and feminists the subjective self is not an unchanging, given entity that moves through an environment and is acted upon by that environment. Rather, the social forces mold and change the subjectivity itself.¹⁹² And, insofar as a person might be said to have some

and in the academic literature, as based in large part on sex differences, whether understood as socially constructed or biological in nature. The highly influential dominance theory of sexual harassment articulated by Catharine MacKinnon is based on a view that sexuality in the workplace has very different implications for women and for men based on the social construction of sexuality as a means of subordinating women. *E.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 220–21 (1979).

190. This phrase is used by Professor Abrams. *See* Abrams, *supra* note 94, at 2517.

191. *See id.* at 2532 (advocating a social constructivist understanding of discrimination whereby “biologically based qualities acquire their meaning through a process of social construction,” both in the eyes of the subjects and the perpetrators of the discriminatory conduct); *cf.* Tribe, *supra* note 42 (proposing a conception of law that, in the tradition of modern physics, would account for the ways in which rules and behavior interact and influence one another).

192. *See, e.g.*, JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 5 (1997) (“[I]t is by being interpellated within the terms of language that a certain social existence of the body first becomes possible.”); Franke, *supra* note 6, at 693 (arguing that sexual harassment is a performative disciplinary practice which “inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects.”). As noted by Professor Abrams, this view offers an “unbiologized account”—it divorces gender identity from biology as such. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1191–92 (1998). This point is more clearly apparent in the context of race than of sex, insofar as the blurring of boundaries in the former is more frequent and more visible. For example, when a person of mixed ancestry self-identifies as a particular race, and is so identified culturally and/or legally, it seems clearer that a social choice is operating as distinct from purely biological constructs. In the context of sex, the operation of these social and political mechanisms is more hidden but not necessarily less real. *See* Katherine M. Franke, *The*

fixed biological characteristics not molded by social forces, those characteristics are imbued with social meanings that bear scant relation to the biological givens. Social construction arguments thus emphasize the primacy of cultural forces and highlight the unjust and inequitable ways that they operate. In addition, these arguments frequently emphasize the hidden power relationships that are created, enforced, and legitimized by the social constructs that overlie biological givens.

In contrast, behavioral biology emphasizes the biological rootedness of the social constructs.¹⁹³ Indeed, the very term “sociobiology” implies just that—the existence of biological and genetic forces that drive social behavior by animals. Both social constructionists and evolutionists view environment and culture as acting upon genes. It is the degree of flexibility, and the normative evaluation of the consequences, that divide the two approaches.

Putting aside, for the moment, this potentially irreconcilable difference in perspective, the question remains: even accepting the premises of the evolutionary argument for average sex differences in behavior and psychology, what are the implications for the law of sexual harassment? The above discussion reveals that, insofar as evolutionary explanations of sex *differences*, as opposed to expected average male and female behavior patterns, might be relevant to sexual harassment law, the nature of these differences argue in support of current sexual harassment protections. Alleged differences in the way that men and women perceive sexual behavior suggest that such behavior does have a differential impact on women in the workplace. In addition, the data and theory on differences show that women reasonably experience persistent sexual advances as harassment even where the male harasser might not view his behavior in that way. To the extent that evolutionary psychology has something to say about male-female difference, what it says is consistent with much current thinking about the harms of sexual harassment.

Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 26–31 (1995) [hereinafter Franke, *Disaggregation*] (discussing the analogy of sexual identity and legal classification to racial identity and legal classification); cf. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 165–66 (2003) (summarizing social psychological literature showing that situation, rather than disposition, is the crucial factor in determining human behavior).

193. See, e.g., David M. Buss, *Author's Response*, 12 BEHAV. & BRAIN SCI. 39, 41 (1989) (responding to peer critiques of cross-cultural mate preference study, and stating that “all versions of the ‘culture hypothesis’ and ‘structural powerlessness’ hypothesis leave a fundamental question unanswered: What is the *origin* of the economic inequality between males and females that is found so pervasively across cultures? An evolution based model of intrasexual competition provides one potential answer.”).

But evolutionary psychology speaks not only of sex differences; it has much to say, also, about more generalized patterns of behavior and the environmental contexts in which these would be likely to arise. These more general patterns are relevant to the law of sexual harassment, and they have been neglected by legal scholars employing evolutionary analysis to the issue of sex discrimination. The balance of this Article focuses on these more general patterns—the evolutionary forest, so to speak, rather than the trees of male-female differences—and discusses the usefulness of evolutionary explanations of these contextualized behavior patterns in the analysis of sexual harassment doctrine.

IV. EVOLUTIONARY EXPLANATIONS FOR TYPICAL HARASSMENT BEHAVIORS

Sexual harassment takes a variety of forms. In order to analyze the phenomenon, it is helpful to break it down into reasonably noticeable fact patterns that may raise distinct questions from a biological and legal perspective.¹⁹⁴ Despite the fact that every abusive environment is in some sense unique, and despite the courts' extreme focus upon context in evaluating abusiveness,¹⁹⁵ it is possible to describe patterns of abuse and harassment that are relevant to understanding the behaviors at issue and

194. Some legal scholars have argued that *sexist* harassment and *sexual* harassment should not be distinguished for purposes of hostile work environment analysis. See Abrams, *supra* note 192, at 1217 (stating that, like Schultz, she views her theory of sexual harassment as broad enough to include sexualized and nonsexualized conduct because both may be “a means of preserving male control and entrenching male norms in the workplace”); Schultz, *supra* note 4, at 1710–20. Whether because of a focus on harassment as a technology of sexism, see Abrams, *supra* note 192, at 1217, or for more tactical reasons, see Schultz, *supra* note 4, at 1720–21 (arguing that courts' tendency to separate the two types of harassment “weakens the plaintiff's case and distorts the law's understanding of the hostile work environment by obscuring a full view of the culture and conditions of the workplace”), these scholars have been suspicious of approaches that deconstruct or de-aggregate harassment behaviors. However, one can recognize that both kinds of harassment serve to subordinate women, and that both can contribute to a pervasively abusive environment, while at the same time asking whether they might have different proximate and ultimate causes and perhaps different prevention strategies. Cf. Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, at 569–89 (1997) (arguing that “rape” encompasses several different behavioral patterns, and criticizing Federal Rule of Evidence 413 for its failure to account for the various motivations behind different kinds of rape).

195. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”). Justice Scalia, concurring in *Harris*, noted the unpredictable and highly subjective nature of the Court's contextual hostile environment standard, but stated that he could not come up with a better test with which to judge whether particular conditions constituted a hostile work environment in light of “the inherently vague statutory language.” *Id.* at 24–25 (Scalia, J., concurring).

evaluating these behaviors under the governing legal standard. This Part describes these observable patterns of behavior, and then explains their likely causes based on an evolutionary model. The next Part uses the insights gained from these explanations to inform and re-evaluate the applicable legal doctrine.

A. Recurring Patterns in Harassment Cases

Broadly speaking, the scenarios that constitute workplace sexual harassment fall into three general categories. I label these scenarios, respectively, “Give Me What I Want,” “Get Out of My Space,” and “Take It Like A Man.” In the first type of case, a single harasser uses one or more of a variety of tactics in an attempt to “get sex” from the victim.¹⁹⁶ The facts of *Meritor Savings Bank, FSB v. Vinson*¹⁹⁷ fall into this category. This general grouping would include quid pro quo cases¹⁹⁸ as well as hostile environment cases in which, for example, a coworker persistently propositions the victim.¹⁹⁹ Though there are myriad variations on the theme,²⁰⁰ the crucial

196. Some recent scholarship has sharply criticized courts’ reliance on a “sexual desire” paradigm. See Cheryl L. Anderson, “Thinking Within the Box”: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law, 19 HOFSTRA LAB. & EMP. L.J. 125, 137 (2001) (noting the “sexual desire” paradigm does little to discourage courts from viewing all male-female harassment through this lens); Franke, *supra* note 6, at 714–24; Schwartz, *supra* note 11; Julianne Scott, Student Scholarship, *Pragmatism, Feminist Theory, and the Reconceptualization of Sexual Harassment*, 10 UCLA WOMEN’S L.J. 203, 220–22 (1999). These scholars point out that much sexist harassment is not sexual, either in purpose or in method. In drawing the lines as I do in this section, I do not mean to disagree with this proposition. It is of course true that much harassment on the basis of sex is not accomplished through sexual conduct or words. In addition, some scholars question whether even sexual behavior is necessarily aimed at sexual relations, or rather is aimed at domination and power. See Schwartz, *supra* note 11, at 1763–66. Again, I do not mean here to take a position on the issue of the relationship between sex, power, subordination, and domination. I suggest only that, functionally, some harassing conduct is aimed at sexual relations with the plaintiff, whatever the underlying motive or ultimate cause.

197. 477 U.S. 57 (1986). In *Meritor*, the plaintiff, Mechelle Vinson, alleged that her supervisor, Sidney Taylor, “made repeated demands upon her for sexual favors” and that she acquiesced because of a “fear of losing her job.” *Id.* at 60. Vinson testified at trial that “Taylor . . . followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.” *Id.*

198. I use the term quid pro quo here to include any situation in which the harasser uses an implicit or explicit threat to influence the victim to accede to his sexual demands. This includes those cases in which the victim acquiesces to the demand and thus can point to no tangible job detriment. It also includes cases in which the victim refuses the demand but the threat is not carried out. As discussed *infra*, this outline of the category of quid pro quo harassment differs from the Supreme Court’s most recent formulation. I argue, however, that the Supreme Court’s current definition of quid pro quo harassment is misguided. See *infra* at pp. 174–81.

199. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 873–76 (9th Cir. 1991) (describing plaintiff’s coworker who “pestered” her at work, “h[u]ng around her desk,” repeatedly asked her to lunch,

quality of cases in this category is that the harassing behavior implies the intention or effect of coercing, extorting, or forcing sexual or other romantic relations upon its target.²⁰¹

In the second general pattern, one or more harassers “haze” one or a few victims using sexual or nonsexual abuse, or some combination of sexual and nonsexual abuse. *Robinson v. Jacksonville Shipyards, Inc.*²⁰² is a typical example of facts falling into this category.²⁰³ Here, the intent or effect of the

and wrote her disturbing notes and letters). The categories of quid pro quo and hostile working environment sexual harassment were originally defined by Catharine MacKinnon. See MACKINNON, *supra* note 189, at 32–47. They were explicitly adopted by the EEOC in 1980 in its Guidelines on Sexual Harassment, and were implicitly adopted by the Supreme Court in *Meritor*, 477 U.S. at 62. More recent cases, however, have limited the usefulness of the distinction. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751–53 (1998); see also discussion, *infra*.

200. My approach here is analogous to evolutionary psychology’s understanding of cultural variation. Evolutionary psychologists recognize variability in expression of human traits but see at bottom some definable “human nature.” They stress that, though it is incredibly malleable and variable, it is not infinitely so. See BROWNE, *BIOLOGY AT WORK*, *supra* note 4, at 1 (noting that “despite the dizzying array of cultural practices chronicled by ethnographers, ranging from the charming to the bizarre, we can be quite certain” that we will, for example, find no society in which humans “live upside down.”); see also RIDLEY, *supra* note 3, at 3:

[A] psychiatrist can make all sorts of basic assumptions when a patient lies down on the couch. He can assume that the patient knows what it means to love, to envy, to trust, to think, to speak, to fear, to smile, to bargain, to covet, to dream, to remember, to sing, to quarrel, to lie.

Id. In the same vein, though the particular expression of the behaviors is quite variable in the hostile environment context, the basic patterns remain more or less constant and discernable.

201. I use the term “sexual relations” here in a broad sense, to include attempts to initiate any kind of romantic relationship with the plaintiff. I recognize that use of the word “romantic” in the context of a discussion of sexual harassment is problematic, but I am constrained by my limited vocabulary and have not been able to come up with a better label to describe the desire on the part of the putative harasser to initiate a nonplatonic relationship with the victim.

202. 760 F. Supp. 1486 (M.D. Fla. 1991). In *Robinson*, plaintiff Lois Robinson was one of a handful of women working in a traditionally male shipbuilding shop. She and the few other female employees testified that the workplace was suffused with sexually explicit “pinups” and a generally sexualized atmosphere. After Robinson began complaining about this environment, she was targeted for an array of sexualized and nonsexual abuse by several of her male coworkers and supervisors. *Id.* at 1493–1502.

203. In Europe, this kind of harassment is referred to as “mobbing,” and there is much academic and popular literature on the phenomenon. See Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 247–63 (2003) (citing numerous sources in the European literature on mobbing). Ironically, the term derives from animal behavior. “Mobbing” is used by ornithologists to refer to “the joint assault on a predator too formidable to be handled by a single individual in an attempt to disable it or at least drive it from the vicinity.” WILSON, *supra* note 32, at 46. European child psychologists and then industrial psychologists applied this concept of animal behaviorism to humans. Friedman & Whitman, *supra*, at 247–48. Also called “moral harassment,” mobbing is a form of “psychoterror” that is understood to include such behaviors as “[r]efusing to communicate with an employee,” “[s]hunning . . . degrading working

conduct is to humiliate or terrorize the target so as to induce him or her to leave the workplace or to submit to the prevailing power structure. Though the conduct is often sexual, the motivation is not primarily sexual.²⁰⁴ Often, the hazing conduct takes the form of sabotaging and undermining the victim's ability to perform her job.²⁰⁵ As in *Robinson*, this type of harassment is frequently initiated after the victim complains about other forms of sexual material or behavior in the workplace.²⁰⁶

In the third category fall those cases in which one or more victims are offended by words or conduct, often sexual in nature, that are not directed specifically at the victim or victims. In *Robinson*, described above, the workplace had been suffused with a "locker room" sensibility for years prior to the entry of women into the traditionally all-male shipbuilding positions. In another case, male firefighters brought a successful First Amendment challenge to a city sexual harassment policy that prohibited them from possessing and looking at pornographic materials in their private spaces.²⁰⁷ Though more than one pattern may be present in a single case, understanding the behavior patterns along these lines serves to make clearer the ultimate causes²⁰⁸ behind the typical behavioral dynamics associated with sexual harassment in the workplace.

conditions," "[b]ullying, humiliations," and "[s]landerous comments, insults, threats." *Id.* at 246–47. For a comprehensive examination of the issue of workplace bullying from the perspective of U.S. law, see generally David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L. J. 475 (2000).

204. Admittedly, creating these categories also creates some potentially thorny evidentiary problems. How is a fact-finder to determine whether the harasser's motivation is primarily sexual, or rather is focused on power, humiliation, and exclusion? It seems, however, that the factual issue is no more difficult—in fact is much less difficult—than the "because of sex" inquiry currently required, and in most cases the motive can easily be inferred from the conduct. Furthermore, both patterns imply legally-cognizable harassment and thus the categorization, while helpful in order to apply the evolutionary models of behavior, is not crucial doctrinally once the evolutionary analysis is completed.

205. Professor Vicki Schultz has collected and meticulously analyzed cases of this type. She argues that, particularly in traditionally male workplaces in which the sex ratio is seriously unbalanced, "a core element of [plaintiffs'] harassment is conduct having the aim or effect of undermining [the women's] work competence." Schultz, *supra* note 4, at 1762. As Professor Schultz demonstrates, this harassment takes many forms, but "sexual desire" is not its primary motivation. *See id.* at 1759–61.

206. Doctrinally, such conduct would give rise to a claim of retaliation. *See generally* 42 U.S.C. § 2000e-3(a) (making it an unlawful employment practice under Title VII to discriminate against an employee "for making charges, testifying, assisting, or participating in" any investigation or proceeding under Title VII); *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir. 1981); *Shannon v. BellSouth Telecommunications, Inc.*, 292 F.3d 712 (11th Cir. 2002).

207. *See Johnson v. Los Angeles Fire Dep't*, 865 F. Supp. 1430, 1442 (C.D. Cal. 1994).

208. In evolutionary biology, ultimate cause is distinguished from proximate cause. Ultimate cause refers to the evolutionary reason that a particular behavior or trait was adaptive;

In breaking down and analyzing harassing behaviors along these lines,²⁰⁹ I focus on the sexual or nonsexual nature of the functional *motives* of the harasser. Thus, behavior directed at getting sex may sometimes be obviously sexual in content, but it often is not. Likewise, behavior more accurately understood as “hazing”²¹⁰ or “mobbing” may employ sexually-charged words or actions, and may even include sexual assault,²¹¹ but such behavior is not necessarily, I will argue, primarily motivated by a desire to get sex from the victim. However, as will become clear below, even in those contexts in which the proximate aim of the harasser is to haze the victim rather than to get sex from the victim, an evolutionary explanation suggests that the ultimate cause of the conduct is “because of . . . sex.”²¹²

B. Evolutionary Explanations

The first broad category of harassment cases, as outlined above, concerns harassers whose conduct appears designed to procure sexual or romantic relations from the victim. Among those whose aim is sexual in that sense, the behaviors may range along a spectrum, from “flirting” to coercion to rape. The other two broad categories are defined by their opposition to the

proximate causes, on the other hand, are the more immediate triggers that lead to the behavior being expressed under particular circumstances. *See* Jones, *Child Abuse*, *supra* note 4, at 1128.

209. I use the terms “harassers,” “harassment,” and “victim” in this Part in order to describe social, and not necessarily legal, conclusions. *Cf.* Heather Antecol & Deborah Cobb-Clark, *The Changing Nature of Employment-Related Sexual Harassment: Evidence from the U.S. Federal Government, 1978–1994*, 57 *INDUS. & LAB. REL. REV.* 443, 447 (2004) (“[F]ollowing standard practice in this literature, our notion of sexual harassment is based on one or more experiences of unwanted sexual behavior. It does not rely on individuals reporting themselves to have been ‘sexually harassed’ and does not necessarily fit with legal definitions.”); Browne, *Seeking Roots*, *supra* note 4, at 8 (noting that the diversity of conduct that could constitute sexual harassment makes statistical assertions about its prevalence misleading); Laura Beth Neilsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 *L. & SOC’Y. REV.* 1055 (2000).

210. By using the term “hazing,” I do not mean to minimize the seriousness of the behavior. Hazing, across a range of social contexts, can result in serious injury or death and often encompasses serious criminal offenses. *See, e.g.*, Amanda Paulson, *Hazing Case Highlights Girl Violence*, *THE CHRISTIAN SCI. MONITOR*, May 9, 2003, at 1 (describing hazing incident at a suburban Chicago high school where girls were beaten and smeared with feces and fish guts); *Who Was Coach Protecting?*, *NEWSDAY*, Dec. 21, 2003, at A08 (reporting violent hazing at a boys’ football camp, including sodomy, beatings, and other “torture”).

211. *See, e.g.*, *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 77 (1998) (plaintiff was threatened with rape, and was actually sexually assaulted by two of his harassers, in a pattern that could be understood at least in part as “hazing” of the plaintiff).

212. *See* 42 U.S.C. § 2000e-2 (2004). As noted *supra* note 189, Title VII requires that harassing behavior be “because of” the sex of the plaintiff in order to constitute sex discrimination. *Id.*

first: In the remaining examples, the harasser or harassers exhibit behaviors that are not primarily or solely aimed at sexual relations with the victim. Often, the victim appears to be targeted partly as a way of fostering bonds within the rest of the group.²¹³ Though the categories can, and often do, overlap, it is useful to separate them in order to examine the relevant behaviors more closely.²¹⁴

In the latter categories, harassers exhibit behaviors that appear to enhance their status within the group or to assert dominance over the victim of the harassment. Many of the behaviors appear to be aimed at driving the victim from the workplace, or communicating to the victim and others that he or she is unwelcome.

1. “Give Me What I Want”

An evolutionary understanding of that subset of behaviors that are directly aimed at sexual relations with the victim of the harassment suggests two significant conclusions. First, the evolutionary model reveals that words and conduct aimed at establishing a sexual relationship are not only “sexual” but also “because of” the sex of both the harasser and the victim of harassment in a factual, but-for causative sense. Furthermore, an evolutionary perspective focusing on ultimate causation renders both the sexual orientation and the anatomical sex of the victim irrelevant to the analysis. In other words, behavior that is directed at “getting sex” is, as a descriptive matter, based on the sex of the plaintiff regardless of the actual, proximate motive of the harasser. Finally, recent scholarship in evolutionary biology and genetics on the role of constraint on female choice in sexual selection has important implications for understanding these behaviors.

213. The experiences of victims in the military academies exemplify this type of abuse. See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68, 68–75 (2002) (describing experiences of Shannon Faulkner at The Citadel in terms that suggest that her victimization had more to do with cementing bonds between the other cadets than with any overtly sexual agenda); see also Browne, *Women at War*, *supra* note 4, at 97–102 (discussing the importance of male coalitions in evolutionary theory, and arguing that women should be excluded from military combat positions based on the importance of all-male groups) (claiming that it is necessary for men to form groups); see generally LIONEL TIGER, *MEN IN GROUPS* (1969).

214. For example, a harasser might begin with the aim of having a sexual relationship with the victim but then turn hostile after being rejected. Or, one or multiple harassers might sexually threaten or assault a victim for the purpose of bonding with the group, forcing the victim to leave, or demonstrating status and power. Some literature suggests that “gang rape” serves largely a male bonding function. See generally PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (1990); Claudia Card, *Rape as a Weapon of War*, 11.3 HYPATIA 1 (1996).

As noted above, the theory of natural selection equates “fitness” primarily with reproductive success.²¹⁵ Reproductive success in males depends primarily on access to fertile partners. In humans, as in other mammals, the female of the species invests the greater differential proportion of energy and time in offspring, and thus the female is regarded as the limiting resource in the competition for mates. For these reasons, evolutionary theory posits that, as a general matter, males will seek quantity in sexual partners, while females will seek quality. Evolutionary scholars typically describe males as tending to be “promiscuous,” and females as tending toward “coy” or “choosy” behavior.

The model of the promiscuous male and the monogamous female²¹⁶ has been modified in recent years in order that it might be reconciled with emerging observational and DNA evidence suggesting that females of many species are not nearly so coy as previously believed.²¹⁷ Similarly, there is mounting data suggesting that males of some species, including humans, have evolved under adaptive pressures for fidelity as well as for promiscuity.²¹⁸ Nonetheless, the traditional model remains dominant and has been relied upon by legal scholars who argue that its teachings call the prohibition against sexual harassment, along with other workplace antidiscrimination doctrines, into question.²¹⁹ This section therefore begins

215. See discussion *supra* at notes 55–58. The definition of fitness as individual reproductive success is incomplete, however, because of the role of “inclusive fitness.” The theory of inclusive fitness posits that the measure of an organism’s success encompasses the success of close kin, since these relatives share significant percentages of genes. Thus, “kin selection,” the reproductive success of parents, siblings, children, and other close relatives affects the overall success of the genes of the individual. Kin selection, along with the theory of “reciprocal altruism,” goes a long way to explaining the puzzle of altruism and cooperative behavior in many species. See generally Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 QUART. REV. OF BIOL. 35 (1971) (reciprocal altruism); Hamilton, *supra* note 128 (kin selection); WRIGHT, *supra* note 111.

216. This view of sexual behavior is reflected in the rhyme penned by William James: “Hoggamus higgamous, men are polygamous; higgamus hoggamus, women monogamous.” ANGIER, *supra* note 141, at 355. James’ theory that human behavior was largely influenced by instinct was eclipsed by the behavioral school of psychology for nearly a century. See RIDLEY, *supra* note 2, at 316–20.

217. See HRDY, *supra* note 26; SMALL, *supra* note 173, at 3 (“[c]ontrary to what theory suggests, female primates just keep on being highly sexual.”); RIDLEY, *supra* note 2.

218. See BUSS, *supra* note 59, at 43 (discussing the human universal of love and its relation to female desire for mates who demonstrate commitment and fidelity); Charles C. Snowdon, *The “Nature” of Sex Differences: Myths of Male and Female*, in FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 30, at 284–89 (describing the “high degree of [mate] fidelity by both sexes” in studies of tamarins and the importance to offspring viability of paternal protection in gorillas and other primates).

219. See BROWNE, BIOLOGY AT WORK, *supra* note 4, at 210–13; RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 269–74

by analyzing the behavior patterns involved in the first category—those involving one harasser who seeks through his behavior to “get sex” from the victim—by employing the standard evolutionary explanation of differential parental investment and consequent male promiscuity and female choosiness.²²⁰

Evolutionary theory understands much, if not most, male behavior as ultimately directed toward reproduction.²²¹ Thus, male conduct that is *explicitly* aimed at asking, encouraging, coercing, or forcing romantic or sexual relations upon a female is the most obvious instance of adaptive behavior driven by Darwinian selection. Professor Kingsley Browne, in an article arguing that hostile work environment harassment liability is problematic because men and women understand the same behavior differently based on differential selection pressures,²²² states that contrary to many feminists’ assertions that sex is used by men to gain power over women,²²³ evolutionary understandings would posit the converse: Power is used by men to gain sex.²²⁴

(1992); POSNER, *supra* note 4, at 90–92 (stating that men have stronger sex drives than women for evolutionary reasons); Browne, *Seeking Roots*, *supra* note 4, at 12–28 (discussing differences among the sexes); Fremling & Posner, *supra* note 4, at 1088–94 (relying on the evolutionary model which posits male promiscuity and female choosiness).

220. As discussed *infra* at note 230 and accompanying text, some assumptions of this basic model have been called into question. Here, however, I analyze the relevant behavior taking the standard evolutionary model on its own terms and given the usual assumptions.

221. Evolutionary psychologists have sometimes been criticized by biologists for their failure to recognize that much sexual behavior in animals might serve adaptive functions other than reproduction. *See* Travis, *supra* note 28, at 6 (citing studies by primatologists Frans de Waal and Frans Lanting that demonstrate that sexuality in bonobos, one of humans’ two closest genetic primate relatives, serves largely a social and group cohesiveness function that goes far beyond its simple reproductive function). *See generally* DE WAAL & LANTING, *supra* note 62 (describing the mating habits of the bonobo apes and their similarities to humans).

222. Browne, *Seeking Roots*, *supra* note 4, at 8–9. Professor Browne argues that, because of men’s and women’s different minds, it is morally questionable to hold men liable for behavior which they reasonably view as courting, whereas females may reasonably view the identical behavior as “harassment.” *Id.* at 37–39. He thus understands much sexual harassment as in fact consisting of simple miscommunication resulting from male/female differences.

223. This idea is generally associated with radical feminism. *See, e.g.*, ANDREA DWORKIN, INTERCOURSE (1988) (equating heterosexual intercourse with rape); MACKINNON, FEMINISM UNMODIFIED, *supra* note 99, at 3 (arguing that, in our society, violence against women is eroticized so that sex becomes violence and violence becomes sex). However, certain strands of the theory have become widespread in the popular culture with, for example, the general acceptance of the notion that rape is a crime primarily of violence rather than of sex. *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 376–77 (1975); Baker, *supra* note 26, at 238 (“If the law is to curb the behavior of rapists, it must recognize that rape is used by men as a conscious, instrumental tool to gain access to power, prestige, and community.”); Georgia Network to End Sexual Assault, *Basic Facts About Rape and Sexual Assault*, at http://www.gnesa.org/sexual_assault/facts.html (last visited Mar. 2, 2005) (“Rape is motivated

Because it is so clear under evolutionary explanatory models that behavior of men toward women that is directed at sexual relations is highly adaptive, and that it is therefore both ultimately and proximately tied to the sex of the object of the behavior, these cases tend to be unproblematic from a causation standpoint.²²⁵ The more difficult cases in the first category have arisen under circumstances of same-sex harassment (and in the elusive but no longer purely theoretical case of the bisexual, or “equal opportunity,”

primarily out of . . . a need to feel powerful by controlling, dominating, or humiliating the victim.”). In this view, rape is an act by which individual men exert power over individual women, and by which men as a group use fear of rape to subordinate women as a group. *Rape as a War Crime*, at www.vday.org/contents/violence/glossary/rapeaswarcrime (last visited Mar. 2, 2005). Recent evolutionary scholarship has challenged this conception of rape as violence divorced from sex. See THORNHILL & PALMER, *supra* note 26; Jones, *Rape*, *supra* note 4, at 897–98; Randy Thornhill and Nancy W. Thornhill, *The Evolutionary Psychology of Men's Coercive Sexuality*, 15 BEHAV. & BRAIN SCI. 363 (1992); see also Browne, *Seeking Roots*, *supra* note 4, at 47–48 n.221 (citing and quoting sources in the “power versus sex” debate in the rape literature).

224. See Browne, *Seeking Roots*, *supra* note 4, at 48 (“Throughout human history, men have used power as a way of obtaining sex . . .”).

225. The theory of workplace sexual harassment as Title VII sex discrimination is generally understood to have grown out of the work of radical feminists, most notably Catharine MacKinnon. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986) (using same general framework for sexual harassment as Title VII discrimination described in MacKinnon’s work); MACKINNON, *supra* note 189, at 57–59; see also Schultz, *supra* note 87, at 2078–82 (2003) (recounting history and development of the “sexualized understanding of harassment”). Professor MacKinnon’s theory of sexual harassment as sex discrimination was grounded in her notion that much male-female sexual behavior is a method by which men subordinate women. Because sexual harassment doctrine was born of this dominance and subordination model of male-female sexuality, its growing pains have often been manifested in cases that do not fit easily into this model. Thus, cases in which abuse is sexist but nonsexual and cases in which the harassment is not by a male or males against a female have presented the most difficult theoretical and doctrinal issues. Feminist scholars writing in the 1990s addressed these issues in several articles reconceptualizing sexual harassment law. These reconceptualizations have moved away from or refocused MacKinnon’s antisubordination model such that nonsexual harassment, same-sex harassment, and harassment based on nonconformity to prevailing gender norms, come within the sexual harassment prohibition. See Abrams, *supra* note 192, at 1172; Franke, *Disaggregation*, *supra* note 192, at 95 (“Title VII should recognize the primacy of gender norms as the root of both sexual identity and sex discrimination, and thereby the law should prohibit all forms of normative gender stereotyping regardless of the biological sex of any of the parties involved.”); Franke, *supra* note 6, at 693 (arguing that sexual harassment is sex discrimination because it is a “technology of sexism” that enforces feminine gender norms upon women and masculine gender norms upon men); Schultz, *supra* note 4, 1692–96 (rejecting the “sexual desire-dominance paradigm” and arguing that it should be replaced with a “competence-centered paradigm”). One potential difficulty with a theory that anchors harassment in gender norm enforcement is that, because gender norms are so pervasive, liability is potentially limitless. It is unclear how one might distinguish between legitimate and illegitimate gender norms. Thus, the theory would sweep all workplace harassment within the concept of sexual harassment.

harasser).²²⁶ More particularly, in the wake of *Oncala v. Sundowner Offshore Services, Inc.*²²⁷ courts have had to confront explicitly the issue of discriminatory causation in those cases in which the behavior appears clearly to be sexual (and even directed toward “getting sex”), yet the sexual orientation of the harasser is unclear.²²⁸ Thus, it is useful to examine the way in which evolutionary theory might understand and explain the behaviors underlying those cases.

Thus far I have assumed that in cases in which a man propositions, flirts with, coerces, or sexually assaults a woman, it is obvious that such behavior is aimed at “getting sex.” Courts have similarly understood such factual

226. See *Hamm v. Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1068 (7th Cir. 2003) (“[s]ex stereotyping’ should not be regarded as a form of sexual discrimination, though it will sometimes . . . be evidence of sex discrimination.”) (Posner, J., concurring); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261–62 (4th Cir. 2001) (finding judgment for defendant where harasser used vulgar language with both female and male harassees; court held that the harassment was therefore not based on sex); *Nichols v. Azteca Rest. Enters., Inc.* 256 F.3d 864, 874–75 (9th Cir. 2001) (holding that a man had a claim for sexual harassment because of his effeminate nature and that the Price Waterhouse rule, protecting women discriminated against for not being sufficiently feminine, also applies to man who is not sufficiently masculine); *Holman v. Indiana*, 211 F.3d 399, 401 (7th Cir. 2000) (finding “equal opportunity harasser” not covered by Title VII where supervisor sexually harassed and propositioned both a husband and wife); *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 735–37 (E.D. Pa. 2002) (denying a firefighter’s claim of sexual harassment where he could not prove that the harassment was due to gender stereotypes and not sexual orientation); *Oiler v. Winn Dixie La., Inc.*, 89 Fair Empl. Prac. Cas. (BNA) 1832 (E.D. La. 2002) (rejecting claim of discrimination by man who cross-dressed when not at work; court found firing was not based on gender stereotypes but on his cross-dressing, which is not protected by Title VII).

227. 523 U.S. 75 (1998).

228. As when, for example, a male coworker or supervisor “gooses” other men, or in cases involving the notorious “bisexual harasser.” See *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 503 (6th Cir. 2001) (hearing male-male harassment suit in which “the practice of ‘goosing’ occurred among male employees . . . on a daily basis”); *Holman*, 211 F.3d at 403, 405 (holding that “Title VII does not cover the ‘equal opportunity’ or ‘bisexual’ harasser, [then], because such a person is not *discriminating* on the basis of sex” when married couple in same workplace claimed that male supervisor sexually harassed them both). Some of the most interesting and original scholarship on sexual harassment appears partly driven by the intuition that same-sex or sexually-indiscriminate harassment cases should not be left in the dust as the Title VII caravan disappears over the horizon. Though Congress has repeatedly rejected sexual orientation discrimination *per se* as a valid claim under Title VII, some courts have held that sex role enforcement harassment constitutes sex discrimination and not sexual orientation discrimination and thus may state a proper cause of action under Title VII. See *Butler v. Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 270 (5th Cir. 1998) (citing Professor Franke for the proposition that sexual harassment must be a practice that is founded in the “service of hetero-patriarchal norms”); *Doe v. City of Belleville*, 119 F.3d 563, 578 (7th Cir. 1997) (citing Professor Franke, and finding that sexual stereotypes drove the harassment of two male brothers), *vacated by* 523 U.S. 1101 (1998); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 137 (S.D. Tex. 1993).

scenarios in this way,²²⁹ and as noted above evolutionary theory also understands the behavior as ultimately aimed at sexual access to reproductive females.²³⁰ Where, on the other hand, the subject and object of the behavior are not male and female, respectively, some courts have had difficulty with the issue whether the behavior, though sexual, was “because of” sex. Justice Scalia’s statements in *Oncale* are illustrative of this thinking. In *Oncale*, Justice Scalia, writing for the Court, suggested that in most cases, in order to satisfy Title VII’s requirement that the harassment be “because of” the sex of the victim, a plaintiff in a same-sex harassment case would be required to demonstrate that the harasser was homosexual.²³¹

An evolutionary approach, however, would explain male harassment of another male, done by means of sexual threats, coercion, assault, or innuendo, as based on the sex of both the harasser and the victim regardless of the other sexual behavior of the harasser. The same conclusion results regardless of the sexual orientation of the victim.²³² Evolutionary models

229. Cf. Schwartz, *supra* note 11, at 1699 (discussing prevalence of per se causation finding in cases in which behavior was sexual in nature). For criticism of the “desire-based ‘but for’ causation theory” on the ground, among others, that it imports heterosexual assumptions of behavior, see *id.* at 1719–21, and sources cited therein.

230. Professor Browne likewise understands the behavior in this way. See Browne, *Seeking Roots*, *supra* note 4, at 9 (noting that “[a]n evolutionary perspective suggests [that] . . . men use power instrumentally to obtain sex”).

231. *Oncale*, 523 U.S. at 79–80. The Court suggested as examples two other evidentiary avenues of proof of the causation element. First, a plaintiff could offer evidence that a person of the same sex directed nonsexual harassment towards the plaintiff on the basis of gender animosity. *Id.* at 80 (“A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”). Second, a plaintiff could offer evidence demonstrating that, in a mixed-sex workplace, one sex was treated differently than the other. *Id.* at 80–81 (“A same-sex harassment plaintiff may also, of course, offer direct comparative [sic] evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”). Professor Schwartz has argued that the thrust of the Court’s opinion “invites the federal courts to embark on some potentially very ugly lines of factual inquiry” regarding whether a man who sexually harasses another man is “‘really’ a homosexual.” Schwartz, *supra* note 11, at 1745. Along with the wisdom of such an approach, the relevance of the inquiry is also doubtful. “Most men who sexually assault other men identify themselves as heterosexual.” *For Men Only: For Male Survivors of Sexual Assault*, at <http://www.utexas.edu/student/cmhc/booklets/maleassault/menassault.html> (last visited Mar. 2, 2005); see also Stop Prisoner Rape, *The Basics on Rape Behind Bars*, at <http://www.spr.org> (last visited Feb. 19, 2005) (“[A] typical male prison rapist chooses a victim on the basis of ‘the weakness and inability of the victim to defend himself.’”).

232. Questions about the cause, nature, and definition of homosexuality are certainly beyond the scope of this article. What I attempt to do here is merely to outline the way an evolutionary biologist might explain homosexuality, and to argue that such an explanation, by its own terms, suggests that the conduct at issue in male-male harassment cases satisfies the “because of . . . sex” requirement of Title VII. There is much recent scholarly work regarding the nature and causes of homosexuality. See, e.g., DEAN HAMER & PETER COPELAND, THE

also support the view that the behavior of the “bisexual harasser” is ultimately based upon the sex of the harassed individual even though the harasser targets both males and females. These understandings follow from a description of this type of male behavior as driven ultimately by the drive to foster alliances with other males so as ultimately to increase reproductive success.²³³

Homosexuality has presented an obvious puzzle for evolutionists. Various theories have been advanced to explain what appears on its face to be a maladaptive behavior.²³⁴ One hypothesis centers on the notions of inclusive fitness²³⁵ and kin selection. This theory posits that homosexuality evolved by kin selection, because by forgoing direct reproduction and

SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR 17–38 (1994) (presenting evidence in favor of the existence of a “gay gene”); JIM MCKNIGHT, STRAIGHT SCIENCE?: HOMOSEXUALITY, EVOLUTION AND ADAPTATION 8–14 (1997); R.C. Kirkpatrick, *The Evolution of Human Homosexual Behavior*, 41 CURRENT ANTHROPOLOGY 385 (2000) 389–90 (citing numerous works); see also BUSS, *supra* note 59, at 250–56 (describing homosexuality as one of the remaining “mysteries of human mating” and summarizing current adaptationist theories); POSNER, *supra* note 4, at 98–108; RIDLEY, *supra* note 3, at 263–65, 279–80 (describing theory of Oxford scientists Laurence Hurst and David Haig that “gay gene” might be in the mitochondrial DNA inherited from the mother, and might be adaptive for females because “[i]t effectively sterilizes males, causing the diversion of inherited wealth to female relatives”).

233. Historically, the most powerful males left a disproportionate number of offspring. See RIDLEY, *supra* note 2, at 198–202 (describing the research of Laura Betzig and noting that “these harems [maintained by male rulers throughout most of recorded history] could hardly have been more carefully designed as breeding machines, dedicated to the spread of emperors’ genes”). Men, along with the males of many species, form political alliances in order to gain power. “From Hannibal to Bill Clinton, men gain power by putting together coalitions of allies. . . . The rewards, for other animals, are largely sexual. For men?” RIDLEY, *supra* note 2, at 197. Part and parcel of “putting together coalitions” is excluding certain individuals—an alliance is meaningless except as it exists in opposition to something else; cf. FRANS DE WAAL, PEACEMAKING AMONG PRIMATES 10–23 (Harv. Univ. Press ed., 1989) (arguing that the concept of cooperation is meaningless without the concept of conflict).

234. The prevalence, therefore, of homosexual behavior calls into question the whole enterprise of evolutionary psychology. Within biology, it supports Gould’s broader evolutionary approach that sees many specific behaviors not as adaptations but as byproducts of other, more general adaptations. *E.g.*, Gould & Lewontin, *supra* note 1. Incidentally, my use of the word “maladaptive” is in no way intended to convey any moral implication. Rather, it is a sociobiological term that describes behavior that does not further, or positively hinders, reproductive fitness. Individuals who engage exclusively in same-sex relations, like celibate individuals, do not directly pass on their genes to future generations. It is only in this respect that the behavior is nonadaptive or maladaptive. For a concise discussion of this issue from an evolutionary and moral perspective, see WRIGHT, *supra* note 111, at 384–86.

235. Inclusive fitness is the sum total of an organism’s direct reproductive fitness and its indirect fitness, which encompasses any increase in the reproductive success of the individual’s kin attributable to the efforts of the individual, discounted by their degree of consanguinity. *E.g.*, Jones, *Child Abuse*, *supra* note 4, at 1133–36 nn. 43–45, and sources cited therein.

focusing energy on caring for and providing resources to close relatives, an individual's overall genetic fitness could be increased. A related theory suggests that parental manipulation might have played a part in the evolution of homosexual behavior, such that certain familial lineages could increase their reproductive success by encouraging homosexual behavior in sons with lower reproductive potential.²³⁶ Neither of these theories appears to have much empirical support.²³⁷

A third hypothesis is that homosexual behavior evolved as a particular application of the phenomenon of reciprocal altruism.²³⁸ In general, the theory of reciprocal altruism holds that seemingly altruistic behavior (that is, behavior that appears to benefit others at the expense of the individual), can be explained by virtue of the selfish gene model of evolution by examining the larger systematic benefits to individuals of helping others who then return the favor.²³⁹ Coalition-building and male-male alliances are one way for individuals to benefit through reciprocal altruism. Recent animal studies demonstrate that "coalitions of males are found in a number of species," including turkeys, lions, woodpeckers, and dolphins.²⁴⁰ In these nonhuman animals, male alliances are quite clearly tied to reproductive success. According to this explanation, then, male homosexuality might have evolved as a byproduct to male alliance-building traits.

Based upon the evolutionary models employed by scholars such as Posner, Epstein, and Browne, male behavior toward other males that is sexual in nature might be understood in much the same way as the kind of male-male behavior that the *Oncale* Court characterized as "horseplay."²⁴¹

236. Note that most of these theories focus on the evolution of male homosexuality. There has been much less study of female homosexuality. See Kirkpatrick, *supra* note 232, at 388; see also Evelyn Blackwood, 41 CURRENT ANTHROPOLOGY 398, 398 (2000) (commenting on Kirkpatrick article).

237. See Kirkpatrick, *supra* note 232, at 391–92.

238. Reciprocal altruism is the mechanism by which most evolutionary theorists explain seemingly altruistic behavior not otherwise explainable by kin selection. See generally DAWKINS, *supra* note 36; Robert Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35, 35–39 (1971); WRIGHT, *supra* note 111.

239. See generally Trivers, *supra* note 238; Robert Axelrod & W.D. Hamilton, *The Evolution of Cooperation*, 211 SCIENCE 1390 (1981).

240. RIDLEY, *supra* note 2, at 195–96; see FRANS DE WAAL, CHIMPANZEE POLITICS: POWER AND SEX AMONG APES 119–23 (1982) (describing male alliances among chimpanzees in a captive group).

241. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998):

[a] professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.

This scenario therefore falls more easily within the second pattern of behavior identified in this section—that directed ultimately at creating or fostering male alliances. As understood by current evolutionary theory, male sexual behavior toward other males can properly be understood as ultimately adaptive based on its role in reciprocal altruism and coalition-building. Because the evolutionary model explains the conduct by virtue of the sex of the object of the behavior, it supports the proposition that male-male sexual behavior is closely tied to the sex of the plaintiff even where the harasser considers himself to be heterosexual or engages in heterosexual behavior in other contexts.²⁴²

2. “Get Out of My Space”

The second relevant behavior pattern in harassment cases involves conduct that appears to have the purpose or effect of intimidating, humiliating, or otherwise “hazing” the victim so as to make that person either leave the workplace or submit to the demands (whether explicit or implicit) of the dominant group. Actors enforce a particular workplace culture, and use various means to do so. As previously noted, such behavior is often sexual or suggestive because sexual or suggestive conduct tends to be an effective tool of humiliation or intimidation.²⁴³ Nonsexual tactics, however, are often used as well. These might be obviously sexist, but they need not be.²⁴⁴

Id. at 81.

242. Sociological and historical data suggest that many persons engage in homosexual behavior while at the same time defining themselves as heterosexual. *See* Halley, *supra* note 32, at 525 (noting that various studies show “that men affirm their identities as heterosexual even when they acknowledge having recent same-sex contacts”); Kirkpatrick, *supra* note 232, at 388–92 (discussing studies).

243. In addition to often being perceived as humiliating or degrading by the victim, sexually explicit words or conduct are frequently perceived as physically threatening. *See* Elizabeth Schoenfeld et al., *Reasonable Person Versus Reasonable Woman: Does it Matter?*, 10 AMER. UNIV. J. GENDER SOC. POL’Y & L. 633, 648 (2002).

244. For example, part of the conduct that contributes to the hostile environment might consist of statements such as “women belong at home” or “this is a man’s job.” *See, e.g.*, Deborah Epstein, *Can a “Dumb-Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 415 (1996) (collecting cases). Or the tactics might be more general and not inherently sexist, but nonetheless directed to forcing the victim out of the workplace. *See, e.g.*, O’Rourke v. City of Providence, 235 F.3d 713, 729–30 (1st Cir. 2001) (ruling that “incidents of nonsexual conduct -- such as work sabotage, exclusion, denial of support, and humiliation -- can in context contribute to a hostile work environment”); Williams v. General Motors Corp., 187 F.3d 553, 561 (6th Cir. 1999) (holding that nonsexual pranks, such as gluing the plaintiff’s toolbox to her desk, allowed as evidence of anti-female animus); King v. Bd. of Regents of Univ. of Wis. Sys., 898 F.2d 533,

Based upon an evolutionary model, such hazing or exclusionary behavior can be understood as driven, at least in part,²⁴⁵ by the sex of the victim of the behavior. The proximate aim²⁴⁶ can generally be understood as either getting the victim to leave, or getting the victim to conform and cooperate. In either event, evolutionary psychology would explain the behavior as ultimately driven by sexual selection and, therefore, as “because of” the sex of the victim.

Humans are members of a highly social species for which group cooperation is and has been critical for survival.²⁴⁷ Whether one adheres to a group-selection or a gene-selection model of natural selection, evolutionary theories of selection describe social coalition and bonding behaviors as highly adaptive.²⁴⁸ Primate infants, in particular, require a prolonged period of care for survival. Writings in evolutionary psychology typically understand much sexually-based role and labor divisions as stemming from

535 (7th Cir. 1990) (noting plaintiff’s harassment claim included allegations of unequal treatment such as a heavier workload, lower salary, repeatedly negative evaluations, rudeness, and interference with her tenure process); *see also* Schultz, *supra* note 4, at 1764, stating:

Sometimes [undermining a woman’s competence at work] takes the form of deliberate sabotage of a woman’s work performance, such as stealing a policewoman’s case files, informing a lab worker that faulty equipment is sound, falsifying medical records to make it appear as though a female surgery resident made an error, or simply assigning her tasks that are impossible to accomplish. (citations omitted).

Id.

245. In disparate treatment cases in which “mixed motives” are alleged, the plaintiff may prevail if she demonstrates that sex was “a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e–2(m) (2000). If the employer then proves that the same employment action would have been taken in the absence of the impermissible motivation, the plaintiff is limited to declaratory and injunctive relief and attorney’s fees. *See* 42 U.S.C. § 2000e–5(g)(2)(B).

246. In evolutionary biology, “proximate” cause is distinguished from “ultimate” cause. For definitions of these terms as used in biology, *see supra* note 208.

247. Indeed, enforced social isolation is considered among the most severe punishments, and has been shown often to lead to psychosis and suicide among those subjected to it. *See* Mary Beth Pfeiffer, *A Death in the Box*, N.Y. TIMES, Oct. 31, 2004, Section 6 (Magazine), at 48, 52 (describing the “debate over the effects of isolation on even a normal human psyche” in the context of a discussion of the use of solitary confinement to control mentally ill prison inmates).

248. Banishment from the community was a historic punishment for certain crimes, and was considered essentially equivalent to death. *See, e.g.,* Stogner v. California, 539 U.S. 607, 624–25 (2003) (noting the English tradition of using banishment as punishment for treason); Smith v. Doe, 538 U.S. 84, 98 (2003) (contrasting punishments such as public shaming and banishment to the mere dissemination of public information on sex offenders pursuant to “Megan’s Laws”); Vance v. Terrazas, 444 U.S. 252, 271 (1980) (finding that a man should not lose his citizenship, and characterizing banishment as “a fate universally decried by civilized people.”) (Marshall, J., concurring in part and dissenting in part) (quoting Trop v. Dulles, 78 S. Ct. 590, 599 (1958)).

this dependency of the infant on the mother.²⁴⁹ In most species in which the infant requires some significant post-natal parental investment in order to survive, parental investment theory predicts that the mother will tend to specialize in this task for several reasons, all stemming from the fact that she internally gestates the offspring.²⁵⁰ First, in these species, the mother but not the father can be certain that she is investing in offspring that carry her genetic material. For the father, there is always some element of uncertainty about paternity. This fact, combined with the mother's greater initial parental investment in the form of the nutrients contained in the egg and her internal gestation, create a situation in which she has a relatively greater incentive to invest further in the offspring.

Along with the natural dependency of the human infant or child, there also exists a high level of interdependence among adults in human groups.²⁵¹ In the EEA, males are thought to have hunted cooperatively. Males are also imagined to have warred cooperatively, both attacking and defending in socially-bonded alliances.²⁵² Those individuals exhibiting stronger social skills could be expected to have increased their reproductive fitness. Female grouping, too, can be explained as an adaptive behavior.²⁵³

249. Cf. FINEMAN, *supra* note 15, at 72.

250. In mammals, the mother also nurses the offspring once born; for nonhuman animals as well as humans throughout all but a fraction of human history, the baby would die if the mother did not make this further parental investment.

251. This is an obvious and fundamental observation, but its moral implications have sometimes been overlooked. Evolutionary biology has often been criticized for its individualistic bias; the tenets of nineteenth century social Darwinism cast a long shadow. Yet even if human social interdependence is explained by virtue of "gene selfishness," the result can be a humanistic, inclusive, and optimistic view of human nature. See WRIGHT, *supra* note 111. One view posits human moral progress in the progressive expansion of the "moral circles" by which people define the beings subject to worth and empathy. See PETER SINGER, *THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY* (1981) (discussed in PINKER, *supra* note 31, at 166–67). In fact, Darwin himself seems to have understood morality in this way. He wrote:

As man advances in civilisation, and small tribes are united into larger communities, the simplest reason would tell each individual that he ought to extend his social instincts and sympathies to all the members of the same nation, though personally unknown to him. This point being once reached, there is only an artificial barrier to prevent his sympathies extending to the men of all nations and races.

WRIGHT, *supra* note 111, at 340 (quoting Charles Darwin, circa 1882).

252. See Browne, *Women at War*, *supra* note 4, at 98–101 (citing numerous sources).

253. Though not as extensively treated as male group behavior, e.g., TIGER, *supra* note 213; Browne, *Women at War*, *supra* note 4, at 97, female group behavior has been viewed as adaptive in several respects. Female primates and other mammals may group together and thus protect themselves and their infants from male violence. See Sarah L. Mesnick, *Sexual Alliances: Evidence and Evolutionary Implications*, in *FEMINISM AND EVOLUTIONARY BIOLOGY*, *supra* note 30, at 207, 216 (noting that "[f]emale coalitions are most likely to evolve in species that reside in groups and are long-lived so that benefits can be reciprocated among coalition

The existence of social norms, including gender norms, is a human universal.²⁵⁴ “By the time they are 3 years old, boys and girls around the world participate in different activities, show different behavioral styles, play more with same-sex peers, and avoid opposite-sex peers.”²⁵⁵ Though the contents and details of social norms show enormous cross-cultural variation—indeed, this variation is at the heart of what we mean by the very term “culture”—that such norms are more or less strongly enforced by formal or informal social practices is not seriously questioned.²⁵⁶ A significant subset of social norms consists of gender norms—cultural stereotypes concerning the appropriate behavior, appearance, and separate roles (including labor roles) of men and women.²⁵⁷

The issue of the enforcement of social norms, including gender norms, has often been a locus of disagreement between social scientists and others who adhere to a social constructivist view of gender, on the one hand, and evolutionary psychologists who view much stereotypically gendered behavior as flowing from evolutionary adaptation, on the other. One interesting finding of the child development psychological literature is that young boys and girls who engaged in “cross-gender” activities were treated

members.”) (citing numerous sources); Barbara Smuts, *Male Aggression Against Women: An Evolutionary Perspective*, 3 HUMAN NATURE 1, 16–18 (1992). In addition, females may help one another with childcare and food-gathering. See, e.g., HRDY, *supra* note 30, at 282. One theory explains female menopause as an adaptation that allowed older women to help younger female relatives with childrearing tasks, thus furthering the grandmothers’ own reproductive fitness. See Kristen Hawkes et al., *Hazda Women’s Time Allocation, Offspring Provisioning, and the Evolution of Long Postmenopausal Life Spans*, 38 CURRENT ANTHROPOLOGY 551, 560–61 (1997); Kristen Hawkes et al., *Grandmothering, Menopause, and the Evolution of Human Life Histories*, 95 PROC. NAT’L ACAD. SCI. 1336, 1336–39 (1998); see also HRDY, *supra* note 30, at 273–83 (discussing “the grandmother hypothesis,” which she suggests should more appropriately be called “the prudent mother hypothesis” because it encompasses fitness effects upon a mother’s own offspring in addition to those of her children).

254. See DONALD E. BROWN, HUMAN UNIVERSALS (1991) list of universals *reprinted in* PINKER, *supra* note 31, at app. 437 (“male and female . . . seen as having different natures”).

255. Beverly I. Fagot et al., *Theories of Gender Socialization*, in THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER 65, 79 (Thomas Eckes & Hanns M. Trautner eds., 2000).

256. See Brant Wenegrat et al., *Social Norm Compliance as a Signaling System: Studies of Fitness-Related Attributions Consequent on Everyday Norm Violations*, 17 ETHOLOGY AND SOCIOBIOLOGY 403, 404 (1996) (noting that “[w]hile norms themselves and the cultural emphasis placed on compliance may vary, similar processes of compliance with social norms have been observed in all societies.”).

257. See Linda B. Epstein, Note, *What is a Gender Norm and Why Should We Care? Implementing A New Theory in Sexual Harassment Law*, 51 STAN. L. REV. 161, 176 (1998) (defining gender norms as “descriptive or normative gender stereotypes”); Eagly et al., *supra* note 104, at 123; Franke, *supra* note 6, at 693 (explaining sexual harassment as “a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects”).

dissimilarly, with the boys experiencing much more negative consequences.²⁵⁸ Girls who played with boys or with boy-preferred toys were not given increased negative feedback by other girls or by boys; however, boys who played with girls or with girls' toys were taunted and rejected by other boys even after modifying their cross-gendered behavior. "The type of negative feedback these boys received was of a different quality from that received by other boys and included gender derogatory terms such as *sissy boy*, *baby boy*, and so forth, which were almost never applied to other children."²⁵⁹ Furthermore, the boys' behavior, unlike the girls', was responsive only to feedback from other boys; the boys "ignored both the positive and negative feedback from girls and teachers."²⁶⁰

If these patterns are widespread, and if this sex difference in peer group gender norm enforcement persists over time and across cultures, then one might wonder whether it represents an evolved psychological trait that would have been adaptive in the EEA. In other words, one might ask whether enforcement of gender norms, and in particular male peer group enforcement of masculine gender norms against other males, is an evolutionary adaptation of the human male psychology. It might indeed have been highly adaptive for males in particular, and under particular circumstances, to police other males in their social group for adherence to stereotypically masculine behaviors and to exclude from their social groups males who did not conform to these (now) stereotypical traits. Males who were not sufficiently aggressive, or strong, or brave, would have been a liability to the other males in the context of group hunting or warring. Viewed in this light, gender norm enforcement by males against other males would satisfy any "but for" causation requirement in the statute.²⁶¹

Therefore, if, as behavioral biologists claim, males have strong evolutionary tendencies to group together and to exclude females and "out-group males" from these groups, then male behavior toward a female victim in this second category of cases is easily explained by evolutionary theory as "because of" the sex of the victim. Where the victim is male, the argument is more complex but leads to the same conclusion though by an alternate route. Where males in a group act to coerce or exclude other

258. See Fagot et al., *supra* note 255, at 65; Beverly I. Fagot, *Consequences of Moderate Cross-Gender Behavior in Preschool Children*, 48 CHILD DEVELOPMENT 902, 902 (1977).

259. Fagot et al., *supra* note 255, at 80.

260. *Id.* at 81, 85; see also Beverly I. Fagot, *Beyond the Reinforcement Principle: Another Step Toward Understanding Sex Role Development*, 21 DEV. PSYCHOL. 1097 (1985).

261. This analysis would be consistent with the approach of those scholars who have argued that harassment based on gender norm noncompliance by "effeminate" men is sex discrimination under Title VII. See Case, *supra* note 6, at 47-51; Franke, *supra* note 6, at 693.

males, they do so for evolutionary reasons that are tied to the sex of the victim.²⁶²

3. “Take It Like a Man”

In the final category of cases, a plaintiff complains of hostile environment harassment where the words or conduct that she finds abusive are not directed specifically at her. Indeed, in some cases the words or conduct that the victim finds abusive were common currency in the workplace before she entered.²⁶³ Under these circumstances, evolutionary sexual selection models would support the argument that such an environment would on average be more offensive and threatening to women than to men.²⁶⁴

262. Biologists who study, for example, primate behavior consistently understand the actions of the animals that they observe as closely based on the sex of the other individuals with which those animals are interacting. In other words, the aggression of a male towards a female is viewed differently from the aggression of the same male towards another male. *See, e.g.*, FRANS DE WAAL, *supra* note 240, at 88. In fact, an animal behaviorist would likely view as nonsensical the attempt to describe interactions between conspecifics *without* considering the sexes of the animals involved.

263. *See, e.g.*, *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 374–75 (4th Cir. 2002) (finding defendant entitled to judgment as a matter of law where plaintiff entered workplace permeated with crude sexual language and behavior, but such atmosphere preexisted her entry and evidence did not demonstrate that the atmosphere changed in any way following her entry), *vacated by* 335 F.3d 325 (4th Cir. 2003) (en banc); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (stating that courts may consider the background “lexicon of obscenity” that existed before plaintiff entered the workplace).

264. An evolutionary analysis is thus consistent with the position that the abusiveness of the environment should be determined by reference to a “reasonable woman” rather than a “reasonable person” or “reasonable man” standard. *See* Browne, *Seeking Roots*, *supra* note 4, at 28 (“For very fundamental reasons, the sexes have differing views of sexuality. Where a man might see ‘opportunity,’ a woman sees ‘danger.’”). Empirical data supports the view that words and behavior that are sexual in nature or that describe body parts or functions in a vulgar way are more offensive, on average, to women than to men. Of course it is entirely plausible to maintain that this average difference is a result of social learning. It is also plausible to explain the difference as a result of sexual selection pressures. My argument here does not purport to answer this question of causation, but only to note that on its own terms the evolutionary thesis would have to accept the proposition that women as women may be differentially impacted by a sexualized or vulgar atmosphere. Professor Browne, though generally critical of the hostile environment sexual harassment cause of action, has stated that “[i]f a biological perspective can contribute anything to sexual harassment policy, it must be the insight that a ‘reasonable person’ standard is meaningless. At least when it comes to matters of sex and sexuality, there are no ‘reasonable persons,’ only ‘reasonable men’ and ‘reasonable women.’” *Id.* at 31. On the other hand, he asserts that a “focus on the plaintiff’s perspective systematically privileges the woman’s view, even if the two parties are equally responsible for miscommunication.” *Id.* at 38–39. The appropriate standard of reasonableness in sexual harassment cases has been the topic of much scholarly and judicial discussion. *See, e.g.*, Robert S. Adler & Ellen R. Peirce,

It is in this class of cases that the evolutionary perspective is most useful as a tool not for answering the question of causation but for highlighting the uncertainty in the doctrine of causation in discrimination law.²⁶⁵ Absent a clear articulation of what causation means in the context of sex discrimination in general and hostile environment discrimination in particular, it is impossible to know whether conduct, *assumed to be abusive to the victim*, constitutes unlawful discrimination. In the prior two categories of cases, it was sufficient to pose the question whether the harasser, for whatever reason, treated the victim badly because of the victim's sex. In those cases, evolutionary theory suggested that the behavior of the individual harasser was directed at the victim based at least in part on her or his sex. Here, by assumption, there is no behavior that is directed at the victim²⁶⁶ and thus the question must necessarily be posed differently.²⁶⁷

The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases, 61 *FORDHAM L. REV.* 773, 825–27 (1993) (questioning whether it is fair to men to hold them to a standard to which they cannot relate); Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 *COLUM. J. GENDER & L.* 195, 196–97 (2001) (making a feminist argument in support of using the reasonable woman, as opposed to the reasonable person, standard); Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?* 10 *AM. U. J. GENDER SOC. POL'Y & L.* 633, 641–58 (2002) (arguing that the difference between the "reasonable woman standard" and the "reasonable person standard" is merely semantic, but that social scientists are right to consider gender differences when determining reasonableness and that other changes, such as educating male jurors on the perspectives of women, would be more fruitful than arguing over the standard itself); E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexual" Standard*, 18 *BERKELEY J. EMP. & LAB. L.* 56, 83 (1997) (arguing that the need for the "reasonable woman standard" is less now that Title VII litigants are entitled to a jury trial, thus ensuring that some of the triers of fact will be female, as opposed to a federal judge, who is more likely to be male).

265. The meaning of the intent or causation element in anti-discrimination law has been the subject of much academic inquiry. See Krieger, *supra* note 96, at 1176; Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 *SUP. CT. REV.* 145, 150–60; Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 *CORNELL J.L. & PUB. POL'Y* 415, 448 (2000); Schwartz, *supra* note 11, at 1709, 1714–17; Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *GEO. L. J.* 279, 288 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. CHI. L. REV.* 935, 937–38 (1989); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 *S. CAL. L. REV.* 733, 740 (1987); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 *LA. L. REV.* 495, 527 (2001); Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 *GA. L. REV.* 563, 564 (1996).

266. The term "directed at" is susceptible to more than one interpretation. I use the term here to imply motive or intention on the part of the actor. If he hangs up a girlie calendar in the workplace in order to enjoy the photographs, it is not "directed at" the plaintiff (nor at anyone, for that matter, except perhaps himself). If he hangs it up in order to bother the plaintiff, then it

In the nondirected cases, the motivations (whether conscious, unconscious, “evolutionary,” proximate, or otherwise) of the various actors whose behavior directly contributes to the abusive environment are most obviously irrelevant to the issue whether the environment is discriminatory. Their behavior is not discriminatory “treatment” in any intelligible sense of the term.²⁶⁸ Consequently, this species of case points to the overall logic of

is no longer an undirected act. Similarly, if sexist jokes are inadvertently overheard by the plaintiff, the words are not “directed at” her. On the other hand, if the jokes are told loudly in her presence so that she will overhear them, they are directed at her. *Compare* *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 n.9 (S.D. Fla. 1989) (holding that pornographic pictures posted in police station were “directed” in that they singled out female employees), *and* *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522–23 (M.D. Fla. 1991) (same), *and* *Stair v. LeHigh Valley Carpenters Local Union No. 600*, 813 F. Supp. 1112, 1114–16 (E.D. Pa. 1993) (calendars of naked women evinced “implicit” intent to discriminate on the basis of sex), *with* *Johnson v. County of L.A. Fire Dep’t*, 865 F. Supp. 1430, 1438 (C.D. Cal. 1994) (finding that the presence of Playboy magazines was unrelated to the creation of a sexually hostile working environment), *and* *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (finding that posters and pin-ups of nude women “had a de minimis effect on the plaintiff’s work environment”).

267. The question must be posed differently, that is, unless one concludes that this class of cases by definition does not implicate Title VII. Some courts have so held, at least in those cases in which the abusive environment preexisted plaintiff’s entry therein. *See* *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) (stating that the evaluation of sexual harassment claims must take into account “environment[s] where crude language is commonly used by male and female employees” and that “[s]peech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments.”); *Rabidue*, 805 F.2d at 622 (finding, notoriously, that a claim premised in part upon preexisting vulgarity and pornography in the workplace must be “considered in the context of a society that condones” such displays); *see also* *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1414–15 (10th Cir. 1997) (holding that the existing workplace culture is relevant to a determination of harassment, but finding that this factor cut in favor of the plaintiff because of the demure and professional workplace culture that preexisted her arrival). Most courts, however, have repudiated the *Rabidue* holding and have reasoned that defendants “cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII.” *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999); *accord* *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999); *Robinson*, 760 F. Supp. at 1524–25. Several legal scholars have criticized judicial treatment of the “prevailing workplace” issue. *See, e.g.*, Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 199 (1994); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 846 (1991). Courts holding that the preexisting environment cannot give rise to a harassment claim rest this result on the argument that there can have been no intention to treat the plaintiff differently where the treatment was uniform and did not change as a result of the plaintiff’s arrival in the workplace. This reasoning applies with equal force, however, to cases in which the conduct is not directed specifically at the plaintiff though it arises after plaintiff’s arrival in the workplace. In either event, the focal issue should not be the intention of the actor toward the plaintiff personally, but rather the differential effect of the behavior on the plaintiff by virtue of her sex.

268. There is one caveat to this argument. It may very well be the case that persons in certain workplaces cultivate a “macho” or sexualized environment for the conscious or unconscious purpose of preserving that workplace as a sphere of male exclusivity. In those

re-directing the intent or causation inquiry to where it more reasonably belongs: to the question of the employer's intent as revealed by the acts or omissions of itself or its agents in preventing or responding to the abusive conduct.²⁶⁹

4. The Significance of the Workplace Context Under Evolutionary Theory

The fact that harassing behavior has been situated in or around the workplace²⁷⁰ takes on heightened significance when an evolutionary

instances, one might imagine that the environment is "directed" at the (eventual) victims notwithstanding the fact that it is in place before they arrive to complain. *Cf.* *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971) (recognizing in the first case explicitly to countenance a cause of action under Title VII for hostile environment harassment based on racial hostility, the "distinct possibility that an employer's [seemingly nondirected] discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees").

269. *See infra* text and note 333 and accompanying text.

270. In some cases, part of the conduct that comprises a hostile work environment occurs outside the physical workplace. *See, e.g.,* *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1101 (8th Cir. 2001) (describing racially harassing conduct occurring outside plant in connection with strike picket line); *Moring v. Ark. Dep't of Corr.*, 243 F.3d 452, 454–55 (8th Cir. 2001) (detailing offensive sexual conduct by supervisor toward plaintiff after hours and on a business trip); *Ellison v. Brady*, 924 F.2d 872, 874–75 (9th Cir. 1991) (finding coemployee sent plaintiff letters, called her, and came to her home); *Aldridge v. Kansas*, No. 96-2382-JWL, 1997 WL 614323, at *9–10 (D. Kan. Sept. 10, 1997) (unpublished decision) (finding that actionable conduct included lewd and inappropriate remarks and physical pursuit of plaintiff that occurred outside the workplace); *McGuinn-Rowe v. Foster's Daily Democrat*, No. 94623-50, 1997 WL 669965, at *4 (D. N.H. July 10, 1997) (unpublished decision) (holding that harassment by supervisor that took place in a local bar could be part of the pattern of conduct that creates a hostile working environment). Some courts distinguish between supervisory and coworker conduct for purposes of deciding whether harassment that occurs outside the workplace may properly be considered. *See* *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153 n.9 (3d Cir. 1999) (finding harassment outside workplace actionable where plaintiff was forced to work with the harasser outside of the workplace); *Turner v. Reynolds Ford, Inc.*, 145 F.3d 1346 (10th Cir. 1998) (unpublished) (holding coworker harassment outside workplace not actionable under Title VII); *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) (finding that derogatory statements made outside the workplace by plaintiff's superiors were relevant to plaintiff's hostile work environment complaint); *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (excluding evidence of sexual harassment by coworker that took place outside work hours); *Bundy v. Jackson*, 641 F.2d 934, 940 n.2 (D.C. Cir. 1981) (finding that supervisor's call to plaintiff at her home was considered as contributing to hostile environment in conjunction with abusive speech at workplace); *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 549 (N.J. 2000) (holding that "harassment by a supervisor that takes place outside of the workplace can be actionable") (citing *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007 (N.J. 1998)). *But see* *Darland v. Staffing Res., Inc.*, 41 F. Supp. 2d 635, 637–39 (N.D. Tex. 1999) (excluding consideration of supervisor's allegedly harassing behavior outside the workplace). This consideration by courts of nonworkplace conduct under

perspective is applied. Much female behavior, and the operation of sexual selection, is influenced by females' need or desire for resources.²⁷¹ Many male behaviors, as well as physical characteristics, are selected on the basis of their supposed contribution to the male's ability to provide resources.²⁷² Indeed, male competition for access to reproductive females and female need for resources are arguably the two most fundamental assumptions that drive evolutionary theories of sexual selection.²⁷³ These issues likewise are central to understanding workplace harassment.²⁷⁴

Title VII has been criticized by some scholars as contributing to employer censorship of employee speech and improper employer control of employees' private lives. Compare Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 628–29 n.6 (1997) (noting that the definition of actionable harassment in no way requires harassing speech to occur within the workplace, and that speech entirely outside the working environment and working hours can and has been used to support a finding of liability under Title VII), with J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2312–14 (1999) (explaining that the modern workplace is no longer reducible to a geographically discrete locale, and that liability for harassing speech may easily result in censorship well beyond the traditional conception of the "workplace"), and Beverly Earle & Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BERKELEY J. EMP. & LAB. L. 282, 299 (1997) (noting First Amendment implications of campus speech codes proscribing sexual harassment outside the workplace).

271. E.g., Patricia Adair Gowaty, *Sexual Dialectics, Sexual Selection, and Variation in Reproductive Behavior*, in FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 30, at 351–56 (explaining received wisdom of sexual selection theory as including idea that females in most mammalian and bird species are the limiting resource for males, and that access to biotic and abiotic resources is a limiting resource for females); Roman Martin Wittig & Christophe Boesch, "Decision-Making" in *Conflicts of Wild Chimpanzees (Pan Troglodytes): An Extension of the Relational Model*, in BEHAVIORAL ECOLOGY AND SOCIOBIOLOGY (2003) ("According to the socio-ecological model, food is proposed as the most beneficial resource for females whereas a sexual partner holds the most benefit for a male"); Buss, *supra* note 138, at 14 (summarizing evolutionary theory that "[f]emales appear to have been limited in reproductive success by access to resources for self and offspring," whereas "[m]ales appear to have been limited by access to fertile females"); Tang-Martinez, *supra* note 30, at 131 (discussing the "near dogmatic assumption made by many evolutionary biologists, including most sociobiologists and many sociobiological feminists . . . that female reproductive success is limited by a female's ability to gain access to resources controlled by males, whereas male reproductive success is limited by access to females.").

272. This latter generalization only applies to species in which the male contributes more than just genetic material to the production of offspring. In other species, males provide little or no resources apart from genetic material. In certain "lekking" species, for example, the male role in reproduction is solely to contribute sperm. In those species, sexual selection operates to create males with impressive physical characteristics, but these are understood as a way of signaling their genetic superiority to females, who look them over in their lek (a large gathering of males) and then choose one (or more) with which to mate. See RIDLEY, *supra* note 2, at 140–42; WILSON, *supra* note 32, at 331–34.

273. These basic drives similarly are central to an economic explanation of sexuality. See generally POSNER, *supra* note 4. Posner posits that the increasing access of females to economic

The notion that, in humans and other pair-bonding species in which paternal investment in offspring is significant, a female chooses a male partly on the basis of his perceived ability to provide resources to her and her offspring is fundamental to much evolutionary thinking and to much scholarship on evolutionary sex differences.²⁷⁵ In species, including humans, in which males often provide some significant parental investment, “females should seek to mate with males who have the ability and willingness to provide resources, shelter, territory, and protection.”²⁷⁶

resources independent of their reliance on male support has been the driving force in the social evolution of sexual relations and family structure. *See id.*

274. That many victims of workplace sexual harassment are dependent on their jobs for economic survival has been emphasized in a wide variety of literature on sexual harassment. *See, e.g.,* MACKINNON, *supra* note 189, at 41–44 (noting that economic dependence on a particular job may deter some women from asserting valid sexual harassment claims); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 46–47 (1999) (same); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC’Y REV. 67, 67–92 (1999) (same). Title VII was in part driven by a recognition that political equality is tied to economic equality, and that discrimination in employment is thus a serious impediment to full social and political equality. *See* H.R. REP. No. 88-914, 88th Congress, at 2402 (Nov. 20, 1963). However, some analyses of sexual harassment emphasize the uniqueness of the employment context, *see, e.g.,* Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 718–20 (1997) (proposing the workplace as a unique intermediary between private and public life, and as such an ideal context for instilling and practicing civic and democratic norms), whereas others emphasize the more generalized nature of typical harassing behavior in the broader culture, *see* MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 99, at 103–16. *See also* Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231, 1232–33 & n.14 (engaging Professor Kathryn Abrams on the issue of the centrality of the workplace as a site of sexual harassment). *But see* Abrams, *supra* note 192 (criticizing Bernstein on this count); *cf.* Balkin, *supra* note 270 at 2310 (arguing that “captive audience doctrine” in first amendment jurisprudence applies to workplace context to permit censorship of employee speech that might otherwise raise first amendment concerns); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 86–87 (1991) (same). An evolutionary perspective suggests that the workplace context is, indeed, crucial to understanding harassing behavior and its harms.

275. *E.g.,* Buss, *supra* note 138, at 1 (1989) (describing a cross-cultural study finding that women are on average more likely to seek men with higher earning capacity).

276. *Id.* at 2. There is evidence that calls this evolutionary premise into question. For example, more than two decades ago evolutionary biologist Patricia Adair Gowaty demonstrated, in a groundbreaking study, that females of a socially monogamous, pair mating species of bird fared no differently, reproductively speaking, when they had no access to resources provided by males than when they did have the help of males. Professor Gowaty removed the males from her study group and compared their success to that of females in the control group. She found no statistically significant difference. *See* Patricia Adair Gowaty, *Male Parental Care and Apparent Monogamy Among Eastern Bluebirds (Sialia sialis)*, 121 THE AM. NATURALIST 149, 155–56 (1983). However, these results have varied from species to species and have been highly controversial. *See also* ANGIER, *supra* note 141, at 302–03 (describing

Several secondary hypotheses follow from this basic premise of sexual selection theory. First, where females are better able to obtain resources independent of male investment, they might be expected to make different reproductive and mate choices than they would if more dependent on males for resources.²⁷⁷ Second, males who are likely to benefit from female dependence might be inclined to resist female attempts to become economically independent. Both of these hypotheses suggest that the workplace is likely to be a forum of heightened intersexual competition.²⁷⁸

Animal studies of sexually harassing behavior²⁷⁹ demonstrate that the effects of harassment are more severe when the female is harassed during resource-gathering activities. Further, these studies suggest that the behavior is more “successful” (in the sense that the harasser achieves his supposed objective of sexual access to the female) when the harassment is connected to a needed resource. In addition, females may “consort” with dominant males in order to discourage harassment by younger and subordinate males.²⁸⁰

recent anthropological studies demonstrating that females in hunter-gatherer societies account for up to 70% of the group’s food).

277. The issue of female choice, and constraints thereon, is a central focus of recent study and discussion in the evolutionary literature. *See infra* note 300 and accompanying text.

278. Professor Browne has similarly noted the potential for male-female conflict in the workplace. He views this conflict as arising not out of female competition with males for resources which in turn affects male competition for female attention, but instead from the integration of women into formerly all-male status hierarchies. In his view, a “side-effect of the breakdown of the sexual division of labor is the expansion of opportunities for sexual conflict to occur in the workplace.” Browne, *Seeking Roots*, *supra* note 4, at 6; *see also* Browne, *Women at War*, *supra* note 4, at 170–78 (suggesting that the presence of (even individually qualified) women in combat units will disrupt male bonding and cause sexual conflict). Many feminists, too, locate the source of female subordination in lack of access to, or control of, resources. *E.g.*, Judith Buber Agassi, *Theories of Gender Equality: Lessons from the Israeli Kibbutz*, in *THE SOCIAL CONSTRUCTION OF GENDER* 313, 314–15 (Judith Lorber and Susan A. Farrell eds., 1991) (summarizing socialist, Marxist, and modern materialist feminist theories). However, these theories reject an evolutionary or biological explanation for the phenomenon, presumably at least in part because they equate a biological or genetic explanation with inevitability.

279. Note that ethologists studying animal behavior typically define “sexual harassment” as unwanted sexual behavior rather than as harassment that occurs “because of” the sex of the victim. Thus, the scope of the harassing behaviors relevant to these studies is both broader (*any* sexual behavior that appears to be unwanted or coercive) and narrower (only *sexual* behavior) than that encompassed by “sexual harassment” under Title VII. In practice, most sexual harassment cases are premised on sexual behavior, *see* Juliano & Schwab, *supra* note 6, at 586–88 (2001), but this may be an effect of the courts’ treatment of these cases and social understandings of harassment rather than the incidence or harmfulness of sexual as opposed to nonsexual but sexist harassment. *See generally* Schultz, *supra* note 4 (criticizing courts for failure to consider nonsexual but sexist harassment in hostile work environment cases).

280. *See* ElizaBeth A. Fox, *Female Tactics to Reduce Sexual Harassment in the Sumatran Orangutan (Pongo pygmaeus abelii)*, 52 *BEHAV. ECOL. SOCIOBIOL.* 93, 93–95 (2002); *see also*

Thus, a standard premise of evolutionary theory offers a plausible factual basis for the argument that sexual harassment (and indeed other forms of treatment that have the intent or effect of driving women from the workplace or resigning them to low-pay, dead-end jobs) is fundamentally tied to competition for economic resources. What the evolutionary account adds to the traditional economic and social accounts is its linkage of sexually harassing behavior to these economic ends, and its ultimate grounding of that behavior in evolutionary adaptation. Rather than a private, noneconomic behavior, sexual harassment in the workplace is revealed, through an evolutionary lens, to be a type of behavior that may be done by males for the (evolutionary, ultimate) purpose of restricting females' access to resources and thus manipulating females for their own reproductive ends. Insofar as females, the limiting resource for males as posited by conventional evolutionary accounts, may be expected to respond to this "manipulation-control" by males, they will be "selected to remain in control of their own reproduction."²⁸¹ If doing so means striving for economic independence, then selection pressures should not be expected to operate to have produced females who forego economically rewarding work by their own choice, as some have argued.²⁸² Instead, females should be expected to strive for economic independence against even the most difficult odds. By many accounts, this is precisely what women have done and continue to do.²⁸³

Mesnick, *supra* note 253, at 207–208 (advancing the "bodyguard hypothesis" to argue that females often enter into pair-bonds with males in order to avoid harassment and likely injury by other males). This finding complicates any claim of "welcomeness" in sexual harassment doctrine.

281. Gowaty, *supra* note 65, at 372. For a fascinating account of natural selection in action in the present day, see generally JONATHAN WEINER, *THE BEAK OF THE FINCH* (1994) (describing the work of Peter and Rosemary Grant studying "Darwin's Finches" in the Galapagos Islands from the 1970s until the present).

282. Kingsley Browne and Richard Epstein make this argument. See BROWNE, *BIOLOGY AT WORK*, *supra* note 4, at 137 ("If women are less willing than men to sacrifice family for career and therefore elect not to do so, their decisions might be considered free choices raising no serious public-policy question."); Richard A. Epstein, *Some Reflections on the Gender Gap in Employment*, 82 *GEO. L.J.* 75, 80 (1993) ("The key element in all cases is the choice of career and the willingness to invest in the education and hard work that makes advancement possible."); Epstein, *Liberty, Patriarchy*, *supra* note 4, at 105–06 ("Knowing what we do about human nature, do we think that women and men will, in the aggregate, follow similar career paths in a market system that is not tainted with duress, fraud, or incompetence? I think that the answer has to be no.").

283. Evolutionary psychologists often speak of human evolution as if it is a historical phenomenon rather than an ongoing process. Thus, they focus on the "Environment of Evolutionary Adaptativeness" as the environment to which the most significant features of humans should be adapted. While it does make sense to consider human traits in the context of the environment that is thought to have existed for a large proportion of human evolution, there

V. DOCTRINAL SPANDRELS IN THE LAW OF SEXUAL HARASSMENT

Title VII prohibits discrimination against an individual on the basis of that individual's sex. This much is clear; this much might be viewed in evolutionary metaphor as the ultimate functional aim of Title VII in the arena of sex, as locomotion is the ultimate functional aim of human legs.²⁸⁴ There might have been any number of designs that would have accomplished the same function, some perhaps more efficiently and some with more elegance. Yet structural and ecological constraints, and perhaps some degree of chance, have dictated that we humans walk on two legs and not four, propel ourselves through life on legs and not wheels, move along the earth and not soar through the air.

Likewise, structural and ecological²⁸⁵ factors have operated to constrain the development of the law of sexual harassment. As the law prohibiting sexual harassment in employment has evolved within this legal ecological niche, several doctrinal spandrels have resulted. These spandrels—these doctrinal byproducts of other functional aspects of the law—have led to confusion and needless complexity in the application of sexual harassment law. In addition, they have at times been mistakenly viewed as central to the legal design project when in fact they should more appropriately be understood as secondary. They have been viewed as the arches and not the spandrels. An understanding of these aspects of doctrine as spandrels and not arches allows a critical re-evaluation of their usefulness without fear that the building might come tumbling down.

In this Part, I identify and analyze three “legal spandrels” in sexual harassment law. The use of the word “sex” in Title VII, combined with the use of the word “sexual” in harassment law, results in the first spandrel. Because of the varying linguistic and social meanings that attach to the words “sex” and “sexual,” the doctrine from the beginning has been rife

is no basis for the conclusion that evolutionary adaptation can no longer occur. If, as current biological studies suggest, males and females of a species coevolve (and if sexual selection is driven in large part by immunological factors that are constantly changing), then it also makes sense to consider current behavior in adaptationist terms.

284. As already noted, *see supra* note 63, such purposive language is Panglossian in the context of evolution; it is, however, an oft-used conceptual shortcut.

285. Ecology is “[t]he study of the interrelationships between organisms and their natural environment, both living and nonliving.” OXFORD DICTIONARY OF BIOLOGY (4th ed. 2000). When I speak of a legal ecology, I mean to refer to all of the following: the interrelationship of a particular law or legal doctrine with other laws; the institutional actors involved in the enactment, enforcement, and interpretation of the law; the language in which the law is expressed; larger cultural understandings of the law and its policies; and the overall legal and social discourses within which the law is situated. Others have employed the metaphor of ecology to law. *See, e.g.*, Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557, 569 (1998).

with ambiguity. I argue that the secondary meanings entailed by these words have often been mistaken for the central functions of the language when in fact they should more properly be understood as peripheral. Second, the birth of sexual harassment law from two very disparate parents—hostile race environment harassment on the one hand and the radical feminist critique of sex-as-subordination on the other—has led to the creation of another legal spandrel. Finally, and most important, the language of Section 703 of Title VII, which provides that discrimination is actionable if it is “because of” the victim’s sex, has combined with prevailing ideologies concerning the contours of intentional discrimination to create a third legal spandrel. I address each of these areas in turn and argue, based in part on the evolutionary analysis above, for a refocusing on the primary, functional aspects of sexual harassment law and away from the distracting, dysfunctional legal spandrels.

Focusing on the functional, designed elements of sexual harassment law, I then argue that an evolutionary perspective is wholly consistent with the position that the three broad patterns of behaviors described and analyzed in the previous Part lead precisely to the social harms at which Title VII is aimed. Indeed, once the focus shifts from the sexuality *vel non* of the harassing behavior and from the sexual desire or intention of the individual harasser, the core doctrine that remains is well suited to address the critical question of whether an individual has been denied an employment opportunity and has been subjected to discriminatory working conditions because of her sex.

Furthermore, the evolutionary approach raises the possibility that the gender blindness of current doctrine may be misplaced.²⁸⁶ Evolutionary explanations of the patterns of behavior generally at issue in hostile environment sexual harassment cases reveal that these behaviors are strongly influenced by the sex of the persons involved. Although this insight does not mean that behavior toward males should never be considered sexual harassment sex discrimination, it does suggest that situations involving male victims might require courts to ask a different set of questions than those asked when the victim is a woman.

Finally, the analysis reveals that arguments concerning the proper role of causation in sexual harassment jurisprudence cannot resolve the difficult cases in which the conscious motivation of the individual harasser is

286. Cf. Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 750 (2002) (discussing the choice that would have to be made by “hypothetical feminist constitution drafters” between symmetry and asymmetry; that is, between a provision that would ban discrimination based upon a forbidden classification, or one that would ban discrimination against a protected class).

unclear. Rather, the long lens of evolution reveals that the kinds of behaviors typically involved in harassment cases may almost always be said to be “based on” the sex of the respective actors; the question of where to draw the “because of” line is, like the question of proximate cause in tort law, at bottom, one of social policy and not of factual causation.²⁸⁷ Here, Supreme Court precedent, the goals of Title VII, and logic all argue for laying the mantle of intention at the feet of the Title VII defendant—the employer—and not of the individual harasser.

A. *The Terminology Spandrel: What is “Sex?”*

The words “sex” and “gender” in discrimination jurisprudence have led to much confusion.²⁸⁸ First, “sex” may be contrasted with “gender” as a way of describing certain purported qualities of being male and being female. Many feminists use the terms to distinguish anatomical maleness and femaleness (“sex”) from socio-cultural norms regarding the traits generally associated with masculinity and femininity (“gender”).²⁸⁹ Courts, however,

287. *E.g.*, Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 755, 773–74 (1950). *See generally* FRANK J. VANDALL ET AL., TORTS: CASES & PROBLEMS (2d ed. 2003).

288. Disagreements over terminology have also led to pitched ideological battles. Some cultural theorists view language and naming as both reflective and constitutive of social hierarchies of domination and subordination. *See, e.g.*, JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 27 (1997) (stating that “[t]he utterances of hate speech are part of the continuous and uninterrupted process to which we are subjected, an on-going subjection . . . that is the very operation of interpellation, that continually repeated action of discourse by which subjects are formed in subjugation”). In contrast, Professor Steven Pinker argues that language is not a “prisonhouse of thought,” but rather is separate from thoughts and attitudes. PINKER, *supra* note 31, at 210. He notes that “people invent new words for emotionally charged referents, but soon the euphemism becomes tainted by association, and a new word must be found, which soon acquires its own connotations, and so on.” *Id.* at 212. Furthermore, purely definitional problems are easily soluble, so that persistent issues of word-meaning signal deeper substantive conflicts. *See* Gray, *supra* note 31, at 387–88. Gray points out the problem of multiple meanings in the context of biological accounts of the concept of “innate behavior,” and notes that “[i]f the problem were merely one of sorting out the confusion caused by using a word with many different meanings, then the issue would have been cleared up years ago with a few new terms and redefinitions.” *Id.* at 387.

289. The notion of sex and gender as distinct categories was popularized by “sexologists” John Money and Anke A. Ehrhardt in their 1972 book *MAN & WOMAN, BOY & GIRL: THE DIFFERENTIATION OF DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY*. They were concerned with the distinctions between anatomical, chromosomal, and hormonal sex on the one hand, and psychological gender identity on the other. *See* ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 3–5 (2000) (discussing the sex/gender dichotomy). Feminists built on this categorical distinction to focus on the use of social power and dominance to enforce gender identities. *See id.* at 3 (“[T]he second-wave feminists of the 1970s also argued that sex is distinct from gender—that social

often use the terms interchangeably, complicating any analysis of what precisely is prohibited by “sex” discrimination.²⁹⁰ Further muddying the waters is the dual sense of the word “sex” itself. “Sex” may mean male or female, but it also refers to the act of engaging in sexual intercourse.²⁹¹ Thus, sex as a noun must be distinguished from sex as a verb.²⁹² It has been noted that imprecision in the use of the words “sex” and “gender” has led to

institutions, themselves designed to perpetuate gender inequality, produce most of the differences between men and women.”)

290. *E.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (“Title VII . . . makes it ‘an unlawful employment practice for an employer . . . to discriminate against any individual [based on] . . . sex’”(quoting 42 U.S.C. § 2000e-2(a)(1)). Severe and pervasive conduct that creates “a work environment abusive to employees [based on] their . . . gender . . . offends Title VII’s broad rule of workplace equality.”); *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 748 (2d Cir. 2003) (discussing discrimination based on “sex,” and making multiple references to the plaintiff being targeted because of her “gender”); *McCown v. St. John’s Health Sys., Inc.*, 349 F.3d 540, 543 (8th Cir. 2003) (referring to “sex” and “gender” interchangeably throughout the opinion, for example, stating that one evidentiary route of proving same-sex harassment is through showing motivation of general hostility of people of the same *gender* in the workplace); *see also Franke, supra* note 6, at 712–25. It is apparent, however, that the prohibition against discrimination “because of . . . sex” in Title VII was meant to refer to sex as a biological category rather than sexual behavior or sexual orientation. *See Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (holding that “the term ‘sex’ in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation”); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986) (holding that the word “sex” in Title VII “logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender”). In addition, all of the federal courts of appeals that have considered the question have held that discrimination on the basis of sexual orientation alone does not fall under Title VII’s proscription against discrimination because of “sex.” *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–32 (9th Cir. 1979). Some federal appellate courts have been receptive to the argument that discrimination against a male on the basis of failure to conform to prevailing gender norms can satisfy Title VII’s requirement of discrimination because of sex. *See Simonton*, 232 F.3d at 37 (“We find this argument more substantial than Simonton’s previous two arguments, but not sufficiently pled in this case.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (stating that “‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender,” and that harassment based on the victim’s failure to act like a man states a claim under Title VII); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding that Title VII was violated where female plaintiff was not promoted in part because she was insufficiently “macho”); *Case, supra* note 6, at 36–75; *Franke, supra* note 6, at 762–71.

291. *See MACKINNON, supra* note 189, at 182, *quoted in Haynie v. Michigan*, 664 N.W. 2d 129, 148 n.10 (Mich. 2003) (Cavanagh, J., dissenting) (“It is no accident that the English language uses the term sex ambiguously to refer both to gender status (as in ‘the female sex’) and to the activity of intercourse (as in ‘to have sex’).”) (emphasis omitted).

292. Ironically, it was this latter meaning of the word “sex” that might have led to some of the confusion. Ruth Bader Ginsberg apparently chose to use the term “gender” rather than “sex” in arguing her groundbreaking discrimination cases because of the unsavory, or titillating, connotations of the latter word. *See Case, supra* note 6, at 9–10.

doctrinal confusion at best and reification of insidious stereotypes at worst.²⁹³ And the use of the word “sex” in harassment jurisprudence has tended to constrain judicial imagination of the multiple ways that people, and particularly women, can be subjected to hostile or abusive working environments.²⁹⁴ On the other hand, opponents of antidiscrimination laws have objected to the substitution of the word “gender” for “sex” for the converse reason: the use of the word “gender” has normative implications about the moral relevance of sex differences that tend to support the political argument in favor of antidiscrimination laws.²⁹⁵

The introduction of behavioral and evolutionary biology as a supplemental lens through which to view these issues further complicates

293. See Schultz, *supra* note 4, at 1704–10; Schwartz, *supra* note 11; see also Case, *supra* note 6, at 2–5 (arguing that much harassment can and should be understood as enforcement of traditional gender roles); Franke, *supra* note 6, at 696–97 (arguing that, with the possible exception of pregnancy rules, it is nonsensical to understand sex discrimination as anything other than gender—or sex role conformity—discrimination);

294. The federal courts of appeals have been divided and inconsistent on the issue of whether nonsexual behavior can constitute harassment on the basis of sex. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (reversing district court “[t]o the extent that the court ruled that overt sexual harassment is necessary to establish a sexually hostile environment”); *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (noting that “[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than sexual advances”); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (holding that nonsexual threats of physical violence and racial slurs were properly considered in support of plaintiff’s sexual harassment claim). *But see DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 595–96 (5th Cir. 1995) (finding misogynistic comments about plaintiff sexist and disparaging, but not overtly sexual); *King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 540 (7th Cir. 1990) (separating nonsexual from sexual elements of plaintiff’s harassment claim, despite her allegation that the combination of such elements “caused her to be permanently psychologically disabled”); see also *Haynie v. Michigan*, 664 N.W.2d 129, 135–36 (2003) (holding that, under Michigan Civil Rights Act, a claim of sexual harassment cannot be predicated solely on nonsexual conduct); *Juliano & Stewart*, *supra* note 6, at 555 (finding, based on a comprehensive examination of federal sexual harassment litigation for the ten-year period following *Meritor*, that “courts have failed to . . . acknowledge harassment premised upon nonsexual behavior”). A recent article defines “hostile environment” harassment as that “consisting of verbal, physical, or environmental behavior *that is sexual in nature* and has the effect of creating a hostile, offensive, or abusive working environment.” Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 10 n.29 (2003) (emphasis added).

295. See Epstein, *Nouns*, *supra* note 145; cf. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting). For feminist arguments that courts should be careful of using the word “sex” when they mean “gender,” and vice versa, see Case, *supra* note 6, at 12 (arguing that “gender” is more appropriately used as an adjective, describing “masculine” or “feminine”); Franke, *Disaggregation*, *supra* note 192, at 1–9. *But see Franke*, *supra* note 6, at 696 (arguing that the distinction is faulty and insidious to the cause of equality—basically arguing that there is no such thing as “sex”; everything is “gender”).

the definitional problems. Though some feminists use the term “sex” to refer to physical and immutable differences between males and females (such as the biological fact that only females can become pregnant, give birth, and lactate), in biology the line between genes and environmental influences is difficult or impossible to draw.²⁹⁶ In particular, scientists who study the biological influences on human and nonhuman animal behavior would consider many of the so-called “gendered” behavioral patterns as at least partly biological or genetic in origin, and vice versa.²⁹⁷ Oxford biologist Richard Dawkins refers to these kinds of behaviors as “the extended phenotype,”²⁹⁸ in order to emphasize that the influences of the genes can reach beyond the physical appearance of the individual organism, and even beyond the behavior of the individual organism, to affect entire ecosystems.²⁹⁹ Indeed, selection works directly upon phenotype, not genotype; phenotype plasticity is of major practical and theoretical importance in the current study of evolutionary biology.³⁰⁰

The behavioral biological perspective, therefore, makes the distinction between sex-as-physiology and gender-as-cultural-norm virtually incoherent. Discrimination is necessarily relational. When a man harasses a woman “because” she is a woman, he does so based upon some interaction

296. In fact, most scientists believe that there is no line, but rather a sort of permeable membrane through which genetic and environmental influences pass back and forth and act upon one another in uncounted ways. See PINKER, *supra* note 31, at 60; RIDLEY, *supra* note 31, at 278 (“Each person is molded by an interaction of his environment, especially his cultural environment, with the genes that affect social behavior.”) (quoting E. O. Wilson); WEST-EBERHARD, *supra* note 31, at 33 (“To solve the nature-nurture problem, one has to acknowledge the deterministic role of the environment, alongside the genes, in development and to consider the development of the entire phenotype.”).

297. “Separating sex from gender does not allow for the ways in which experiential inputs shape physiology and anatomy, and the ways in which physiological and anatomical differences shape behavior and experience.” Gray, *supra* note 31, at 406 (citing R. HUBBARD, *THE POLITICS OF WOMEN’S BIOLOGY* (1990)).

298. Phenotype is defined as “[t]he observable characteristics of an organism. These are determined by its genes, the dominance relationships between the alleles, and by the interaction of the genes with the environment.” OXFORD DICTIONARY OF BIOLOGY 453 (4th ed. 2000) (internal cross-references omitted).

299. See generally RICHARD DAWKINS, *THE EXTENDED PHENOTYPE: THE GENE AS THE UNIT OF SELECTION* (1982). For a briefer summary of this idea, see DAWKINS, *supra* note 37, at 134–37. Though he does not address the issue of cultural gender roles and behavior, the general framework of his theory of extended phenotypes would apply to such roles and behavior if they have a genetic component. Dawkins offers the example of a beaver’s dam to illustrate the ways in which a genetically-driven behavior can have widespread effects. He views the pond created by the beaver’s dam, and the consequent interactions of other species in the pond, as the extended phenotype of the beaver’s gene for dam-building. *Id.* at 135–36.

300. See WEST-EBERHARD, *supra* note 31, at vii (offering a “synthesis of development and evolution” primarily for a scientific audience).

between her phenotype (the way her femaleness is outwardly expressed both physically and behaviorally) and his ideas and beliefs about that “Woman” phenotype.³⁰¹ He cannot discriminate based directly upon her genotype, or upon the presence in her cells of an X chromosome, because those are invisible to him. Sex discrimination, then, is phenotype discrimination; phenotype discrimination is “gender” discrimination insofar as the concept of gender encompasses the outward expression of “sex.”

Because discrimination consists of harmful treatment that stems from one person’s ideas and beliefs about another person’s extended phenotype,³⁰² it is appropriate to describe and analyze sex discrimination as gender discrimination. In this sense, a focus on sex-as-biology or on sex-as-sexual-behavior is a misleading and dysfunctional spandrel in the law of sexual harassment.

B. *The “Mother’s Eyes, Father’s Nose” Spandrel: Who Are the Parents of Hostile Environment Sexual Harassment Law?*

Hostile work environment sexual harassment doctrine was born of two very different jurisprudential parents: an analogy to hostile racial environment harassment on the one hand³⁰³ and as a sort of adjunct to the

301. Cf. FINEMAN, *supra* note 15, at 51 (arguing that, notwithstanding debates about biology, culture, and essentialism, “women *will* be treated as mothers (or potential mothers) because ‘Woman’ as a cultural and legal category inevitably encompasses and incorporates socially constructed notions of motherhood in its definition”). When this insight is applied to treatment of women on an individual level, it suggests that particular actors will treat particular women based in part upon their ideas of “Woman,” however acquired.

302. There is abundant evidence that animals make relational choices based upon phenotype. For example, in a series of studies biologists found “that male swallows with artificially lengthened [sic] tails acquired mates more quickly, reared more young, and had more adulterous affairs than males of normal length.” RIDLEY, *supra* note 3, at 137 (citing A.P. Møller, *Female Choice Selects for Male Sexual Tail Ornaments in the Monogamous Swallow*, 332 NATURE 640, 640–42 (1988)). Interestingly, scientists have also found that the more “attractive” males are significantly less helpful around the nest. *See id.* at 224.

303. *See Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (noting that “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality”); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982) (applying the legal standard enunciated in *Henson* to claims for hostile work environment based on either race or sex); *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) (explaining the relevance of “discriminatory environment” cases to sexual harassment). Of course, both race and sex discrimination may be present in the same case. The particular problems faced by victims at the crossroads of multiple subordinating identities have recently been the focus of several scholarly works. *See generally* Crenshaw, *supra* note 94, at 150–67; Harris, *supra* note 94, at 590–605. While I recognize that these negative synergies of discrimination complicate any analysis of sexual harassment law, here I focus only on sex, and not race, discrimination.

paradigm quid pro quo harassment case, embodying the feminist conception of male use of sex and sexuality as a method of subordinating women, on the other.³⁰⁴ When this offspring was then raised in an environment in which the word “sex” is susceptible of several meanings, doctrinal confusion and legal spandrels were bound to result.

1. The Analogy to Race

The first federal case to recognize a claim of hostile work environment harassment arose in the context of a Title VII claim of racial discrimination. In *Rogers v. EEOC*,³⁰⁵ the plaintiff claimed that her employer, an optometry practice, engaged in “patient segregation” whereby it treated or classified patients depending upon their race. The court interpreted this part of the plaintiff’s claim to allege that the practice was discriminatory towards *her*, and held it sufficient to allow the claim to proceed.³⁰⁶ In a now well-known passage, the court stated that “the phrase ‘terms, conditions, or privileges of employment’ in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”³⁰⁷ The court thus recognized that imposing upon a person the requirement that she work under conditions of extreme racial animosity, bigotry, or ridicule implicated a “term or condition” of employment sufficient to trigger Title VII protection regardless of whether a tangible employment action was taken.

Following *Rogers*, several federal courts of appeals recognized that the existence of a racially hostile environment, even absent a tangible job action,³⁰⁸ could give rise to a valid claim of employment discrimination.³⁰⁹

304. See *Williams v. Bell*, 587 F.2d 1240, 1245–46 (D.C. Cir. 1978) (finding that retaliatory dismissal for refusal to accede to sexual advances violated Title VII); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1045 (3d Cir. 1977) (same); *Barnes v. Costle*, 561 F.2d 983, 994–95 (D.C. Cir. 1977) (reversing district court’s grant of summary judgment to employer that conditioned plaintiff’s advancement on acquiescence to supervisor’s sexual demands); *MACKINNON*, *supra* note 189, at 174–92.

305. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

306. *Id.* at 240–41.

307. *Id.* at 238.

308. Because of the potential expansiveness of this premise, courts began right away to impose various limitations upon the hostile environment claim. One possible limitation, eventually rejected by the Supreme Court in a nonrace hostile environment case, centered on requiring that the plaintiff demonstrate some measurable harm. Because by definition the hostile environment claim did not result in a tangible employment action, by necessity the required harm was psychological or emotional. See, e.g., *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (6th Cir. 1992) (affirming judgment for employer where harassing conduct did not affect the plaintiff’s psychological well-being), *rev’d*, 510 U.S. 17, 22 (1993) (finding that the district and appellate courts erroneously relied on the element of psychological harm, and noting that “Title

Whereas in *Rogers* the abusiveness of the environment toward the plaintiff-employee stemmed from the employer's discriminatory treatment and classification of the clients of the business, in subsequent cases the abusiveness of the environment often stemmed from pervasive racist expression or conduct in the workplace.³¹⁰ Once courts had held that offensive racial expression and behavior in the workplace could, without more,³¹¹ state a claim under Title VII, it "follow[ed] ineluctably" that a hostile work environment caused by sexual harassment could likewise state a Title VII claim.³¹²

Once the requirement of a tangible harm was discarded, it became necessary to limit in some alternative way the perceived vast sweep of the hostile environment cause of action.³¹³ In the hostile environment situation,

VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct"); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987) (same); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (requiring plaintiff to demonstrate that "sexual harassment . . . seriously [affected her] psychological well-being"); *Downes v. F.A.A.*, 775 F.2d 288, 292-93 (Fed. Cir. 1985) (same). A second limitation, still extant, requires that the harassment have been "unwelcome." *E.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (stating that "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'").

309. *See Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986); *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981); *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980); *Firefighters Inst. for Racial Equal. v. St. Louis*, 549 F.2d 506 (8th Cir. 1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976); *see also Cariddi v. Kan. City Chiefs Football Club Inc.*, 568 F.2d 87 (8th Cir. 1977) (national origin).

310. *E.g.*, *Snell*, 782 F.2d at 1103 (affirming judgment for plaintiffs where workplace evidenced proliferation of demeaning literature and epithets and repeated ethnic slurs, in addition to incident in which Hispanic inmate was humiliated in the presence of Hispanic officer); *Gilbert*, 722 F.2d at 1394 (implicitly accepting that widespread use and official condoning of racial remarks, derogatory epithets, racially-oriented graffiti, and the like could state a claim of hostile environment discrimination, but upholding as not clearly erroneous district court finding that the evidence was insufficient to establish a pattern of harassment in that case); *Johnson*, 646 F.2d at 1257 (holding that "[u]nquestionably, a working environment dominated by racial slurs constitutes a violation of Title VII," but finding in that case that the racial comments were insufficiently frequent, steady, and directed to violate Title VII).

311. This is not to suggest that there are no further requirements for proving a hostile environment claim, but rather that in theory such a claim can stem solely from abusive, insulting, or humiliating words and/or conduct.

312. *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981); *see also Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

313. In one of the earliest cases to consider a claim of sexual harassment, the district court (in)famously expressed the sentiment:

If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once

then, both the race cases and the sex cases have tended to focus on the offensiveness of words or conduct that so permeate the environment as to adversely affect the terms and conditions of the plaintiff's employment.³¹⁴ In the racial context, offensiveness is relatively unambiguous, and courts seem content to perform their "gatekeeper" function with reference to the requirement that the harassment, in order to violate Title VII, be "severe or pervasive."³¹⁵ In the context of harassment based on sex, in contrast, courts have sometimes viewed the question of offensiveness with greater ambivalence.

This ambivalence is potentially two-fold. First, there is the perception that the discriminatory effect of sexual advances, language, and behavior in the workplace depends both on the subjectivity of the victim³¹⁶ and on the

harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.

Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (explaining that Title VII is not to be used as a "general civility code for the American workplace," and that the Court has "never held that workplace harassment . . . is automatically discrimination . . . merely because the words used have sexual content or connotations"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (reiterating that hostile work environment standards must be "sufficiently demanding to ensure that Title VII does not become a 'general civility code'").

314. *See, e.g., Oncale*, 523 U.S. at 81 (noting that Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 827 (6th Cir. 1997) (explaining that "there may be times when offensive comments have an impact in the workplace, indeed constitute 'harassment,' but do not create an objectively hostile work environment").

315. *E.g., Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986) (a few instances of racial slurs being uttered not severe or pervasive); *Fortenberry v. United Airlines*, 28 F. Supp. 2d 492 (N.D. Ill. 1998) (insulting racial terms did not rise to the level of a hostile environment claim); *Harris v. SmithKline Beecham*, 27 F. Supp. 2d 569 (E.D. Pa. 1998) (racial comment made to African-American plaintiff by her supervisor was not severe).

316. To prevail on a hostile environment claim, the plaintiff must prove that the complained-of conduct was both objectively and subjectively hostile or abusive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993). The subjective component involves an inquiry into whether the particular plaintiff in fact "subjectively perceive[d] the environment to be abusive," because if she did not, then "the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id.* at 22–23. The objective element, however, has not been uniformly applied by the federal circuit and district courts. Some courts focus on whether alleged harassment would be viewed as abusive by a "reasonable person." *See, e.g., Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir. 1999) (applying a "reasonable person" standard); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995) (same); *Hirschfeld v. N.M. Corr. Dep't*, 916 F.2d 572, 580 (10th Cir. 1990) (same); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1317 (11th Cir. 1989) (same);

manner in which she has projected her subjective reaction.³¹⁷ Identical sexualized conduct might constitute harassment in one context and might be perfectly appropriate in another, according to this reasoning.³¹⁸ Second, even assuming that the plaintiff is subjectively offended and that the conduct is “unwelcome,” it is possible that social norms that disapprove of racial bigotry operate more strongly than parallel norms against offensive sexual language and conduct.³¹⁹

Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (same); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 414 (7th Cir. 1989) (same). Other courts have tailored the inquiry further still, employing a “reasonable woman” or “reasonable minority” standard. *See, e.g.*, *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993) (applying a “reasonable woman” standard); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (same); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482, 1486 (3d Cir. 1990) (same); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (same); *Stingley v. Stare*, 796 F. Supp. 424, 428 (D. Ariz. 1992) (applying a “reasonable person of the same gender and race or color” standard); *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991), *vacated in part by* 765 F. Supp. 1529 (D. Me. 1991) (applying a “reasonable black person” standard). There has also been much debate among academics concerning the appropriate reasonableness benchmark. *See, e.g.*, Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177, 1214–1233 (1990); Saba Ashraf, *The Reasonableness of the “Reasonable Woman” Standard: An Evaluation of its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483 (1992); Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195 (2001).

317. I refer here to the requirement that the plaintiff demonstrate that the sexual conduct was “unwelcome.” *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (stating that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’”)(citing 29 C.F.R. § 1604.11(a) (1985)). This requirement has been criticized as importing into sex discrimination law the same myths and sexual stereotypes that have long plagued the law of rape. *See Estrich, supra* note 267, at 826–34.

318. Indeed, this is the central tension in the law of rape. *Cf. Estrich, supra* note 315 (describing the myriad of ways in which the sexual harassment doctrine replicates the male-biased assumptions in the law of rape). In noting the disanalogy to race, Professor Hébert has pointed out that it “is difficult to imagine the Supreme Court” imposing an unwelcomeness requirement on racially harassing conduct or suggesting that a plaintiff’s demeanor might have invited the harassment. *See L. Camille Hébert, Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 824 (1997). *But see Powell v. Missouri State Hwy. and Transp. Dep’t*, 822 F.2d 798, 801 (8th Cir. 1987) (finding that racially charged language did not rise to the level of actionable harassment where plaintiff participated in banter by calling white coworkers “honky” and “whitey”); *Jones v. First Federal Sav. and Loan Ass’n of Winston-Salem*, 546 F. Supp. 762, 779 (M.D.N.C. 1982) (summary judgement granted in favor of employer where both blacks and whites engaged in sporadic comments and joking, with black employees referring to their white coworkers “soda crackers” and “honkies”); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (seemingly racially offensive terms “were bandied back and forth without apparent hostility or racial animus”).

319. *See Hébert, supra* note 318, at 833 n.54 (“Arguably, the difference is that sexist behavior is perceived as *relatively* more acceptable, or as *relatively* less offensive, than racist behavior . . .”) (quoting Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1396).

Moreover, there is no clear racial analog to the quid pro quo sexual harassment case or to the hostile environment case that is predicated upon unwelcome sexual advances aimed, however inappropriately, at establishing some sort of sexual relationship with the plaintiff.³²⁰ Though the analogies between race (and color, religion, or national origin) and sex are often apt in the hostile environment context, they are nonexistent in the quid pro quo context. There, the sexual nature of the conduct distinguishes it from virtually all other kinds of actionable discrimination.³²¹ In this respect, judicial acceptance of the discriminatory nature of sexually coercive behavior in the workplace emerges as a genuinely radical development.

2. The Feminist Anti-Subordination Argument

In addition to the analogy to hostile racial environment cases, the judicial acceptance of sexual harassment as a violation of Title VII was informed by the radical feminist description of sexuality and power. One of the primary architects of the doctrine, Professor Catharine MacKinnon, has described human sexuality largely as both an expression of, and a mechanism for perpetuating, male domination over women.³²² Though this position was certainly not embraced wholeheartedly by the Supreme Court in *Meritor*, to a large extent its assumptions drove the development of the law of sexual harassment. The paradigmatic sexual harassment case was, and remains,

320. This seems to be one of Justice Thomas's concerns in his dissent in *Ellerth*. *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 766–67 (1998) (Thomas, J., dissenting). He argues that the Court's "rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define" has the result that "employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged." *Id.* Though the dissent does not elaborate, it appears to assume that employer liability for hostile environment claims predicated upon race will continue to be judged under a negligence standard where a tangible employment action has not been shown.

321. Some scholars have criticized Title VII doctrine and theory for taking insufficient account of the ways in which race and sex combine and interrelate in many cases of discrimination. See *Abrams*, *supra* note 94, at 2493–2517; *Harris*, *supra* note 94, at 585–90. The argument that racial harassment and sexual harassment are not analogous across the category of cases in which the harasser is motivated by sexual desire does not imply that race is necessarily (or even potentially) irrelevant in those cases. It implies only that there is no similar "desire" category of cases in a pure racial harassment context.

322. In *Sexual Harassment of Working Women*, Professor MacKinnon defines "sexual harassment" as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another." She goes on to state that sexual harassment is "one dynamic which reinforces and expresses women's traditional and inferior role in the labor force." MACKINNON, *supra* note 189, at 1, 4.

that of a male supervisor abusing his power over subordinate female employees to extort, or attempt to extort, sexual favors.

In *Sexual Harassment of Working Women*, first published in 1979, Professor MacKinnon outlined two broad categories of sexual harassment discrimination. The first, which she labeled “quid pro quo” harassment, was “defined by the more or less explicit exchange: the woman must comply sexually or forfeit an employment benefit.”³²³ However, MacKinnon understood the category broadly to include situations in which the woman complies with the threat.³²⁴ She argued that the injury consisted in “being placed in the position of having to choose between unwanted sex and employment benefits or favorable conditions.”³²⁵

The injury at issue in the quid pro quo case is of a different nature than the harm that results when a person is subject to a working environment suffused with severe or pervasive “intimidation, ridicule, and insult.”³²⁶ According to the Supreme Court, a hostile environment “can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”³²⁷ In addition, the Court has hinted at a kind of dignitary injury³²⁸ separate from these more tangible harms. Holding that a plaintiff could survive summary judgment even absent a showing of “tangible psychological injury,” the Court stated that “the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.”³²⁹ Putting aside the hopelessly circular nature of this reasoning, the impression remains that the injuries that result from being forced to work in a discriminatorily abusive environment are distinct from those that result from being pressured by someone in a relative position of power to engage in a sexual relationship.

323. *Id.* at 32.

324. *See id.* at 32–33.

325. *Id.* at 37.

326. The Court in *Meritor* characterized hostile environment discrimination in these terms. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

327. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

328. For an argument that sexual harassment liability should be evaluated under a “respectful person” standard, see generally Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997–98). Though her article focuses on the standard to be applied to determine whether particular behavior satisfies the objective prong of the “hostile or abusive” element, Professor Bernstein’s analysis treats sexual harassment as a dignitary harm. *Id.* at 509 (“That hostile environment sexual harassment is fundamentally an injury to dignity escapes few who have experienced and studied the phenomenon.”).

329. *Harris*, 510 U.S. at 22.

The EEOC and the Supreme Court have blurred the lines between these conceptually distinct forms of discrimination by referring to both under the rubric “sexual harassment.” In addition, the Supreme Court has narrowed the usefulness of the quid pro quo harassment category by defining it narrowly only to include “threats to retaliate against [a plaintiff] if she denied some sexual liberties” where those “threats are carried out.”³³⁰ In other cases involving attempts to leverage power for sex, the Court applies the label hostile work environment sexual harassment. Thus the Court has coopted these definitional categories to correspond to its formulation of when an employer is entitled to assert an affirmative defense to vicarious liability.³³¹

Quid pro quo harassment as originally defined by MacKinnon is encompassed by the first pattern of behavior analyzed in Part III, in which a harasser attempts to get sex from the victim. Conduct of coworkers that is also aimed at coercing sex is also included in the first category. These are the behaviors with no clear analogue in the race, religion, or national origin contexts. These are the behaviors that are or should be understood as *sexual* as opposed to simply *based on sex*.

Cabining the term “sexual harassment” to quid pro quo situations, broadly understood, would liberate hostile environment harassment from the confusion and ambiguity engendered by the use of the word “sexual” in connection with the pure hostile environment cases. Once the “sexual” in hostile environment harassment is replaced by “sex” or “sexist,” or perhaps “gender,” the misapprehension that sexual behavior is required to create a hostile environment will more easily be dispelled, and the analogy to the hostile racial environment cases will be clear.

A redefinition (or, more accurately, relabeling) of the two broad categories of “harassment on the basis of sex”³³² in this way, roughly tracks

330. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998). The Court’s use of the term corresponds only to the first of several types of quid pro quo harassment as originally defined by MacKinnon. See MACKINNON, *supra* note 189, at 32–40.

331. See *infra* text accompanying notes 344–351.

332. There are two potential problems with insisting that “sexual harassment” be referred to as “harassment on the basis of sex.” First, the phrase “harassment on the basis of sex” is rather awkward; exhorting judges to use a phrase that is both unwieldy and not in common usage seems bound to fail. Yet the virtues of the phrase in the legal context are substantial: it encompasses the causation requirement of Title VII; it tracks more closely the terms used in other categories of discrimination; and it is much less subject to misinterpretation and misapplication. Second, the phrase “sexual harassment” is widely used and understood in the popular culture, and restricting that use is neither desirable nor possible. However any problem posed by this inconsistency is more apparent than real. Even as presently understood, the term “sexual harassment” has different meanings in the popular and legal contexts. See, e.g., Merit Systems Protection Board Report on Sexual Harassment (stating that the definition in the survey

the first two broad classes of cases outlined in Part III. Quid pro quo harassment is behavior designed to “get sex” from the victim; hostile environment harassment on the basis of sex is an aggregation of words and conduct, sexual or not, designed to exclude or control the victim or victims, often through humiliation or fear. The important distinction between the two is not whether the harassment includes sexually-explicit or suggestive words or conduct. Rather, the more useful line is between behavior designed to solicit or coerce sex and that designed to humiliate, demean, or expel a person because of that person’s sex or sex role signaling.³³³ That sexually explicit language or conduct might be used in the latter context is relevant only because it is a common strategy of harassment. And while commentators frequently wonder why women are on average more offended than men by sexually explicit words and conduct,³³⁴ it is

of “sexual harassment” is different from the legal definition); *see also* sources cited *supra* note 194.

333. *Cf.* Fremling & Posner, *supra* note 4, at 1080–1101 (explaining the harm of sexual harassment as primarily a status offense). These authors focus on the economic and evolutionary explanations for “status signaling” behavior in males and females, and argue that much sexual solicitation is offensive to females because it suggests that they are of lower status than they actually are or believe themselves to be. At times the authors sound like they inhabit an alternate universe. “[E]ven if the solicitation is private and others are not aware, the woman’s self-esteem will still be damaged because she will realize that at least one man doubts whether she is really a high-status woman.” *Id.* at 1082. And “in deciding whether to permit nude pinups in the workplace, the employer would trade off the costs to its female employees (who would insist on being compensated through higher wages) against the benefits to its male employees, who would accept lower wages.” *Id.* at 1088. Nonetheless, their focus on signaling as an evolutionary strategy is instructive. Humans signal not only status, but also gender; status-enforcing norms operate alongside gender-enforcing norms.

334. Studies have shown that women are more offended by sexually explicit words and by “curse” words than are men; there is also one intriguing study in which, when people were told to role-play opposite gender roles, women imagining they were men rated the words as less offensive than women-as-women. *See* JAY, *supra* note 184, at 186–88. Some feminists have argued that the protectionist tendency of Title VII case law that assumes that sexually-explicit language or a sexually-charged atmosphere is more offensive to women than to men is itself sexist and reinforces harmful “repronormal” social stereotypes of women. *See* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 201 (2001)

I wonder if an intergenerational moment might have arrived when we would want to de-sacrilize the sex-danger alchemy within feminist legal theory— not to ignore the significance of sexual violence for women, but instead to de-essentialize sex’s a priori status as a site of danger for women and one best cleansed of such danger.

Id.; *cf.* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS 247–64 (1995) (arguing that censorship of pornography on the ground that it harms women actually works to undermine women’s equality and autonomy).

nonetheless not uncommon for men to be harassed by this method as well.³³⁵

C. The Causation Spandrel: Whose Intention Counts?

The “because of” language in the text of Section 702 of Title VII, combined with an ideological schema that tends generally to locate discrimination in notions of individual fault and wrongful motives,³³⁶ has resulted in an unfortunate focus in hostile environment sex discrimination cases upon the intentions and motivations of individual harassers. This preoccupation with the fault of the individual harasser is a third legal spandrel in sexual harassment law. In fact, individual fault is at best a neutral byproduct of the doctrine; insofar as it is relevant to liability, it should be presumed wherever the harassment fits one of the three broad patterns described in Part IV, and knowledge that such behaviors occur “because of . . . sex” should be imputed to the employer—the relevant causal actor under Title VII.

There are several reasons that a focus on intent is especially problematic in hostile environment cases. First, though it is the employer who is liable to

335. *E.g.*, *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998) (deciding a same-sex harassment suit claiming former supervisors and coworkers called plaintiff names with homosexual overtones); *King v. Super Serv., Inc.*, 68 Fed. Appx. 659, 660 (6th Cir. 2003) (unpublished opinion) (entertaining but rejecting same-sex harassment claim); *Davis v. Coastal Int’l Sec., Inc.*, 275 F.3d 1119, 1121 (D.C. Cir. 2002) (deciding a same-sex harassment suit alleging that coworkers grabbed plaintiff’s crotch, made kissing gestures, and requested oral sex); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2000) (extending protection in same-sex cases to pure gender stereotyping by holding that “a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”); *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1378 (8th Cir. 1996) (acknowledging same-sex cause of action); *Hampel v. Food Ingredients Specialties, Inc.*, 729 N.E.2d 726, 729 (Ohio 2000) (considering action of plaintiff’s alleged same-sex harassment involving his supervisor’s request for oral sex).

336. *See also* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978) (proposing a “victim perspective” as a replacement of the perpetrator centered model). *See generally* Krieger, *supra* note 96 (describing the prevailing discrimination paradigm as one premised upon notions of evil intent, and arguing instead for an understanding of much discrimination as resulting from a morally neutral cognitive bias); Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1411–12 (1990) (describing, as the “dominant” view in American antidiscrimination jurisprudence, “the ‘perpetrator’ perspective,” which is concerned with “eradicating the behaviors of” those who have acted with “individual badness”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that unconscious discrimination is widespread and should be recognized as actionable).

the plaintiff under Title VII³³⁷ for maintaining or failing to correct an abusive working environment that is “severe or pervasive,” the actual behavior upon which liability is premised is nearly always that of coworkers or supervisors. Indeed, the “employer” is most often a corporate entity rather than a physical person. Thus, any inquiry into the discriminatory motive or intent behind the actual harassment is necessarily one step removed from the defendant in the case.³³⁸ Second, one or a few isolated instances of harassment generally do not rise to the level of actionable hostile work environment abuse.³³⁹ Instead, in order to be considered “severe or pervasive” and therefore discriminatory, conduct or abusive language must usually span a significant period of time and be comprised of numerous incidents.³⁴⁰ Often, the abusive environment is the result of the actions of several different persons in the workplace.³⁴¹ Under these

337. See 42 U.S.C. § 2000e(b) (2003) (stating that “an employer is a ‘person’ with 15 or more employees”); *Newsome v. Admin. Office of the Courts*, 51 Fed. Appx. 76 (3d Cir. 2002) (unpublished opinion); *Smith v. Amedisys, Inc.*, 298 F.3d 434, 448 (5th Cir. 2002) (finding no individual liability under Title VII); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 262 (5th Cir. 1999) (holding that Title VII extension of liability to agents of employer was intended to incorporate the theory of respondeat superior, not to impose liability on individuals).

338. Cf. *White & Krieger*, *supra* note 265, at 1195 (making a parallel argument in the context of challenged employment actions).

339. *E.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (stating that “offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment’”); *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 463 (7th Cir. 2002) (holding that isolated incidents may not constitute sexual harassment); *Brennan v. Metro. Opera Ass’n*, 192 F.3d 310, 318 (2d Cir. 1999) (holding that “[i]solated, minor acts or occasional episodes do not warrant relief”); *King v. Bd. of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (explaining that “generally, repeated incidents create a stronger claim of hostile environment” than single incidents); *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1381 (S.D. Ga. 2001) (noting that “merely inserting . . . [a] rude or sexualized comment/gesture/joke into a lengthy list [of discussions] accumulated over years of employment does not . . . a Title VII claim make”); *Jones v. Clinton*, 990 F. Supp. 657, 675–76 (E.D. Ark. 1998) (finding a single, albeit notorious, incident of harassment insufficiently severe to constitute a hostile environment). *But see Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (stating that “even a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive work environment for purposes of Title VII liability”).

340. In *Meritor* and subsequent cases, the Supreme Court articulated the standard using the disjunctive “or.” 477 U.S. at 67. However, courts applying the “severe or pervasive” standard have generally found that a single or small number of incidents do not satisfy the requirement, unless that incident is especially heinous (for example rape or serious sexual assault). *Id.*

341. Indeed, it is precisely this aspect of the law that is troubling to those scholars who argue that current Title VII hostile environment doctrine raises First Amendment concerns. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII’s Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563 (2001); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment*

circumstances, the issue of the intent of the various actors whose behavior has contributed to the hostile environment becomes problematic.

Individual harassers are not liable for sexual harassment under Title VII. Though some courts in the past questioned this proposition,³⁴² the overwhelming weight of authority now holds that it is the employer only that is liable under the statute.³⁴³ The question becomes, therefore, whether the employer is liable vicariously for the discriminatory intent of the harassing employees, or rather whether the employer is liable for its own discriminatory intent. If the latter, then the issue of the motivation of the harasser or harassers takes on a different and less critical role.

In the hostile environment context, the test for employer liability differs depending upon whether the harassment is carried out by a supervisor or by coemployees. Where a supervisor sexually harasses a subordinate, the employer is liable for the acts of its supervisory employees according to agency principles of vicarious liability.³⁴⁴ As outlined by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*,³⁴⁵ agency principles require that an employer be strictly liable for “an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the

Cases, 90 NW. U. L. REV. 1009 (1996); Volokh, *supra* note 270, at 627. Professor Volokh points out that offensive words which in themselves do not constitute a violation of Title VII can, when considered in combination with other isolated offenses, become actionable. Thus, employers have a strong incentive to censor all employee speech that might possibly count as a piece of a larger hostile environment puzzle. *Id.* at 638–40.

342. See *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *rev'd in part and aff'd in relevant part*, 900 F.2d 27 (4th Cir. 1990) (en banc); *Goodstein v. Bombardier Capital, Inc.*, 889 F. Supp. 760, 763–65 (D. Vt. 1995).

343. See *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1316 (2d Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995); *Smith v. Lomax*, 45 F.3d 402, 403 (11th Cir. 1995); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Grant v. Lone Star Co.*, 21 F.3d 649, 651–53 (5th Cir. 1993), *cert. denied*, 513 U.S. 1015 (1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991). For a recent article which criticizes this trend and argues that individual supervisors should be liable for harassment, see Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 9, 74 (2003).

344. Courts have relied upon agency principles to justify the imposition of vicarious employer liability in hostile work environment cases: employers provide supervisory employees with the authority to make decisions affecting the terms and conditions of employment, and the employer is therefore responsible for the supervisor's harassing behavior when it alters those terms and conditions. See, e.g., *Meritor*, 477 U.S. at 72 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219–37 (1958)); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–91 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759–60 (1998).

345. 524 U.S. 742 (1998).

employee.”³⁴⁶ This employer liability is absolute in cases in which a “tangible employment action”³⁴⁷ has been taken, but it is subject to an affirmative defense in other cases. To prevail on the affirmative defense, the employer must demonstrate: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁴⁸

Compare this defense to the standard of employer liability in cases of coworker (nonsupervisor) harassment: In those cases, an employer is not vicariously liable for the acts of its employees but only for its own actions according to a negligence standard. Thus, “[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.”³⁴⁹ It is apparent that, in hostile environment harassment cases (in which, by definition, no tangible employment action has been taken), there is no substantive difference in the standard of liability by which the employer defendant is judged. The questions whether the

346. *Id.* at 765.

347. In the 2004 term, the Supreme Court resolved an issue that had divided the federal circuits: whether a constructive discharge is a “tangible employment action” such that it prevents the employer from relying on the affirmative defense. *Penn. State Police v. Suders*, 124 S. Ct. 2342, 2550 (2004); *see also* *Robinson v. Sappington*, 351 F.3d 317, 336–37 (7th Cir. 2003) (holding that a constructive discharge qualifies as a tangible employment action only where the action was effected by the official act of a supervisory employee); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003) (same); *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *cert. granted*, 504 U.S. 1040 (2003); *Jaros v. LodgeNet Entm’t Corp.*, 294 F.3d 960 (8th Cir. 2002) (holding that a constructive discharge constitutes a tangible employment action and thus bars the affirmative defense); *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 WL 924599, at *1 (6th Cir. June 26, 2000) (unpublished decision) (holding that a constructive discharge does not constitute a tangible employment action and thus does not prevent the defendant from asserting the affirmative defense); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294–95 (2d Cir. 1999), *cert. denied*, 529 U.S. 1197 (2000) (same). In *Suders*, the Supreme Court held that a constructive discharge is not a tangible employment action for purposes of the availability of the *Ellerth/Faragher* affirmative defense except in cases in which that action is effectuated by a supervisor’s official act. 124 S. Ct. at 2344, 2355–56.

348. *Ellerth*, 524 U.S. at 765. Though this defense is framed in the conjunctive, it has sometimes been applied in the alternative. *See* Grossman, *supra* note 341, at 8 n.23 (discussing cases in which courts have eliminated the second prong of the defense).

349. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1257 (11th Cir. 2003) (to face liability, employer must have had notice of the harassment and failed to remedy the problem); *Ellerth*, 524 U.S. at 759; *see also* *Courtney v. Landair Transp., Inc.*, 227 F.3d 559, 564 (6th Cir. 2000) (the master-servant relationship does not apply in coworker cases; rather a negligence standard applies); 29 C.F.R. § 1604.11(d) (2003) (“With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”).

employer “exercised reasonable care to prevent and correct promptly” the harassing behavior on the one hand, or “knew or should have known about the conduct and failed to stop it” on the other, are essentially the same. The practical difference, then, lies in which party bears the burden of proof in demonstrating the employer’s reasonableness or lack thereof.

The substantive issue that underlies the question whether an employer is liable for a hostile environment created by its employees, whether supervisory or not, is the reasonableness of the *employer’s* conduct in the particular case. Under these circumstances, it makes little sense to inquire very far, if at all, into the subjective intent of the individual harasser or harassers. The subjective intent of the harasser should play a lesser role because it is the reasonableness of the *employer’s* conduct that is at issue. Even where the employer acts through its employees, its liability depends on its actions taken in response to the creation of the hostile environment (or to prevent it), and not on its actions as taken by the harassing employees.³⁵⁰ Under these circumstances, it is both reasonable and fair to charge employers with the knowledge³⁵¹ that the patterns of behaviors generally involved in hostile environment harassment cases, as outlined in Part IV, occur “because of . . . sex” as required by Title VII.

A focus on the reasonableness of the employer’s response to hostile environment harassment also makes much sense in those cases in which the hostile environment is created by the combined effect of the conduct of multiple employees. It would be difficult, and would entail engaging in a legal fiction in any event, to attempt to discern some “collective” intent for a hostile environment created in this way.³⁵² As courts have repeatedly

350. The exception to this analysis is the “pure” quid pro quo case in which a supervisor takes a tangible job action based upon the employee’s acceptance or rejection of a sexual quid pro quo. There one might argue that the intention of the individual supervisor is itself quite relevant. It is precisely these cases, however, in which evolution theory most clearly demonstrates that the harasser’s behavior is driven by the sex of the victim.

351. In his opinion in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), decided on the same day as *Ellerth*, Justice Souter engaged in a remarkably candid discussion of the reasons for vicarious liability of employers for harmful acts of their agents. The opinion states, “In the instances in which there is a genuine question about the employer’s responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law.” *Id.* at 796. Thus, in determining the scope of employer liability for harassing conduct, the court should evaluate “the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor’s employment, and the reasons for the opposite view.” *Id.* at 797.

352. Several commentators have considered the nature of the “because of” element of Title VII. The issue is generally framed as an inquiry into whether Title VII requires a conscious motivation to treat members of a protected class differently, or rather whether some degree of causation-in-fact is all that is required. See Robert W. Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards*

emphasized, a hostile working environment may arise out of an amalgam of individual words and actions, any one of which might be unfortunate or obnoxious or offensive, but not itself actionable under Title VII.³⁵³ Under these circumstances, it is much more useful to answer the question of discriminatory intent by virtue of the conduct of the defendant-employer.

Cove, 64 TUL. L. REV. 1359, 1383–84 (1990) (discussing the differential aims of judicial inquiries into causation and intent in Title VII hostile work environment cases); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 52 (1991) (suggesting that courts have found the causation model to be an “unsatisfactory formulation” of the plaintiff’s burden of proof, and that courts have consequently “been left free to fall back on a purely intuitive sense of what evidence establishes a sufficient causal nexus between motive and act”); George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL’Y & L. 43, 48–49 (1993) (explaining that Title VII’s “because of” language actually refers to an employer’s course of action “based on” a prohibited characteristic, and that courts and commentators have erroneously conflated this requirement with an inquiry into the employer’s subjective intent). Professor Linda Krieger and others have argued persuasively that differential treatment of racial or ethnic minorities or of women can be based upon unconscious or unintentional cognitive processes and that factual or but-for causation is therefore a more appropriate inquiry under Title VII. Krieger, *supra* note 96; Lawrence, *supra* note 336; McGinley, *supra* note 265. As to the nature of the causation standard, many scholars advocate a “but/for” approach. *See id.* at 419 (insisting that Title VII’s “proof mechanisms serve the role of determining causation rather than conscious intent, assuring that the underlying employment decision is made because of the employee’s protected characteristic, either with or without the employer’s conscious awareness”) (emphasis omitted); Jeffrey A. Van Detta, “*Le Roi Est Mort; Vive Le Roi!*”: *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa Into a “Mixed-Motives” Case*, 52 DRAKE L. REV. 71, 93–94 (2003) (arguing that Title VII’s “because of” language mandates a consideration of “but/for” causation rather than “intent,” because the requisite intent is “always outlying, lurking in the background in our discriminating society”). The statutory and judicial approaches to the “mixed-motives” scenario tend to support the argument in favor of a but-for approach to causation, at least in cases involving tangible employment decisions. In a mixed motives case, the plaintiff claims that a discriminatory purpose was part of the motivation for a particular employment decision, though other legitimate motives were also present. The 1993 amendment to Title VII codified the mixed motive claim and provided for an affirmative defense. 42 U.S.C. § 2000e-2(m) (2000). If the plaintiff demonstrates that a discriminatory motive entered into the employment decision, the employer then has an opportunity to defend against the claim by demonstrating that the decision would have been the same even absent the improper motive. 42 U.S.C. § 2000e-5(g)(2)(B)(ii). The Supreme Court recently held that the plaintiff can satisfy its burden of demonstrating that an unlawful motive entered into the decision-making process wholly with circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003).

353. *E.g.*, *Faragher*, 524 U.S. at 788; *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (holding that verbal harassment standing alone is not enough to create an abusive working environment; rather, incidents of harassment must occur in concert or with a regularity that can be reasonably termed pervasive); *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986) (requiring evidence of more than just “a few isolated incidents of racial enmity”). *See generally* Volokh, *supra* note 270, at 647 (arguing that isolated instances of harassment by many persons may, in the aggregate, be severe and pervasive).

In *Davis v. Monroe County Board of Education*,³⁵⁴ the Supreme Court confronted an analytically identical issue.³⁵⁵ There, a student alleged that she had been sexually harassed by another student, and she attempted to hold the school board liable for its failure to remedy the situation in the face of repeated complaints and requests.³⁵⁶ The Court stated: “We disagree with respondents’ assertion . . . that petitioner seeks to hold the Board liable for [the harasser’s] actions instead of its own. Here, petitioner attempts to hold the Board liable for its own decision to remain idle in the face of known student-on-student harassment in its schools.”³⁵⁷ Without examining the specific intent of the child whose behavior was alleged to have created the abusive environment, the Court assumed that the harassment, if severe and pervasive so as to compromise the victim’s equal access to an educational program or activity, would be actionable and that the school board would be liable for its deliberate indifference to the harassment.³⁵⁸

Similarly, in sex discrimination cases that fall within one of the behavior patterns outlined in Part III, which based on evolutionary analysis generally occur because of both the sex of the harasser and the sex of the victim, the causation element of section 703 should be presumed satisfied insofar as the intent of the individual harasser is concerned. This is because, on a systemic level, these types of behavior occur because of sex and the employer should be held to this knowledge when the reasonableness of its own behavior is evaluated.³⁵⁹ Insofar as both Congress and the Supreme Court have made

354. 526 U.S. 629 (1999).

355. In *Davis*, the claim was brought under Title IX rather than Title VII. *Id.* at 632–33. Thus, the standard by which the defendant was potentially liable for its failure to prevent or remedy the severe student-on-student harassment alleged was different from the negligence standard applicable under Title VII. Under Title IX, the appropriate inquiry is whether the funding recipient has acted with “deliberate indifference.” See *Bryant v. Indep. Sch. Dist.*, 334 F.3d 928, 934 (10th Cir. 2003) (setting a standard to be deliberate indifference for harassment); *C.R.K. v. U.S.D. 260*, 176 F. Supp. 2d 1145, 1163 (D. Kan. 2001) (finding school not deliberately indifferent, therefore not liable for harassment). The majority in *Davis* explicitly drew on Title VII sexual harassment cases in its discussion. 526 U.S. at 651 (citing *Oncale*, 523 U.S. at 75 and *Meritor*, 477 U.S. at 57).

356. *Davis*, 526 U.S. at 641.

357. *Id.*

358. See *id.* at 648–53.

359. A burden-shifting scheme similar to that employed in the pretext cases might usefully be employed in hostile environment cases in which the employer wishes to assert that, despite the general pattern, the conduct in the particular case was not based on the plaintiff’s sex. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973). This approach, consistent with the vicarious liability formulation of *Ellerth* and *Faragher*, would place upon the defendant the burden of demonstrating that harassing behavior was not based on the sex of the plaintiff, once the plaintiff had offered prima facie evidence that that the behavior was based upon her sex. This prima facie case would be satisfied by evidence that the conduct fell within

clear that prevention and deterrence are of primary importance in the Title VII statutory scheme,³⁶⁰ such an approach would shift the focus of the analysis from the spandrel of individual blameworthiness to the functional doctrinal element of sex-based discrimination and harm.

VI. CONCLUSION

Evolutionary theory has the potential to aid understanding of various legal issues both from a metaphorical standpoint and as a tool for understanding broad patterns of human behavior. As metaphor, the concept of evolutionary spandrels highlights the tendency of functionally more marginal doctrinal elements to assume heightened importance in the minds of judges and scholars. In this way, the spandrels come to be viewed as central to the doctrinal structure when in fact they should more properly be seen as peripheral. The complex development of Title VII sexual harassment law has resulted in several of these doctrinal spandrels: a focus on the sexual character of the harassing behavior rather than on the functional motives of the harasser(s); an attempt to hold racial and sexual harassment doctrine consistent over the broad sweep of discrimination cases; and an undue focus on the intent and blameworthiness of individual harassers rather than on the employer's actions in preventing and addressing reasonably foreseeable harassment based on sex. Both doctrine and theory would be well-served by an effort to refocus the inquiry upon the more central, functional, and weight-bearing elements of sexual harassment doctrine.

In the arena of sex discrimination law, evolutionary analysis as a substantive means of understanding patterns of human behavior has been utilized primarily by scholars who argue that Title VII is misguided. However, evolutionary understandings of the behaviors often seen in harassment cases suggest that these patterns of behavior are based upon the sex of the victim and thus satisfy the "because of . . . sex" requirement of Title VII. Insofar as evolutionary analysis of gender difference has been employed by those who would criticize laws that prohibit sexual harassment in the workplace, it is entirely appropriate to ask whether such evolutionary theory might in fact support a feminist conception of sexual harassment. An

one of the patterns understood by evolutionary theory to be generally based upon the sex of the victim.

360. See, e.g., *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (stating that "[Title VII's] 'primary objective' is 'a prophylactic one,'" and that "it aims, chiefly, 'not to provide redress but to avoid harm'") (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

evolutionary perspective on harassing behaviors in the workplace suggests that the broad patterns seen in typical harassment cases occur, on a systemic level, because of the victim's sex. Thus, where such patterns are present, employers should be presumed to know that such conduct is discriminatory on the basis of sex. A standard of reasonableness would therefore require an employer, the only party liable under Title VII, to take steps to prevent and correct those environments likely to bring about the harassing behaviors seen in the typical classes of cases analyzed herein.

This approach neither excuses harassment by individuals nor suggests that sexual harassment is inevitable because the behavior is somehow genetically determined. Rather, it recognizes that certain work environments are more likely, on average, to give rise to socially harmful and discriminatory patterns of behavior. Furthermore, it illuminates the manner in which sexual harassment tends to constrain female autonomy and to restrict access to resources in order to constrict female agency and choice. This recognition, in turn, puts the onus on employers to be proactive in deterring and preventing such presumptively discriminatory behaviors. Scientific study of male/female difference will no doubt continue whether legal feminists embrace or reject it. But if evolutionary analysis can help to accomplish the goals of reducing workplace sexual harassment and promoting female autonomy, surely it merits serious discussion. At the very least, it is incumbent upon those scholars who have employed evolutionary analysis for the purpose of criticizing sexual harassment law to consider that evolutionary theory might in fact illuminate the discriminatory nature of typical workplace harassment behaviors. Even better, perhaps engagement across these issues will create a dialogue that could bridge gaps between feminists and evolutionary psychologists and carry the debate forward as science continues to add to our understandings of human behavior.