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ARTICLE: **LET ME HOLLER** AT YOU: AFRICAN-AMERICAN CULTURE, POSTMODERN FEMINISM, AND REVISITING THE LAW OF SEXUAL HARASSMENT

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SUMMARY:

... It has also challenged accepted norms in second wave feminist thought about sexuality, with third wavers critiquing second wavers for what they view as sexual conservatism, leading to expanded perspectives on sexual and domestic relations. ... Moreover, we should ask, given third wave feminist concerns with asserting female sexual agency, and their rejection of what has been deemed the Victorianism or sexual conservatism of second wavers, how might the "cultural" sexual banter argument get new teeth in this moment? Third wavers generally reject second wave absolutes, such as Catharine MacKinnon and Susan Brownmiller's arguments that sexual behavior in the workplace are necessarily instances of discrimination against women and exercises of power. While it is without question that much sexual harassment falls under that category, not all sexual behavior in the workplace (or school, or street) is fundamentally oppressive under third wave, and this author's own, analysis. ... This section continues the discussion of race, culture and sexual harassment law through the specific lens of the social practice of "hollering." ... Just as women are subjects of patriarchy in public spaces, the poor and people of color and subject to class and race based hierarchies in the context of public space. ...

TEXT:

[*111] INTRODUCTION

Third Wave (or postmodern) Feminism has changed priorities in the feminist movement. ⁿ¹ It has called for a shift in demographic orientation to more centrally consider the experiences of poor women, lesbian women, and women of color. It has also challenged accepted norms in second wave feminist thought about sexuality, with third wavers critiquing second wavers for what they view as sexual conservatism, ⁿ² leading to expanded perspectives on sexual and domestic relations. ⁿ³ Feminist *legal* scholarship, however, has yet to fully theorize the impact of third wave feminism on its projects. One way to begin this task is to revisit issues that were central to an earlier generation of feminist legal scholars, and consider how an analysis in light of third wave concerns might impact conventional wisdom. This essay takes on that project with respect to sexual harassment. Specifically, it considers whether an analysis of "hollering" at a woman, a practice in African-American communities in which men verbally approach women to indicate sexual interest, offers insight into how we should understand sexual harassment both legally and culturally.

In this essay I talk about what an analysis of "hollering" brings both to environments in which sexual harassment law applies, as well as to public spaces where speech is virtually unregulated. This brings together discussions of "street harassment,"ⁿ⁴ with discussions of workplace and school-based harassment. This multi-environment analysis is appropriate because hollering is not identical to [*112] catcalling, which is almost purely the province of street harassment.ⁿ⁵ Hollering is an effort to make a sexual or romantic connection with a woman who isn't known or well known to the speaker. It is therefore not identical to a party making objectifying comments without the expectation of a response. But at the same time, "hollering" may be unwanted, abusive, or harassing, and is thus not always playful banter between the sexes.ⁿ⁶

This article also focuses on heterosexual male to female approaches.ⁿ⁷ The fact that female to male hollering is less common than male to female hollering is a function of gender culture in African-American communities and in the United States more generally. Women approaching men to express sexual interest still only occurs on narrow and strictly circumscribed grounds even decades after the feminist movement. This is worthy of further analysis elsewhere. Similarly, hollering amongst gay and lesbian people, and between gay and straight people is an important area for examination, particularly given episodes in which violent heterosexist responses have been meted out against gay people expressing interest in straight people,ⁿ⁸ or against gay people thwarting the advances and abuses of straight people.ⁿ⁹ While this essay does not delve into those subjects, they are essential for the further development of the ideas in this essay.

Imagine an attractive African-American woman walking along a crowded city street on a summer afternoon. She passes a group of young black men. One of them calls to her, "Can I holler at you for a minute?" then enlists his friend's approval, "Damn, she's fine!" This interaction is repeated in U.S. cities many times each day. For some women who receive this attention, it is experienced as friendly or flattering. Others deem it vulgar. For some it is appreciated, for others it is offensive or scary.ⁿ¹⁰ The men who holler clearly have many different characters, affects, and attitudes. But without question, being "hollered at" in this [*113] way, is a commonplace in the lives of African-American women. The phenomenon is described by some critics as a form of sexual harassment,ⁿ¹¹ often "street harassment," and by others as innocent sexual banter.ⁿ¹² Between these two descriptions, there is a complex landscape which offers insights about the boundaries of sexual harassment law.

One of the benefits of thinking about hollering in the context of sexual harassment law is that it complicates the analysis. Hollering is not objectively wrong like rape, or other physical violence and battery, and yet it may very well constitute an unwanted sexual advance or a form of bullying. It is also at times a pre-cursor to violent acts.ⁿ¹³ That it cuts both ways--positive and negative--puts it in a category with the most complicated facets of gender relations, the ones which are most challenging to regulate appropriately, those rife with ambivalence and negotiation. The analysis is further complicated by race and "culture" as elements in the practice. I begin this essay by outlining the evolution and limitations of traditional sexual harassment doctrine. Second, I examine the role that race has played in the increased visibility of sexual harassment law in the national consciousness. Third, I examine the impact of race-based assumptions about behavior on this increasingly visible doctrine. Finally, I use the practice of hollering to suggest ways in which our conception of sexual harassment might evolve.

I. SEXUAL HARASSMENT LAW

The basic definition of workplace sexual harassment comes from the United States Equal Employment Opportunity Commission (EEOC).ⁿ¹⁴ "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when" submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.ⁿ¹⁵

According to the EEOC guidelines, if the harasser's conduct is unwelcome, sexual harassment can occur in a variety of circumstances. This includes, but is not limited to, the following: (1) the harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee; (2) the victim as

well as the harasser may be a woman or a man--the [*114] victim does not have to be of the opposite sex; (3) the victim does not have to be the person harassed, but could be anyone affected by the offensive conduct; (4) unlawful sexual harassment may occur without economic injury to or discharge of the victim.

Sexual harassment is federally prohibited in workplaces under Title VII ⁿ¹⁶ and in schools under Title IX of the Civil Rights Act of 1964. ⁿ¹⁷ There are also comparable, or in some cases (i.e. California and Connecticut) more extensive, state statutes to support these federal legal rules. ⁿ¹⁸ Sexual harassment was established as a cause of action through a series of lawsuits. ⁿ¹⁹

As developed from this law, there are two categories for sexual harassment claims: ⁿ²⁰ quid pro quo claims, ⁿ²¹ and hostile work (or school) environment claims. ⁿ²² In the quid pro quo context one generally has to establish that sexual conduct was expected in exchange for some workplace benefit. ⁿ²³ It is sufficient to show a threat of economic loss to prove quid pro quo sexual harassment. ⁿ²⁴ Moreover, establishing the quid pro quo claim may only require a single sexual advance if it is linked to the granting or denial of employee benefits. ⁿ²⁵ Courts have held employers strictly liable for supervisors who have engaged in quid pro quo harassment. ⁿ²⁶ An employee who has submitted to the advance and then changed his or her mind is not precluded from bringing a quid pro quo claim.

Hostile work environment sexual harassment occurs if unwelcome sexual conduct unreasonably interferes with the employee's job performance or creates a hostile, intimidating, or offensive work environment--even if said harassment does not result in tangible or economic job consequences. Employers, supervisors, coworkers, customers, and clients may all create a hostile work environment. Examples of hostile work environment sexual harassment might include: repeated requests for sexual favors; demeaning sexual inquiries and vulgarities; offensive language; other verbal or physical conduct of sexual or degrading nature; sexually offensive, explicit or sexist signs, cartoons, calendars, literature [*115] or photographs displayed in plain view; or offensive and vulgar graffiti.

II. RACE AND SEXUAL HARASSMENT

Black women have figured prominently in the development of sexual harassment law and policy. As Adrienne Davis notes:

Margaret Miller, Paulette Barnes, Diane Williams, and Maxine Mun-ford were among the earliest women to litigate sexual harassment as prohibited sex discrimination. Sandra Bundy brought an important hostile environment claim in 1981, and Mechelle Vinson was the plaintiff in the United States Supreme Court case affirming it as a viable cause of action under Title VII in 1986. ⁿ²⁷

In contrast to what Davis has termed the "[w]hitewashing of feminism," she importantly connects the history of black women's sexual victimization during and after slavery to more contemporary expressions of race and class inequality manifested in the sexual harassment of black women. ⁿ²⁸

Although the most important sexual harassment law was established in 1986 with the Vinson case, national attention did not turn to sexual harassment until 1991, during the confirmation hearings of Supreme Court justice Clarence Thomas. ⁿ²⁹ Anita Hill's accusations of sexual misconduct on Thomas's part when he was her employer at the EEOC were described as sexual harassment. Although public opinion initially swayed in support of Thomas, who termed the inquiries a "high tech lynching" ⁿ³⁰ but was confirmed, it soon shifted in support of Professor Hill. In the 1992 election cycle, women took office in record numbers, and sexual harassment claims multiplied exponentially. ⁿ³¹ According to the Equal Employment Opportunity Commission filings, sexual harassment claims grew from 6,127 in 1991, to 15,342 in 1996, ⁿ³² a likely result of the public nature of those [*116] hearings.

III. HARASSMENT AS CULTURE

In this section I will discuss the intersection of race, culture and sexual harassment law.

The public spectacle of the Clarence Thomas confirmation hearings was embarrassing for many African-Americans precisely because the highly sexualized conversation seemed to coincide with images of African Americans as hypersexual.ⁿ³³ However, it was ironic that black women, who were historically marginalized in the feminist movement, became principal agents for the development of sexual harassment law, and the cultural acceptance of the idea of sexual harassment as a social wrong.

In response, however, there have been authors who defend black men accused of sexual harassment by offering "cultural" explanations for alleged sexual harassment. This defense began with Clarence Thomas.ⁿ³⁴ Orlando Patterson notably argued that even if Thomas had said all the off-color things Hill accused him of, he would hardly have been harassing her, but instead engaged in culturally appropriate sexual banter.ⁿ³⁵ Similarly, sociologist Robert Staples says, "[t]here are cultural differences in how Black men approach Black women, and if that is taken onto a job, then one would not expect Black women to be offended by it, unless it was asked in exchange for a job or promotion."ⁿ³⁶

Cultural explanations of sexual harassment are problematic for several key reasons. First, they presume an intent-based conception of sexual harassment; if conduct is not meant to be harassing, but is rather an innocently pursued culturally acceptable behavior, it should not be deemed harassment. However, sexual harassment is about victimization. Thus, it seems that injury rather than intent should be the basis for evaluating sexual harassment.ⁿ³⁷

Cultural presumptions use a phenotypic or linguistic designation to assume that individuals participate in specific cultural practices, an assumption that may be woefully inaccurate. To make a cultural presumption implies that there is no right to dissent from one's own cultural practices, or that there are no contested cultural practices despite the fact that cultures are dynamic, interactive and [*117] ever-changing. For example, within the black community there may be conflicts about appropriate sex talk that are disregarded by cultural explanations of sexual harassment.ⁿ³⁸ Or, the recipient of the attention could be a black woman who, by virtue of socialization and personal history, is less familiar with African-American courting practices than a white or Latina colleague. Should she be presumed to be familiar with explicit bantering of the style supposedly popular in black communities and therefore prevented from experiencing that interaction as sexual harassment? Might not her sexual orientation, her religion, her age, also be factors in her experience of this interaction? Moreover, who gets to determine cultural rules? If we revisit the foundation of Kimberle Crenshaw's intersectionality theoryⁿ³⁹ and understand that one can be impacted by race, gender, class, and sexual orientation, all at once, then culture--which is comprised of a mix of people with different power relations--should provide no simple refuge from critique or censure whether it is culture writ large or small.ⁿ⁴⁰

In contrast with those who make cultural presumptions, there are those who apply normative conceptions of appropriate sexual interactions without considerations of sub-cultural contexts that might lend themselves to different interpretations. Given that many of the hostile work environment factors are also things that may be culturally determined, such as posters, images or graffiti, there is the potential that forms of black cultural expression might be evaluated more harshly than others, especially in a context in which one is evaluating whether something is "obscene."ⁿ⁴¹ For example, because black men in particular are imagined in this society as hypersexual and predatory there is the danger that an innocent black male might easily be seen as a victimizer for behavior that another man could engage in without alarm.ⁿ⁴² One need only look to the way black men have operated as the poster children for sexism in American popular culture,ⁿ⁴³ despite their relatively small power in American patriarchy, to find this normative approach to sexual harassment a cause for alarm. The resolution of these tensions [*118] in the sexual harassment context is necessarily found somewhere between the voice of the harassed, the action of the harasser, and their surrounding community.

Critical theorist and law professor, Leti VoJpp Joas warned as that "cultural" explanations of bad behavior can often serve to construct people of color as fundamentally deviant and othered.ⁿ⁴⁴ Moreover, they can fail to distinguish between good actors and bad actors in a community by lumping them all as participants in "bad culture." The depiction of men of color as being particularly sexist is often tied to racist conceptions, and the depiction of women of color as wanting or being accustomed to sexual attention that white women would be uncomfortable with also runs the risk of perpetuating racist stereotypes. It is also important to consider how the cultural label serves to exceptionalize certain

populations. ⁿ⁴⁵ All sexually harassing behavior is cultural, as patriarchy and class power are parts of our culture. Culture should not operate as excuse, nor should people of color be exceptionalized as the only people who have gendered culture. If we travel backwards along a slippery slope of understanding culture as excuse, we can imagine that so many of our social transformations--the dismantling of de jure segregation, greater equality for women--could not have occurred.

Critiques of harassing versions of common sexual interactions from within cultural communities are both illuminating and critical to acknowledge as elements of culture. For example, documentary filmmaker Aishah Shahidah Simmons connects hollering to the range of abusive practices that occur intra-racially in the African-American community in her film *No!* ⁿ⁴⁶ In 2000, the New York Puerto Rican Day Parade was marred by a series of sexual assaults. ⁿ⁴⁷ The assumption that "it was the culture" may have led police to ignore the violence being perpetrated against women during that event, many of whom were "of the culture." ⁿ⁴⁸

Moreover, we should ask, given third wave feminist concerns with asserting female sexual agency, ⁿ⁴⁹ and their rejection of what has been deemed the [*119] Victorianism or sexual conservatism of second wavers, how might the "cultural" sexual banter argument get new teeth in this moment? Third wavers generally reject second wave absolutes, such as Catharine MacKinnon and Susan Brownmiller's arguments that sexual behavior in the workplace are necessarily instances of discrimination against women and exercises of power. ⁿ⁵⁰ While it is without question that much sexual harassment falls under that category, not all sexual behavior in the workplace (or school, or street) is fundamentally oppressive under third wave, and this author's own, analysis. Knowing this growing perspective, and at the same time witnessing the revitalization of old forms of sexism in 21st century American culture, we have to be quite deliberate about distinguishing between conduct that is oppressive and that which is not in a contemporary context.

Sexual banter is not only a fact of life, but for many women and men a quite pleasurable one, across cultures. It an important, and potentially valuable, part of our social rituals. The "hollering" of black men is a culturally specific kind of social ritual, distinct but not exceptional. How do we treat "hollering" which for some is harassment and for others welcome, or at times harassment and other times not, given this matrix? The response must be an analysis that is temporal, contextual, and directional.

IV. HOLLERING UNDER THE LAW

This section continues the discussion of race, culture and sexual harassment law through the specific lens of the social practice of "hollering." In light of this discussion I detail three components that should be part of sexual harassment analyses.

While off the cuff street hollering usually does not fit the context that would allow it to even be considered sexual harassment no matter how vulgar ⁿ⁵¹ (although it at times becomes assault) there are plenty of occasions in which hollering falls under the contexts considered in Title VII (employment) and Title IX (education). One obvious context is hollering in school, particularly on the middle school, high school, and collegiate levels. Young men frequently begin hollering at girls, or in other regional lingo "trying to talk to" girls, in early adolescence to test their own attractiveness and to explore their burgeoning sexuality.

It was the case of a black girl, fifth grader LaShonda Davis, brought by her [*120] mother Aurelia, that established that Title IX provides a remedy against schools which fail to curtail student-student sexual harassment. ⁿ⁵² However, it is important to distinguish hollering from the behavior in the Davis case in which a young man was engaged in consistent sexual battery that was going unchecked by teachers and other school officials. ⁿ⁵³

Another place where hollering might venture into sexual harassment territory is the workplace, particularly in sectors of the service economy. Early articles on black women and sexual harassment imagined that harassers would generally be white men, as white men are disproportionately in positions of power. ⁿ⁵⁴ This idea however is short sighted as many individuals in the service economy work in environments that are overwhelmingly people of color

(visit a McDonalds in any major city). Harassers may be colleagues or bosses in this context.

Given that in these workplaces and schools (1) sexual energy will be present, (2) men and women will likely approach each other with sexual interest, and (3) that versions of "hollering" take place there, how should the law determine when that behavior becomes harassing? What insights should we use for thinking about sexual harassment more generally?

A. TEMPORAL CONSIDERATIONS

Imagine a girl in the hallway at high school. A boy says something about her attractiveness. She has several choices at that point. She can ignore him, she can respond negatively, she can respond positively. If the response is negative it has been clearly established that his sexual interest is unwanted. He then has several choices. He can accept that he has been rebuffed and move on, he can be persistent and continue to express his interest, or he can respond with hostility. The response can create a hostile academic environment, not only for the specific girl, but for other people in the environment.

If the girl responds positively to the boy's approach, then we have a potentially satisfying form of social interaction between the boy and girl. ⁿ⁵⁵ The danger with [*121] policies that do not consider the temporal element in the form of the girl's response is that they remove the girl's sexual agency--she does not get a chance to respond (or even engage in her own hollering)--and penalize sexual expression in general. Temporality is an important first prong of a third wave conscious sexual harassment policy. It even has application in what I would term an as yet unrecognized version of quid pro quo harassment because of the if-then structure that might be created to avoid harassment (i.e. if the girl consents then she will no longer be humiliated.)

The hard case appears when the girl ignores the boy. It is possible that she is ignoring him as part of sexual gamesmanship. It is possible that she hasn't heard him. It is possible that she is interested in him but, given the images of good and bad girls, that the girl does not feel comfortable publicly expressing her interest for fear of being labeled easy.

On the other hand, it is possible that she is ignoring him because she is afraid of a backlash against an uttered negative response, because she is intimidated, or because she has learned the best way to deal with unwanted attention is to disregard it. As Max Smith wrote of her own ignoring reaction to such unwanted approaches, "I've found that, unfortunately, it does little or no good at all to engage in a verbal exchange with abusive men." ⁿ⁵⁶

In the *ignoring* scenario the question of victimization is in great part subject to the internal emotional state of the girl, and yet the conditions of possible victimization are created by social norms and an external context, as well as her individual experience. Do we demand that the girl who doesn't want the attention, but is inclined to ignore the boy, speak up in order to establish harassment? If we don't, don't we run the risk of sending inconsistent messages to the young man about how he should or should not be? Isn't learning appropriate sexual behavior a collaborative and community-based process requiring that we all in some way or another "speak up"? These are the sort of questions posed by postmodern feminism. Clearly a temporal analysis is not enough to answer them. There are other dynamic factors that must be evaluated.

B. CONTEXT

It is not sufficient to create an expectation structure about how women and girls respond to sexual advances without establishing norms of safe environments for them to speak up. When schools and workplaces create policies for describing what sexual harassment is, they must be aware of the culture of the institution and the cultures the members of the institution bring with them. They must also promote healthy interactions between community members. This means they must be responsive to how people choose to interact and supportive of human [*122] interactions that relate to a wide range of variables including experience, ethnicity, language. Cultural proficiency is required with respect to both productive and destructive behaviors; institutions should support the former and discourage the latter. In particular, schools, as socializing institutions for the world at large, must educate boys and girls about how to interact as

much as they teach them "what not to say." This is the impetus behind Nan Stein's landmark work, "Flirting or Hurting: A Teacher's Guide to Student-to-Student Sexual Harassment in School."⁵⁷ Educators like Stein understand that students must learn how to be responsive and respectful to individuals and to their environment. They must not ignore the social, cultural and emotional lives of children.

If the first prong of our re-evaluation of sexual harassment would be an attention to temporality and response, where sexual harassment is a possibility only for behaviors engaged in after attention is clearly established as unwanted, then the second prong must be context.

Third wave feminists assert a desire that women be understood as sexual agents. If we want young women to be able to express themselves as sexual agents and to be self-determining, they must be expected to speak up about what they do not want--a goal which is tied to broader feminist projects and perhaps a critical arena for pursuing feminist movement in the 21st century. Moreover, we should not use law to destroy pleasurable mating rituals that may include flirting and pursuit. That is to say, we should imagine ways to protect the possible positive or ambivalent meanings of the ignoring response to a hollering boy, yet provide support to increasing the negative utterance when a negative response is felt on the part of the girl. If she doesn't want to hear it, we must encourage her to tell him so.

Given that there will be contexts in which the ignoring response remains a cover for a negative response even after we encourage girls to "Talk back," we should be able to provide young men with information about how to avoid behaving in ways that are injurious when they intend to be flattering even if the girl does not speak up.

This means that boys and girls (and men and women) should be taught that there are circumstances in which the girl or woman (or boy or man if he is the one subject to the hollering) should not be expected to speak up, because it is unsafe. Below, I have delineated such circumstances.

1. Hostile immediate environment: If the immediate environment appears to be physically threatening then we can presume that the woman who is not interested will not feel comfortable speaking up. This cannot be defined merely by the body of the man however, as his build and features are out of control. However it can be defined by what he does with his body: touching, brushing against her, [*123] blocking her path, particularly if he is with others, all might be deemed elements of a hostile immediate environment.

2. Previous behavior of the young man: If the young man has been witnessed having a hostile or persistent relationship to another young woman who rebuffed his advances, then it is fair for the young woman to assume that he will do the same with her, and therefore she should not be expected to speak up about his unwanted attention.

3. Institutional failures: If the school, workplace, or other institution has failed to protect students who express negative responses to the attention, then the institution has failed in its responsibility to create a context in which young women or women generally can and should be expected to "talk back." This may also be analogized to public spaces which are generally unprotected.

C. DIRECTIONAL CONCERNS

If we understand that raunchiness is part of our social worlds, and work is, despite our best efforts, a social environment, it seems that employers should have some discretion with regards to deciding how much to police behavior that is ambiguous. This discretion should be exercised depending upon questions of directionality, which adds another dimension to our temporal and contextual analysis.

Without question, the quid pro quo sexual harassment is a directionally specific act. Someone does something specific to someone else in an effort to force sexual behavior. The hostile work or school environment may or many not

be directional. I may be in an office in which people are telling dirty jokes every day and making me miserable, but not directing their jokes to me, or I may be in one in which they are trying to provoke me. Directional harassment, that identifies particular individuals for harm, appears as though it should have greater prohibitions and penalties than non-directional harassment. But importantly, it should be possible to infer directionality by difference. For example, if I am the only woman, or black person, or member of a particular religious group, then disregard for my experience as a member of a protected class itself can and should be seen as a basis for inferring a directional harassment.

The vulnerability that is attended to in a directional harassment analysis certainly can and should extend beyond the male/female heterosexual context. It also should not demand literal presence of the victim in every instance. In *Schwapp v. Town of Avon*, the Second Circuit appropriately held that "ten racially-hostile incidents of which [plaintiff] allegedly was aware during his 20-month tenure," only four of which occurred in his presence, were enough to create a potential harassment case.ⁿ⁵⁸ Finally, a directional analysis has two [*124] important valences--the circumstances of the individual person combined with the reality of his or her group membership--which may be more specific than gender or race. This might be gay or lesbian, rape or incest survivor, or other particular sub category of men or women.

On the other hand, if the work or school community is full of behaviors that all sorts of people are comfortable with, but which one individual is not, should that person's individual discomfort be able to trump all sexual behavior or references, regardless of context variables? The answer to that would seem to be clearly no. For example, if one goes to many retail stores in cities you can hear rap music playing in the background. In some cases it is quite explicit. For a person working at that store, should the explicit nature of the music be deemed to create a hostile work environment? In *Slayton v. Ohio Dep't of Youth Services*, a U.S. Court of Appeals upheld a \$ 125,000 damages award based in part on a coworker's playing "misogynistic rap music" and displaying "music videos depict[ing] an array of sexually provocative conduct."ⁿ⁵⁹

In that context, with explicit music playing, does hollering take on a different dimension? It may very well change the dynamic because of the impact of the music's imagery, much in the way that whether an area is dark, or whether there are many men and few women, might affect one's perception of an environment.

Certainly such a context should not be considered a hostile work environment if the complainant never says anything, but what if she does, as in this instance, say something? Should we treat listening to music differently than if one of the employees is reciting explicit lyrics in the earshot of someone who says she doesn't want to hear that? Should it matter if they are "directed" to her? What if other women in the environment want to hear the music or the amateur rapper? In the *Slayton case*, the plaintiff was a correctional officer at a juvenile facility. How does that environment differ from a retail or office environment, and how might different forms of media (music vs. film or photography) be treated differently?

Additionally, it is quite possible that there will be more than one person who is offended by non-directional conduct. While there is a "power in numbers" if multiple people object to certain conduct, and that power in numbers might make it more possible to informally respond to this conduct, it also can provide evidence that this is not merely a matter of individual taste, but conduct that is reasonably identified as harassing. While a second wave analysis might tend to make objective assessments of what constitutes harassing conduct for a hostile work or school environment, it seems as though the contingency, agency, and subjectivity, analyses of third wave feminism, encourage an assessment of this variety of variables: time, context, and direction.

V. NORMS

The line of thinking in this article in some ways departs from norms that were [*125] established as a result of the work of second wave feminists and the impact of sexual harassment law shout how people should be expected to behave. The conventional wisdom has become, just don't say anything sexual. Of course, that wisdom is breached in every city and school every single day. Hence we have an inconsistency that is exacerbated by the growing sexual assertiveness of young women. What is clear is from our analysis is that the initial statement or approach is generally

not appropriate for policing. I would argue that this is the case even for statements that are quite vulgar or explicit (unless they violate other codes of student or employee conduct) precisely because our popular culture, radio, television, film, are so filled with vulgarity that we have inconsistent expectations about sexual behavior if we can hear it all around us, but cannot speak it. Moreover, to accept the third wave feminist rejection of Victorianism means to acknowledge that women as well as men are often fond of vulgarity or explicitness. Hence, the response to hollering is incredibly important. We have to be careful about making assumptions about what women can or cannot, will, or should do in a given context based upon demographic information and instead use a rich assessment of the situation when we are evaluating whether harassment occurred. Likewise, we must be careful in feminist movement about essentializing certain groups of women and making assumptions about their feminist responses or consciousness, even as we are able to further develop feminist thought by looking to the diverse ways women have asserted themselves across cultures and generations. In the history of U.S. feminism, speaking up was a primary form of social protest.ⁿ⁶⁰ But speaking up need not be limited to collective protest, it can be a way of living that is expected and normalized.

This might be seen as a position in full support of the *Faragher/Ellerth* defense in sexual harassment claims, but it is only partly so. The *Faragher/Ellerth*ⁿ⁶¹ defense arises from two Supreme Court decisions holding that in Title VII harassment cases not involving a tangible employment action (such as demotion or termination), an employer may establish a partial or complete defense by showing (a) that the employer exercised reasonable care to prevent and promptly correct any workplace sexual harassment and (b) the plaintiff unreasonably failed to take advantage of the preventative or corrective measures.

The availability of the defense does put a rather explicit burden on the party subject to harassment to speak up. But the speaking up should be interpreted in light of the contextual questions mentioned earlier, such as whether there was [*126] implicit acceptance of such behavior in the workplace or, as well as temporal concerns such as whether availing oneself of procedures would effectively be too late to thwart the injury. *Fallager/Ellerth's* reasonability language (with respect to the plaintiff) implicitly addresses contextual concerns, but only does so in the context of procedural safeguards against harassment, not a broader sense of speaking up. It also does not provide assurances as to the breadth of contextual concerns which does not merely include backlash against whistle-blowing, but also should include things like simple intimidation.

VI. PUBLIC SPACES

The foregoing analysis is largely focused on the legally cognizable arenas in which sexual harassment occurs. However, arguably the majority of sexually harassing behaviors occur in public spaces if only because it is largely unregulated. We learn a great deal about social roles and identities through our experiences in public spaces, and therefore the rules either formal or informal about public spaces are extremely important. As Laura Beth Nielsen writes:

Offensive public speech is a compelling context in which to explore legal consciousness. Because the nature of race- and gender-based street speech is central to personal identity, offensive public speech is personally significant to those who are routinely made its targets. And, offensive public speech connects, reinforces, and perpetuates existing hierarchies of race and gender. Moreover, law is implicated in such speech. If the law protects such speech, it grants a license to the practice. But targets of offensive remarks might also look to law as a tool for rectifying these problems, making law fundamental in constructing this aspect of social life.ⁿ⁶²

Even if we know that public harassment is not likely to become a cause of action, it is still worthwhile to consider whether it should be and if so how, and what factors should become part of our analysis. Feminist critics of street harassment have argued that women are expected to submit to an ongoing threat of violence in public spaces because street harassment has been normalized.ⁿ⁶³

But in the context of hollering we have a significant complication to this idea. Holler-ers or their demographic are often members of a vulnerable population in urban communities. For example, in Amanda Glasbeek's article *My Wife*

has Endured a Torrent of Abuse: Gender, Safety and Anti-Squeegee Discourses in Toronto 1998-2000, she describes the gender safety discourse of the neo-liberal anti-squeegee efforts in Toronto as being appropriated for the purposes of anti-poor legislation. The victimized women, imagined as middle and upper class [*127] ladies were subjected to the "assaults" of the poor and disorderly. This dynamic is instructive in the hollering analysis. Just as women are subjects of patriarchy in public spaces, the poor and people of color and subject to class and race based hierarchies in the context of public space. To the extent that feminists argue for a regulation of harassing public speech it is important that in the process other inequalities are not supported or affirmed.

If the holler-ers are poor men, or men of color, there is the danger that their advances are more vulnerable to being considered assault than others because they belong to groups whose rights are less vigilantly protected, or because they make women of privileged groups especially uncomfortable. For this reason, it is wise to be cautious about the idea of regulating public speech of this sort.

Race critics who have advocated for regulation of offensive speech ⁿ⁶⁴ have talked about power relations in considering the impact of offensive speech. And indeed, in this context we have to be cognizant of how regulating offensive speech may either equalize or coincide with power inequities. While sexism exists in all groups, if we look at rates of employment, imprisonment, head of household status, and education along the lines of gender in the African-American community, we do not get a picture that looks like a patriarchal one. Notwithstanding the greater physical power on average of men over women, the power relations relative to the state are not obvious with all groups, and therefore how we evaluate the impact and the policing of offensive sexual speech must be nuanced.

The real issue is neither the right to say a particular thing, nor a specific prohibition against certain types of speech. Instead, we should consider what discursive possibilities are destroyed if the speech is not protected, or what conduct is affirmed if it is, and fundamentally how to facilitate healthy inter-gender relationships. As the feminist movement is revitalized in the 21st century, rigorous attention must be paid to social spheres and dynamic interaction.

CONCLUSION

Hollering on the street is at best an invitation for interaction. Like so much sexual conduct it is something that can be both beautiful and ugly. Knowing which it is, requires more information than simply hearing, "Yo, you fine! Can I talk to you for a minute?"

That is only the beginning.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Criminal Law & Procedure
 Criminal Offenses
 Crimes Against Persons
 Coercion
 Elements
 Education
 Law
 Discrimination
 Gender & Sex Discrimination
 Sexual Harassment
 Labor & Employment
 Law
 Discrimination
 Harassment
 Sexual Harassment
 Coverage & Definitions
 Sexual Harassment

FOOTNOTES:

n1 See generally JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* (2000).

n2 See, e.g., Alfonso Rita & Jo Triglio, *Surfing the Third Wave: A Dialogue Between Two Third Wave Feminists*, *HYPATIA* (June 1997),

available at <http://iupjournals.org/hypatia/hyp-12-3.html>. But see JANE GERHARD, DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF TWENTIETH-CENTURY AMERICAN SEXUAL THOUGHT, 1920 to 1982 (2001) (counterpoint to depictions of second wavers as anti-sex).

n3 As a caveat, I note that there are also important critiques to be made of third wave feminism including its excessive focus on individual choice rather than group circumstance, and the relatively thin critique of the tight relationship between gender roles and commodity culture.

n4 Street harassment has been defined as, "the unsolicited verbal and/or nonverbal act of a male stranger towards a female, solely on the basis of her sex, in a public space." Olatokunbo Olukemi Laniya, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment, or "Hey Sexy" and Other Verbal Ejaculations*, 14 COLUM. J. GENDER & L. 91,100 (2005).

n5 Street harassment is a term that includes philosophical perspective that I do not completely endorse. Although most sexual approach of women on the street may be harassment, not all of it is, and this is a worthwhile distinction to make.

n6 Earlier scholarship distinguished between culturally specific banter and sexual harassment, however often failed to provide nuanced discussions of intra-cultural and inter-sexual complexities. Post-modernist concerns with contingency and identity, although themselves appropriately subject to critique, may allow us to deepen our analysis of such topics.

n7 1990's-era feminist legal discussions of street harassment contain virtually no self-critique of the heteronormativity of the language and ideas. Hence, feminist legal thought has to deconstruct assumptions based upon sexual orientation that have become normalized in the literature.

n8 See *Playing With Fire: A Jenny Jones Anti-Gay Murder Trial Media Round-Up*, ALERT, Gay and Lesbian Alliance Against Defamation, Nov. 1, 1996, available at http://www.glaad.org/action/al_archive_detail.php?id=2272; Mubarak Dahir, *Homosexual panicking 'the verdict in the' Jenny Jones television show case, which involved the murder of a gay man, raises several questions in the gay community*, THE ADVOCATE (June 22, 1999).

n9 See generally Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125 (2000); Amy Lovell, "Other Students Always Used to Say, 'Look at the Dykes'": *Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617 (1998).

n10 Author Max Smith argues that the distinction between that which is welcome and offensive for her is whether the man "hollering" makes specific reference to parts of her anatomy or wanting to engage in a penetrative act with her. Max Smith, *Down These Mean Streets*, ESSENCE MAGAZINE, May 1993, at 152.

n11 *See Id.*

n12 Compare Smith, *supra* note 10, with Orlando Patterson, Op-ed, *Race, Gender and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, § 4, at 15.

n13 *Ellison v Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (noting that sexual harassment may create a fear of sexual assault or rape).

n14 *See generally* 29 C.F.R. § 1604, et seq.

n15 29C.F.R. 1604.11(a)(2006).

n16 Title VII, 42 U.S.C.A. § 2000e-2, *see also* *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Mentor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (establishing cause of action for sexual harassment under Title VII).

n17 *See Sexual Harassment Guidance*, Department of Education, available at <http://www.ed.gov/about/offices/hst/ocr/docs/sexhar00.html>.

n18 *See, e.g.*, Conn. Gen. Stat. § 46a-54(15)(B) (1992), California Government Code § 12950.1 (2007).

n19 *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971); *Williams v. Saxbe*, 413 F.Supp. 654 (D.C. Cir. 1976), *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

n20 *See generally Meritor Sav. Bank*, 477 U.S. 57.

n21 *See Champion v Nationwide Sec., Inc.*, 545 N.W.2d 596, 601 (Mich. 1996); *see also* 29 C.F.R. § 1604, et seq.

n22 *See Radtke v. Everett*, 501 N.W.2d 155 (Mich. 1993); *see also* 29 C.F.R. § 1604.11(a) (1985).

n23 29 C.F.R. § 1604, et seq

n24 *Id.*

n25 *Id.*

n26 *See* Jansen v. Packaging Corp. of America, 123 F.3d 490 (7th Cir. 1996) (en banc), *cert. granted* in part, Bulington Indus., Inc. v. Ellerth, 522 U.S. 1086 (1998); *Champion*, 545 N.W.2d 596.

n27 Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 457 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

n28 *Id.*

n29 A number of important scholarly works have considered the race and gender politics of the hearings. *See, e.g.*, RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS (Anita Faye Hill & Emma Coleman Jordan eds., 1995); RACE-ING JUSTICE AND EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992); COURT OF APPEAL: THE BLACK COMMUNITY SPEAKS OUT ON THE RACIAL AND SEXUAL POLITICS OF THOMAS VS. HILL (Robert Chrisman & Robert L. Allen eds., 1992).

n30 *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing Before The S. Comm. On The Judiciary*, 102d Cong. Part 4, 202 (1991), available at http://www.senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm (follow "Part 4" hyperlink under "Clarence Thomas").

n31 Michael X. Delli Carpim & Ester R. Fuchs, *The Year of the Woman? Candidates, Voters, and the 1992 Elections*, 108 POLITICAL SCIENCE QUARTERLY, Spring 1993, at 29-36.

n32 See *Sexual Harassment Charges, Equal Employment Opportunity Commission & Fair Employment Practices Agency Filings Combined: FY1997-FY2006*, available at <http://www.eeoc.gov/stats/harass.html>.

n33 See generally Morrison, *supra* note 29.

n34 To a lesser extent, the defense was also used with boxer Mike Tyson who has been accused of both rape and sexual harassment. See Holly Maguigan, *Cultural Evidence and Mate Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U.L. REV. 36 (1995); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & Soc. CHANGE 433 (1994-95).

n35 Orlando Patterson, *Race, Gender, and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, § 4, at 15

n36 Lynn Norment, *Black Men, Black Women and Sexual Harassment*, EBONY MAGAZINE, Jan. 1992, at 118.

n37 This may be analogized to Richard Delgado's victim centered approach to discrimination law. See Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001).

n38 See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 533 (1993).

n39 Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE (Martha Albertson Fineman & Rixanne Mykitiuk eds., 1994).

n40 There are cultural groups that are correlated to ascriptive groups or history, but there is also local, institutional and even office culture to contend with.

n41 Eugene Volokh has argued that sexual harassment law, along with racial harassment is problematic in that it has failed to distinguish between obscene speech and speech which may have artistic, political or some other socially redeemable merit. However one can surmise that even if this distinction were made, obscenity is more likely to be attributed to works coming from "low culture" of which African-American cultural practices are more likely to be seen as belonging. See Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997).

n42 See PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER AND THE NEW RACISM* (2004) (a nuanced analysis of gender politics media and race).

n43 Mike Tyson was the symbol for date rape, Clarence Thomas for sexual harassment, O.J. Simpson for domestic violence, and hip hop culture for the rise in popular cultural misogyny and objectification of women.

n44 Leti Volpp, *Blaming Culture for Bad Behavior*, 12 *YALE J.L. & HUMAN.* 89 (2000).

n45 For example, people of color are "cultured" (in the patterns of life sense, not in the cultural capital sense) whereas whites are not.

n46 NO! A WORK IN PROGRESS (AfroLez Productions 2004) (distributed through California Newsreel).

n47 Andy Newman, *4 Women Report Sexual Attacks in or Near Park*, N.Y. TIMES, June 12, 2000, at B3; see also Francis R. Aparicio, *Racializing the Puerto Rican Day Parade: Recent Media Representations of U.S. Puerto Ricans in the Public Space*, NEWSLETTER (Juan Antonio Corretjer Puerto Rican Cultural Center, Chicago, IL), April 2001, available at http://www.pccc-chgo.org/paseo_publications/racializing_prparade.pdf (a thoughtful analysis of the race and gender politics in media representation of this episode).

n48 C.J. Chivers & William K. Rashbaum, *Inquiry Focuses on Officers' Responses to Violence in Park After Parade*. N.Y. TIMES, June 14, 2000, at B1; see generally, *HIP HOP: BEYOND BEATS AND RHYMES* (Byron Hurt 2006) (for discussion of police non-enforcement of multiple episodes of sexual battery against women at Black Entertainment Television's Spring Bling Event in 2004).

n49 See generally JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM AND THE FUTURE* (2000); LESLIE HEYWOOD AND JENNIFER DRAKE, *THIRD WAVE AGENDA: BEING FEMINIST, DOING FEMINISM* (1997); LISTEN UP! VOICES FROM THE NEXT FEMINIST GENERATION (BARBARA FINDLEN ED., 2d ed. 2001); TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM (Rebecca Walker ed., 1995); ADIOS BARBIE: YOUNG WOMEN WRITE ABOUT BODY IMAGE AND IDENTITY (Ophira Edut ed., 1998); COLONIZE THIS!: YOUNG WOMEN OF COLOR ON TODAY'S FEMINISM (Daisy Hernandez & Bushra Rehmaneds., 2002).

n50 See generally, CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

n51 See Laniya, *supra* note 4, at 127 (arguing that a legislative response is necessary to combat street harassment), accord Bowman, *supra*

note 38.

n52 See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

n53 Erik Pitchal, *Just a Little Kiss?*, Z MAGAZINE, December 1996, available at <http://www.zmag.org/ZMag/articles/dec96pitchal.htm>. In this article Pitchal supports the distinction established by Nan Stein with respect to educational context between Flirting and Hurting. FLIRTING OR HURTING? SEXUAL HARASSMENT IN SCHOOLS (Nan Stein and WBGY Television 1994) (available from GPN educational materials).

n54 I have avoided a discussion in this essay distinguishing black from white men and other men of color vis a vis hollering not simply because it is an African-American cultural practice and therefore more likely to be engaged in by black men, but also because I am resistant to essentializing cultural behaviors to specific bodies without more in depth contextual analysis than this piece calls for. Suffice it to say, that this piece begs the question, to be broached elsewhere, about cross-cultural moments of sexual engagement and how we treat those moments as even more complicated moments of interpretation. The same demand for greater complexity exists in cross-class and intra-gender/sexual orientation moments of sexual engagement.

n55 I have deliberately tabled here the potential for internalized sexism to have shaped both of their interests in each other, not because it is irrelevant but rather because addressing internalized sexism is part of a much larger project of revolutionizing gender politics which will be well served by improvements in discrete pieces of the puzzle like this area of law.

n56 Max Smith, *supra* note 10, at 152.

n57 FLIRTING OR HURTING? SEXUAL HARASSMENT IN SCHOOLS (Nan Stein and WBGY Television 1994) (available from GPN educational materials).

n58 *Schwapp v. Avon*, 118 F.3d 106(2d Cir. 1997).

n59 206 F.3d 669, 674 (6th Cir. 2000).

n60 The format of the "speak out" in the women's movement began in May of 1975 with a program held by the Women's Center at Cornell University. It became a widespread organizing practice in the coming years, which proliferated in various forms, including take back the nights and take back the streets campaigns.

n61 See *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc.*, 524 U.S. 742. The Court has more recently extended the defense in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). In this case, the Court overturned a Third Circuit ruling that the important affirmative defense the Court granted employers in its 1998 *Ellerth/Faragher* decisions was never available in constructive discharge cases.

n62 Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Street Harassment*, 34 LAW & SOC'Y REV. 1055, 1059(2000).

n63 See generally *Id.*

n64 See MARI MATSUDA, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).