Abuse of Female Sweatshop Laborers: Another Form of Sexual Harassment that Does Not Fit Neatly into tbe Judiciary's Current Understanding of Discrimination Because of Sex

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I. INTRODUCTION

> I want better treatment from employers to ensure the minimum wage. I feel like I'm killing myself. Every day I'm working harder and harder and making less, and it seems to me I'm running out of strength. . . .
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> We come here and they treat us like dogs. I'm always scared. The supervisor yells and screams at me and I start remembering the others who were worse. I'm traumatized when I see them yelling and screaming. When the [supervisor yells], I immediately start shaking because I am very scared. Sometimes I get very, very desperate but I know I have to keep up the struggle because I have children. We suffer a lot in this country, too much. We will continue to struggle, see if we can get ahead.
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> I keep on struggling so my kids will have a better life and won't end up like me as a presser [working an industrial iron]. That's all I want.
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> —"Aracely," female laborer in a sweatshop in Los Angeles's garment industry.[1]

Like Aracely, the workers in sweatshops in America's garment industry commonly

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1. Jo-Ann Mort, *"They Want to Kill Us for a Little Money": Sweatshop Workers Speak Out, in* NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 193, 195 (Andrew Ross ed., 1997).

work far more than forty hours per week without receiving overtime pay.[2] In fact, overtime pay is just a secondary concern, because most sweatshop employees earn far below minimum wage to begin with.[3] Workers' supervisors are so strict that they often prevent their employees from using the bathroom during entire shifts.[4] Many female workers cannot become pregnant for fear of losing their jobs.[5] Supervisors treat employees so harshly that women often must return to work sooner than two weeks after giving birth, even by painful Caesarian section, or face termination.[6]

Many factors could explain the cause of the horrible conditions found in the U.S. garment industry: the workers are poor,[7] the workers are minorities,[8] the workers are often immigrants,[9] and the workers are often in the country illegally.[10] One factor that must not be overlooked, however, is that the workers are *female*.[11] The horror stories recounted in the previous paragraph make it clear that workers in the garment industry receive poorer treatment *because of their sex*.

Title VII of the Civil Rights Act of 1964 prohibits employment "discriminat[ion] . . . because of . . . sex."[12] As such, one might think that the above-described improper treatment of women in the garment industry logically should fall within Title VII's ambit. However, courts interpreting the Supreme Court's current Title VII doctrine may not reach this conclusion quite so easily.

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2. *See infra* notes 43-48 and accompanying text.

3. *See infra* notes 43-48 and accompanying text.

4. *See infra* notes 55-57 and accompanying text.

5. *See infra* notes 60-61 and accompanying text.

6. *See infra* notes 62-64 and accompanying text.

7. Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 195, 200 (1992); Leo L. Lam, *Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623, 632 (1992).

8. Hayashi, *supra* note 7, at 195, 200; Lam, *supra* note 7, at 632; *see* Center for Economic and Social Rights, *"Treated Like Slaves": Donna Karan, Inc. Violates Women Workers' Human Rights* 2 (Dec. 1999) [hereinafter CESR], *at* http://www.cesr.org/text%20files/dknyrep2.PDF (last visited Apr. 22, 2002).

9. MIRIAM CHING YOON LOUIE, SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL FACTORY 32-33 (2001); Steve Nutter, *The Structure and Growth of the Los Angeles Garment Industry*, *in* NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 199, 206-07 (Andrew Ross ed., 1997); Andrew Ross, *Introduction* to NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 24 (Andrew Ross ed., 1997); Elizabeth Weiner & Hardy Green, *A Stitch in Our Time: New York's Hispanic Garment Workers in the 1980s*, *in* A NEEDLE, A BOBBIN, A STRIKE: WOMEN NEEDLEWORKERS IN AMERICA 279 (Joan M. Jensen & Sue Davidson eds., 1984); Hayashi, *supra* note 7, at 200; Barbara E. Koh, *Alterations Needed: A Study of the Disjunction Between the Legal Scheme and Chinatown Garment Workers*, 36 STAN. L. REV. 825, 828 (1984); Lam, *supra* note 7, at 632.

10. Nutter, *supra* note 9, at 207; Hayashi, *supra* note 7, at 200; Lam, *supra* note 7, at 632.

11. LOUIE, *supra* note 9, at 4, 32-33; Nutter, *supra* note 9, at 206; Ross, *supra* note 9, at 15, 24; Weiner & Green, *supra* note 9, at 278; Hayashi, *supra* note 7, at 195, 200; Koh, *supra* note 9, at 828; Lam, *supra* note 7, at 632; CESR, *supra* note 8, at 2, 6.

12. "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000).

The Supreme Court last examined the meaning of the phrase "discriminat[ion] . . . because of . . . sex" in *Oncale v. Sundowner Offshore Services, Inc.*[13] Since *Oncale*, the lower courts have faced the task of defining the outer parameters of what acts qualify as "discriminat[ion] . . . because of . . . sex."[14] These courts must set these limits because they must decide who may sue whom; a lower court must know whether a plaintiff has stated a recognizable cause of action.[15] Therefore, a lower court might understand alleged conduct of a "sexual" nature to be based on sex, while the same court might view conduct of a "gender bias" (or less "sexual") nature to not be based on sex.[16] Courts draw these lines in an attempt to follow the Supreme Court's mandate

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13. 523 U.S. 75 (1998).

14. *See, e.g.*, Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000); Newtown v. Shell Oil Co., 52 F. Supp. 2d 366 (D. Conn. 1999); Young v. Houston Lighting & Power Co., 11 F. Supp. 2d 921 (S.D. Tex. 1998); *see infra* Part III.A (discussing *Newtown*, *Young*, and then *Holman*).

15. For example, a Seventh Circuit case interpreting "discriminat[ion] . . . because of . . . sex" after *Oncale* ruled that a supervisor cannot sexually harass both a male and a female employee at the same time because, by treating both plaintiffs badly, he cannot *discriminate* against either of them because of their sex. *See Holman*, 211 F.3d at 403; *see infra* Part III.A (discussing *Holman* in further detail).

16. Throughout this Article, the author will refer to acts of a "sexual" versus a "nonsexual" nature. The idea of conduct of a "sexual"/"nonsexual" nature derives from the works of legal scholars such as Katherine M. Franke and Vicki Schultz. *See* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

> [T]he Supreme Court recognized two kinds of sexual harassment, quid pro quo and hostile environment harassment. In fact, there are three kinds of sex harassment: (1) quid pro quo harassment, which by definition is sexual in nature; (2) hostile environment *sexual* harassment, whereby the plaintiff alleges that the defendant engaged in unwelcome conduct of a *sexual* nature that created an intimidating, hostile, or offensive working environment; and (3) hostile work environment *sex* harassment, in which the plaintiff alleges that, because of the plaintiff's sex, the defendant engaged in *nonsexual* conduct that created an intimidating, hostile, or offensive working environment.
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> With regard to the last two kinds of harassment, the law distinguishes between sexually oriented harassment and sex-based harassment, sometimes called *gender-based* harassment. Although in principle the former is a subset of the latter, courts for the most part have treated them independently. Most courts have been willing to recognize claims for sexual harassment based upon either conduct that is sexual in nature or conduct that creates a hostile environment but is nonsexual in its content.

Franke, *supra*, at 716-17 (emphasis added). These scholars believe that courts often "operat[e] under too narrow a view of sexual harassment"—that is, "courts have placed too much emphasis on the 'sexual' aspect of sexual harassment claims" and "courts often ignore [claims based on] nonsexual conduct." Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 580 (2001) (discussing the work of Professors Franke and Schultz).

According to these scholars, conduct of a "sexual" nature includes sexual "remarks, touching, or display of pornographic pictures," Franke, *supra*, at 723 (quoting Vondeventer v. Wabash Nat. Corp., 887 F. Supp. 1178, 1181 (N.D. Ind. 1995)), unwanted sexual advances, Schultz, *supra*, at 1686, 1717, sexual jokes, *id.* at 1717, "'requests for sexual favors,'" *id.*

in *Oncale*[17] for lower courts to recognize only those claims based on "discriminat[ion] . . . because of . . . sex."

This Article argues that courts should not construct such artificial boundaries against a claim for sexual harassment. Courts currently adhere to an understanding of "discriminat[ion] . . . because of . . . sex" that focuses primarily on the "sexual" aspects of sex.[18] However, the phrase "discriminat[ion] . . . because of . . . sex" is wonderfully bland, generic, and open to a myriad of interpretations—and this is how it should be. Courts should embrace a broad interpretation of "discriminat[ion] . . . because of . . . sex" that would recognize causes of action that have *any* connection with the idea of "sex"—whether that is sex in a sexuality sense, a gender inequity sense, a perpetuation of gender stereotypes sense, or an enforcement of gender norms sense.[19]

(quoting EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. § 1604.11(a) (1983)), "verbal or physical conduct of a sexual nature," *id.*, or conduct based on sexual desire, *id.* at 1689, 1692. By contrast, conduct of a "nonsexual" nature includes conduct designed to "perpetuate[], enforce[], and police[] a set of gender norms that seek to feminize women and masculinize men," Franke, *supra*, at 696, conduct designed to put women "in their 'proper place,'" *id.*, conduct that "violates formal equality principles," *id.* at 705, conduct that "subordinates women to men," *id.* at 725-26, or conduct that undermines women's competence in the workplace, Schultz, *supra*, at 1687. Examples of "nonsexual" sexual harassment include:

> characterizing the work as appropriate for men only; denigrating women's performance or ability to master the job; providing patronizing forms of help in performing the job; withholding the training, information, or opportunity to learn to do the job well; engaging in deliberate work sabotage; providing sexist evaluations of women's performance or denying them deserved promotions; isolating women from the social networks that confer a sense of belonging; denying women the perks or privileges that are required for success; assigning women sex-stereotyped service tasks that lie outside their job descriptions (such as cleaning or serving coffee); engaging in taunting, pranks, and other forms of hazing designed to remind women that they are different and out of place; and physically assaulting or threatening to assault the women who dare to fight back.

Id.

The remainder of this Article will refer to these two different types of conduct using the shorthand notations of "sexual" and "nonsexual." Additionally, the terms "gender-based harassment" or "gender discrimination" will be used to describe conduct designed to discriminate or degrade women in a nonsexual manner.

17. *See Oncale*, 523 U.S. at 78-82.

18. *See* Franke, *supra* note 16, at 716-18; Juliano & Schwab, *supra* note 16, at 580-82; Schultz, *supra* note 16, at 1689. Professors Juliano and Schwab performed an empirical study to test the theories of other legal scholars who argued that courts place too much emphasis on the sexual aspects of a sexual harassment claim. Their findings "support the arguments of Schultz and Abrams that courts are not including nonphysical, nonsexual harassment within the scope of sexual harassment. In cases in which plaintiffs alleged less favorable work assignments, for example, plaintiffs were significantly less successful than plaintiffs alleging requests for sexual favors." Juliano & Schwab, *supra* note 16, at 581.

19. This Article, in Part V, proposes a new model for a broader interpretation of "discriminat[ion] . . . because of . . . sex." The model categorizes a broad range of conduct as conduct that *could* constitute "discriminat[ion] . . . because of . . . sex" for Title VII purposes. The model incorporates theories of discrimination postulated in previous scholarly works as examples of the conduct that this model would recognize as "discriminat[ion] . . . because of . . .

Courts need a broader interpretation of "discriminat[ion] . . . because of . . . sex" because many causes of action that one could logically interpret as sexual harassment—including the above-described harassment against women in the garment industry—might remain unrecognizable under the judiciary's current "sexual"-focused interpretation of a valid cause of action. By focusing on the "sexual" aspects of "discriminat[ion] . . . because of . . . sex," courts often overlook causes of action based on unequal treatment of women in the workplace, reinforcement of gender stereotypes, or subordination of female employees.[20] For instance, nothing in the above descriptions of sweatshop abuses falls within the "sexual" understanding of "discriminat[ion] . . . because of . . . sex." In those examples, the female employees were not propositioned for sex, teased in a sexual manner, fondled, flirted with, or called degrading sexual epithets. Nonetheless, some of the aspects of the treatment of these women arose because of sex—strictly because they were women. A narrow, "sexual"-based interpretation of "discriminat[ion] . . . because of . . . sex" by a court might preclude these women from submitting a recognizable cause of action for sexual harassment.

Furthermore, women in the garment industry face an additional textual hurdle in the wake of the Supreme Court's latest interpretation of "discriminat[ion] . . . because of . . . sex." The *Oncale* Court stated that:

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat[ion]* . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[21]

Some lower courts have latched onto the Supreme Court's idea of differing treatment between the sexes from the preceding sentence, and these courts have used this idea to preclude claims brought by plaintiffs who endured sexual harassment, but who could not show that members of the opposite sex were treated differently.[22] It is not unreasonable, however, to picture a sweatshop composed entirely of female workers.[23] In this situation, female plaintiffs could never prove that they have been exposed to

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sex"; this Article refers to these theories of discrimination using the language of the previous legal works. For example, Professor Franke used terms such as "gender stereotypes" and "gender norms," as are shown in the accompanying text. Franke, *supra* note 16, at 693.

20. *See* Franke, *supra* note 16, at 716-18; Juliano & Schwab, *supra* note 16, at 580-82; Schultz, *supra* note 16, at 1689.

21. *Oncale*, 523 U.S. at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993)) (emphasis in original).

22. *See infra* notes 101-08 and accompanying text (discussing the "equal opportunity harasser" cases).

23. The majority of garment industry operations are small setups in urban locations. Lam, *supra* note 7, at 628. The vast majority of garment industry laborers are female. CESR, *supra* note 8, at 2 (estimating that women make up 70% of the workers in the U.S. garment industry). This combination implies that a sweatshop composed entirely of female workers is completely realistic. For example, see *id.* at 11, which describes the "Choe factory" in New York's Manhattan fashion district, a seventy-worker factory "manned" entirely by women.

conditions of employment to which men are not exposed, because there are no men on their jobs. Therefore, these women conceivably could not establish the more traditional "gender inequality" cause of action under Title VII.[24] They cannot prove unequal treatment of the sexes, but they *can* prove that they have faced harsh*er* working conditions *because of their sex*.[25] Thus, they deserve Title VII's protection.

For various reasons discussed herein, the average sweatshop worker may refuse to pursue a litigation right through the judicial system.[26] However, a broader interpretation of "discriminat[ion] . . . because of . . . sex" would ensure that female sweatshop workers would at least enjoy the option to pursue a powerful cause of action to redress the wrongs inflicted against them by their employers.

In arguing that courts should interpret "discriminat[ion] . . . because of . . . sex" more broadly, this Article, in Part II, will begin by describing the atrocities facing female workers in the United States' garment industry. Next, Part III will examine cases that followed *Oncale* in order to highlight inconsistencies in the ways that lower courts interpret "discriminat[ion] . . . because of . . . sex." This Part argues that courts currently understand "because of . . . sex" in inconsistent and underinclusive manners; thus, a new interpretation is needed. Then, Part IV will discuss why some deserving plaintiffs, including female sweatshop workers, need a broader interpretation of "discriminat[ion] . . . because of . . . sex." Finally, Part V will suggest how the judiciary could implement a broader interpretation of "discriminat[ion] . . . because of . . . sex."

II. SWEATSHOP CONDITIONS IN THE UNITED STATES[27]

Garment retailers and manufacturers in the United States control a very large and profitable industry.[28] Profits from manufacturing the clothing we wear soar into the

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24. "By targeting discrimination, or different treatment, because of membership in a protected class, Title VII aims to identify and then remedy those employment practices that illegitimately take into account race, color, religion, national origin, or sex." Franke, *supra* note 16, at 706. Thus, Title VII prohibits conduct of any nature that treats two individuals differently because of their sex. *See id.* Furthermore, Professor Franke explained that courts first understood that "[s]exual harassment is sex discrimination because it violates formal equality principles." *Id.* at 705-14.

25. In fact, the harassment described above is perhaps more pernicious and destructive to women than the "sexual" sexual harassment that courts readily recognize.

26. *See infra* note 73 and accompanying text.

27. Statistics on sweatshops are inherently inaccurate and incomplete, *see* Lam, *supra* note 7, at 623 n.7, because sweatshops, by their very nature, are often underground operations that "regularly violate[] both wage or child labor and safety or health laws." *Id.* at 623 (quoting U.S. GEN. ACCT. OFF., "SWEATSHOPS" IN NEW YORK CITY: A LOCAL EXAMPLE OF A NATIONWIDE PROBLEM, BRIEFING REPORT TO THE HONORABLE CHARLES E. SCHUMER, HOUSE OF REPRESENTATIVES/UNITED STATES GENERAL ACCOUNTING OFFICE 1 (GAO/HRD-89-101BR, 1989)); *see also* Weiner & Green, *supra* note 9, at 279 (describing the garment industry as "a two-tiered industry: a legitimate sector and an 'underground' sector").

28. The garment industry is set up in a "pyramid structure." *See*; CESR, *supra* note 8, at 2-5; Hayashi, *supra* note 7, at 198-200; Koh, *supra* note 9, at 827-28; Lam, *supra* note 7, at 629-31; LOUIE, *supra* note 9, at 4-5. "Retailers," large corporations like Nordstrom, Macy's, Bloomingdale's, Wal-Mart, and K-Mart that sell the clothes to customers, make up the top of

billions of dollars each year.[29] The majority of the production of clothing in the United States takes place in large metropolitan areas[30]—New York, Los Angeles, and San Francisco house the largest garment industries[31]—with many individual cities operating billion-dollar industries in their own right.[32] Yet many of the garment industry's million-plus employees[33] toil under some of the most appalling working conditions existent in the United States.

Although the garment industry is large, individual shops where clothing is made are typically quite small.[34] Large garment manufacturers—like Levi-Strauss, DKNY, Gap,

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the pyramid. CESR, *supra* note 8, at 3; Lam, *supra* note 7, at 629; LOUIE, *supra* note 9, at 4-5. Below retailers are the "manufactures," the brand names like Levi-Strauss, DKNY, Liz Claiborne, Gap, and Esprit, who design clothing, but who often do not assemble the clothing themselves. CESR, *supra* note 8, at 3-4; Hayashi, *supra* note 7, at 199; Koh, *supra* note 9, at 827; Lam, *supra* note 7, at 629-31; LOUIE, *supra* note 9, at 4-5, 33. Instead, the manufacturers often "contract out" much of their work to individual shop owners, or "contractors," who actually produce the clothing and ship it back to the manufacturer. CESR, *supra* note 8, at 4; Hayashi, *supra* note 7, at 199-200; Koh, *supra* note 9, at 827-28; Lam, *supra* note 7, at 629-31; LOUIE, *supra* note 9, at 4-5. At the bottom of the pyramid lie the oft-exploited "garment workers," who work for the shop owners performing the actual sewing. CESR, *supra* note 8, at 2-3; Hayashi, *supra* note 7, at 200; Koh, *supra* note 9, at 828-29; Lam, *supra* note 7, at 629-31; LOUIE, *supra* note 9, at 4-5.

"This pyramid structure is no accident: It was created by retailers and manufacturers to reap the benefits of cheap labor, without having to assume legal or moral responsibility for sweatshop conditions that can result." CESR, *supra* note 8, at 4 (quoting Richard P. Appelbaum & Leonard I. Beerman, *Sweatshops Continue, But Nobody Is To Blame*, L.A. TIMES, Oct. 24, 1999, at 6).

29. Lam, *supra* note 7, at 627 (noting that "revenues in California alone gross billions of dollars annually.").

30. *Id.* at 628.

31. *Id.*

> Apparel sweatshops, however, do not exist only in New York and California; they exist wherever a large, illegal alien workforce is willing to work for sub-minimum wages. Labor officials have inspected and reported sweatshops in a wide range of cities such as Chicago, Dallas, Miami, and Washington, D.C., each of which is home to a substantial immigrant population.

Id. at 635 (internal quotation omitted).

32. *Id.* at 627 n.29 ("The San Francisco area itself has a five-billion-dollar-a-year industry, employing over 10,000 workers, most of whom are Chinese women."); CESR, *supra* note 8, at 5 (explaining that New York City's "$20 billion apparel industry is NYC's largest, and considered the backbone of New York City's industrial base.") (internal quotation omitted); *see also* LOUIE, *supra* note 9, at 33 (describing the size of Los Angeles's and San Francisco's garment industries); Nutter, *supra* note 9, at 199-200 (The apparel industry in the Greater Los Angeles area "is now a big fish in an even bigger pond—the largest manufacturing industry in the leading manufacturing county in the United States.").

33. CESR, *supra* note 8, at 2; Lam, *supra* note 7, at 628.

34. CESR, *supra* note 8, at 5 ("Eighty percent of apparel businesses in the [Manhattan] Fashion District employ 20 or fewer people."); Koh, *supra* note 9, at 828; Lam, *supra* note 7, at 623, 635 n.70 ("The Census Bureau in 1982 estimated that over 40% of the domestic apparel shops employed fewer than 10 persons."); Nutter, *supra* note 9, at 199, 204 ("Most contractors in Los Angeles are small, employing less than fifty workers. The average shop has about twenty-five workers and performs sewing assembly and finishing only."); Weiner & Green, *supra* note

Esprit, and Liz Claiborne[35]—normally "contract out" work to small, individual sewing shop owners, and these small contractors actually produce the clothes.[36] However, the large corporations hold a considerable power imbalance over the multitude of competing small contractors, and, as a result, the corporations usually negotiate very favorable contract terms.[37] The small shop owners are forced to operate their shops on the slimmest of budgets, and they in turn pass this economic hardship on to their employees in the form of substandard working conditions.[38] Hence, the "sweatshop" is born.[39]

Women of ethnic minorities and immigrant women (both legal and illegal) make up an extremely disproportionate percentage of the garment industry's workforce.[40] Sweatshop employers, who are predominantly men,[41] seek out these women because they are an easily exploitable labor source.[42] For example, shop owners utilize a "piecework wage system" to avoid paying the mandatory minimum wage,[43] and shop owners have developed a "homework" scheme to skirt the mandatory overtime laws.[44] Although the federal minimum wage is $5.15 per hour,[45] workers in the piecework

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9, at 281.

35. *See* CESR, *supra* note 8, at 3-4; Hayashi, *supra* note 7, at 199 n.27; Koh, *supra* note 9, at 827; Lam, *supra* note 7, at 629; LOUIE, *supra* note 9, at 33.

36. LOUIE, *supra* note 9, at 4-5; Hayashi, *supra* note 7, at 199-200; Koh, *supra* note 9, at 827; Lam, *supra* note 7, at 629-30; *see* CESR, *supra* note 8, at 2-5.

37. LOUIE, *supra* note 9, at 4; Weiner & Green, *supra* note 9, at 282; Hayashi, *supra* note 7, at 199-200; Koh, *supra* note 9, at 827-28; Lam, *supra* note 7, at 630; *see* CESR, *supra* note 8, at 2-5.

38. LOUIE, *supra* note 9, at 4; Weiner & Green, *supra* note 9, at 279, 282; Hayashi, *supra* note 7, at 199-200; Lam, *supra* note 7, at 630-31; *see* CESR, *supra* note 8, at 2-5.

39. A sweatshop is any "small manufacturing establishment employing workers under unfair and unsanitary conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2308 (1981).

40. CESR, *supra* note 8, at 2, 6; Hayashi, *supra* note 7, at 195, 200; Koh, *supra* note 9, at 828; Lam, *supra* note 7, at 632;. Nutter, *supra* note 9, at 206; Ross, *supra* note 9, at 15, 24.

41. *See* LOUIE, *supra* note 9, at 4; Altagracia Ortiz, "En la aguja y el pedal eché la hiel": *Puerto Rican Women in the Garment Industry of New York City 1920-1980*, *in* PUERTO RICAN WOMEN AND WORK: BRIDGES IN TRANSNATIONAL LABOR 55, 73 (Altagracia Ortiz ed., 1996).

42. *See* Hayashi, *supra* note 7, at 200; Lam, *supra* note 7, at 632.

43. *See* CESR, *supra* note 8, at 8; Hayashi, *supra* note 7, at 202; Koh, *supra* note 9, at 828-29; Lam, *supra* note 7, at 635-36; LOUIE, *supra* note 9, at 34-35; Nutter, *supra* note 9, at 209; Weiner & Green, *supra* note 9, at 283. Under the piecework system, workers receive pay based on the number of pieces they complete rather than the number of hours they work. Hayashi, *supra* note 7, at 202; Lam, *supra* note 7, at 635-36. Although employers claim that the piecework system provides incentives for workers to be more productive, in actuality, employers use the system to avoid paying the hourly minimum wage. Hayashi, *supra* note 7, at 202; Lam, *supra* note 7, at 636.

44. *See*; CESR, *supra* note 8, at 8; Hayashi, *supra* note 7, at 198; Lam, *supra* note 7, at 636-37; LOUIE, *supra* note 9, at 33-34; Nutter, *supra* note 9, at 209. "Homework" refers to the practice of sending workers home after a full day at the sewing shop with additional garments to complete that night at home. Lam, *supra* note 7, at 636; *see* Nutter, *supra* note 9, at 209. This practice provides a means for employers to avoid reporting the number of hours that their employees truly work, thus avoiding the appearance of violations of mandatory overtime laws. Lam, *supra* note 7, at 636; *see* Nutter, *supra* note 9, at 209.

45. Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (1994).

wage system can take home as little as $2 per hour (or less);[46] likewise, workers who work over forty hours per week should receive overtime,[47] but the homework system often requires workers to log sixty to eighty hour weeks and "overtime is rarely paid."[48]

More shocking than the low wages and long hours, however, are the workplace conditions encountered by sweatshop employees. Women in sweatshops often toil under dark, damp, hot, unsafe, and unsanitary conditions.[49] Because the small-time shop owners operate on such threadbare budgets, employees often work in cramped workspaces with poor ventilation, locked exits, electrical wiring violations, and other fire and health hazards.[50] Bathroom facilities may be wretched with stench and filth.[51] Workers also face potential disease spreading factors, such as infestations of rats in the factory[52] or the use of unsafe equipment ("guns" that attach tags to clothing) that could spread HIV or hepatitis.[53]

Furthermore, the shop owners all too often ensure that their employees accept these terrible working environments through a scheme of systematic harassment and degradation.[54] Employers want as much production as possible from their employees during their shifts, so the employers prohibit their employees from taking breaks, including breaks to use the bathroom.[55] Workers recount stories of supervisors forcing them to work entire shifts without going to the bathroom, "unless they had finished stitching their quota."[56] The very condition of the restroom facilities may be degrading: one worker reported that "[t]he bathrooms are outside on our floor. . . . Almost no one goes to the bathroom, they feel embarrassed."[57]

Supervisors, pressured to fulfill the terms of difficult contracts with corporate manufacturers, constantly harass their employees to work faster.[58] Workers also feel pressure to survive under the piecework wage system, which fosters "self-exploitation and competition between workers."[59] As a result, sick days or maternity leave are unthinkable for most sweatshop employees.[60] "[T]aking a sick day or maternity leave

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46. CESR, *supra* note 8, at 8; Hayashi, *supra* note 7, at 202; Lam, *supra* note 7, at 636; Ross, *supra* note 9, at 12-13; *see* LOUIE, *supra* note 9, at 34-35; Nutter, *supra* note 9, at 209.

47. Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (1994); Koh, *supra* note 9, at 831.

48. CESR, *supra* note 8, at 8-9; *see* Hayashi, *supra* note 7, at 202; Koh, *supra* note 9, at 831, 831 n.32; Lam, *supra* note 7, at 636; LOUIE, *supra* note 9, at 33; Nutter, *supra* note 9, at 209.

49. CESR, *supra* note 8, at 9; Hayashi, *supra* note 7, at 201; Lam, *supra* note 7, at 633-34; Ortiz, *supra* note 41, at 62.

50. CESR, *supra* note 8, at 9; Lam, *supra* note 7, at 633-34; Nutter, *supra* note 9, at 208-09; Ortiz, *supra* note 41, at 62.

51. Mort, *supra* note 1, at 193.

52. *Id.* at 196.

53. Nutter, *supra* note 9, at 210.

54. *Id.* at 209; Ross, *supra* note 9, at 10; CESR, *supra* note 8, at 9.

55. Mort, *supra* note 1, at 196; CESR, *supra* note 8, at 12-15.

56. CESR, *supra* note 8, at 12; *see* Mort, *supra* note 1, at 196.

57. Lina Rodriguez Mesa, *Testimony*, *in* NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 5 (Andrew Ross ed., 1997).

58. CESR, *supra* note 8, at 12, 15 ("Supervisors screamed at [workers] constantly to work faster and forbade them from looking up.").

59. LOUIE, *supra* note 9, at 35.

60. CESR, *supra* note 8, at 13.

could jeopardize [employees'] job[s] since the boss and supervisors would scream at them and threaten to fire them on the spot."[61] One woman working in a sweatshop in Los Angeles

> underwent a C-section, after which the doctor recommended a six-month hiatus. She returned to work in eight days. She would have been fired otherwise. Another operation was necessary to stop internal bleeding, brought on by lack of rest. The boss called the hospital to make sure that she wasn't lying about her illness. Once again, she was back after eight days—and now, she bleeds often. She is fatigued by her surgery and the purple veins bursting out of her legs make it difficult to stand.[62]

As with minimum wage and overtime laws, the existing laws provide little real protection for sweatshop workers in need of maternity leave. For instance, under the Family and Medical Leave Act, eligible workers should receive three months of job-protected maternity leave.[63] However, women in sweatshops often return to work in two weeks for fear of losing their jobs.[64]

In addition to pressure to work longer or faster, women commonly encounter more overt forms of harassment. To keep costs down and to prevent workers from expressing their rights, supervisors routinely physically, sexually, and verbally abuse their employees.[65] "Sexual harassment of women is an everyday event in many shops."[66]

Furthermore, pressure to work long hours can affect women more harshly than men, because women often perform the role of primary caregiver. Many female sweatshop employees lament their inability to spend time with their children.[67] Many poor mothers experience difficulty in obtaining adequate daycare.[68] As a result, children often must join their mothers at the factory after school to wait for their mothers to finish their shifts.[69] Women with sick children at home cannot ask for time off to tend to such family emergencies, "since the likelihood of losing their job [is] very high."[70]

In situations where men join women at the workplace, supervisors commonly assign work on the basis of gender, with women predictably receiving the lower-paying assignments.[71]

> Rarely are women able to penetrate the domain of men's work. Men are the cutters, cutting hundreds of layers of fabric at once into pattern pieces. The aristocrats of apparel workers, cutters are relatively highly paid . . . . Men are also pressers, pressing seams and finished garments to prepare them for shipping. . . .

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61. *Id.*
62. Mort, *supra* note 1, at 194.
63. 29 U.S.C. § 2612(a)(1) (2000); *see* CESR, *supra* note 8, at 21 n.45, 23.
64. *See* CESR, *supra* note 8, at 23.
65. Nutter, *supra* note 9, at 209; Ross, *supra* note 9, at 10; CESR, *supra* note 8, at 9, 13-15.
66. Nutter, *supra* note 9, at 209.
67. *See, e.g.*, Mort, *supra* note 1, at 193; CESR, *supra* note 8, at 15.
68. Weiner & Green, *supra* note 9, at 279, 286; CESR, *supra* note 8, at 15.
69. Weiner & Green, *supra* note 9, at 286.
70. CESR, *supra* note 8, at 15.
71. *See* Nutter, *supra* note 9, at 208; Weiner & Green, *supra* note 9, at 284.

> [W]omen are not considered strong enough for the hot, heavy irons or the now-motorized cutting tools.[72]

As is readily apparent, female laborers—the backbone of the garment industry—endure severe harassment and gender inequality every day at the workplace. Much of the harassment described in the foregoing paragraphs did not involve "sexual desire" or "sexual" conduct, but most of the harassment did occur "because of sex." Only women can be forced to forgo pregnancy for fear of losing their jobs, not men. Only women cannot take adequate time from work for maternity leave. Male supervisors verbally harass and physically abuse female employees to reinforce the women's position of inferiority at the workplace. Women receive the lesser-paying job assignments, not men. And no man was ever forced to return to work eight days after a Caesarian section.

The remainder of this Article argues that the degradation facing women in sweatshops is not merely a racist or classist form of discrimination; rather, it is a form of discrimination based on sex. Therefore, it is sexual harassment. These women deserve Title VII's protection. Title VII will not solve all of the problems endured by women working in sweatshops, but it could provide a post-termination litigation option for women who now traditionally assert very few of their rights while still employed.[73]

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72. Weiner & Green, *supra* note 9, at 284.

73. Workers in sweatshops typically fear repercussions for asserting their rights. Many employees are recent immigrants or undocumented workers, so they fear deportation if they were to assert their rights. Hayashi, *supra* note 7, at 201; Lam, *supra* note 7, at 640. Even for nonimmigrant employees, workers fear that voicing their rights will lead to immediate blacklisting or retaliatory termination. Hayashi, *supra* note 7, at 201; Lam, *supra* note 7, at 640. "Often bosses do not hire workers who are identified as 'troublemakers' for speaking out against conditions in one factory—a practice that coerces workers to accept conditions without seeking recourse." CESR, *supra* note 8, at 9. Furthermore, some recent immigrants are unaware of the rights they do possess. Koh, *supra* note 9, at 833-34; Lam, *supra* note 7, at 640. Workers sometimes even develop a benevolent relationship with their supervisor, despite the harsh working conditions, based on cultural ties or feelings of indebtedness for the economic security that the supervisor provides. Lam, *supra* note 7, at 640-41; *see* Koh, *supra* note 9, at 829.

To complicate matters further, the workers' employers are not the proverbial "deep pocket" defendants sometimes present in other sexual harassment cases. Oftentimes, the supervisors in a sweatshop "were formerly garment workers themselves. They open or buy garment shops because entering the industry is one of the few opportunities for economic advancement available to them that requires little capital." Hayashi, *supra* note 7, at 199-200. "Furthermore, many shop owners who violate wage and hour laws or owe back wages are insolvent. Thus, the garment worker is further deterred from initiating a lawsuit by the futility of seeking damages from an insolvent party." Lam, *supra* note 7, at 643.

Certain commentators have argued forcefully—albeit under the Fair Labor Standards Act rather than in the Title VII context—that the manufacturers must be held accountable for the acts of the shop owners, because the manufacturers' favorable contracts force the shop owners to violate labor laws. *See generally* Hayashi, *supra* note 7; Lam, *supra* note 7. Manufacturers set up the pyramid structure to insulate themselves from liability for the contactors' treatment of the sweatshop workers, but, in reality, the manufacturers "dominate[] all aspects of production." CESR, *supra* note 8, at 27. Manufacturers "develop[] . . . long-term relationship[s]" with shop owners and they visit the shops every day. *See id.* at 27-28. Thus, arguably, the manufacturers should be held accountable for the abuses of the shop owners. *See* CESR, *supra* note 8, at 27-

The following sections explore how courts could reformulate their Title VII doctrine to provide a cause of action that would cover the undeniably sexual form of harassment that female sweatshop laborers confront everyday.

III. THE CURRENT MEANING OF "DISCRIMINAT[ION] . . . BECAUSE OF . . . SEX"

This Part explores courts' current interpretations of Title VII's touchstone for sexual harassment—that is, "discriminat[ion] . . . because of . . . sex"—and how this interpretation affects variously situated plaintiffs. Part III.A uncovers logical inconsistencies hidden in the way that courts apply Title VII. Part III.B then explains that, apart from creating logical inconsistencies, lower courts' applications of Title VII are underinclusive: these courts fail to protect certain groups of people who face discrimination because of sex.

This Part discusses the current state of the law so that Part IV can explain that, like the deserving plaintiffs in Part III.B, female sweatshop workers may not now possess a recognizable cause of action under courts' current Title VII doctrines. Part V will then describe how courts could modify Title VII law to protect these deserving plaintiffs.

A. Logical Inconsistencies

In 1964, Title VII prohibited "discriminat[ion] . . . because of . . . sex."[74] In interpreting this statutory phrase, the Supreme Court now recognizes "sexual harassment" as one such form of sex discrimination.[75] The Court also recognizes that sexual harassment cases may arise in one of two varieties—"quid pro quo" cases or "hostile work environment" cases.[76] Courts easily reckon that quid pro quo cases occur "because of . . . sex," likely due to the inherent "sexual" (as in "sexual desire") nature

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28; Hayashi, *supra* note 7; Lam, *supra* note 7.

Although granting a Title VII cause of action to sweatshop workers may not solve these laborers' problems (for the aforementioned reasons), bestowing additional litigation rights on this oppressed group cannot hurt. Plus, any potential plaintiffs who stand in a deserving position under a statute's language ought to have access to that statute in the courts. Female sweatshop laborers stand in such a position. Furthermore, a study of the unique position of sweatshop workers provides a useful academic exercise designed to convince the judiciary that its current interpretations of "discriminat[ion] . . . because of . . . sex" are underinclusive. 42 U.S.C. §2000e-2(a)(1) (1994).

74. 42 U.S.C. § 2000e-2(a)(1) (1994).

75. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.") (alteration in original); *see* Franke, *supra* note 16, at 702-04.

76. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993); *Meritor*, 477 U.S. at 65-67. "[Q]uid pro quo harassment occurs when submission to sexual conduct is implicitly or explicitly made a condition of concrete employment benefits." Franke, *supra* note 16, at 716 n.123 (citing 29 C.F.R. § 1604.11(a)(1)-(2) (1996)). Hostile work environment sexual harassment claims arise "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris*, 510 U.S. at 21 (internal quotations and citations omitted).

of a quid pro quo claim.[77] Hostile work environment claims, however, present more difficult line drawing problems for courts that must determine whether the hostile work environment arose "because of . . . sex."[78] Courts struggle with this determination because not all hostile work environment claims involve aspects of "sexual" conduct;[79] rather, plaintiffs often pursue claims under the hostile work environment label based on "behavior that 'merely' subordinates, disrespects, enforces gender norms, or attacks the competence of women (and men),"[80] wherein no sexual conduct occurred and the harasser felt no sexual desire whatsoever for the plaintiff.[81]

With *Oncale v. Sundowner Offshore Services, Inc.*[82] in 1998, the Supreme Court weighed in with its own interpretation of the phrase "discriminat[ion] . . . because of . . . sex."[83] The *Oncale* Court encountered a hostile work environment claim brought by a male plaintiff complaining of the inappropriate acts of his male coworkers.[84] Mr. Oncale alleged that his coworkers "subjected [him] to sex-related, humiliating actions," "physically assaulted [him] in a sexual manner," and "threatened him with rape."[85] The District Court awarded summary judgment in favor of the defendant, reasoning that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers."[86] The Supreme Court unanimously disagreed, stating that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."[87] The Court never explained, however, exactly what discrimination "because of . . . sex" means.

Consequently, the *Oncale* decision immediately raised questions about the proper interpretation of the phrase "discriminat[ion] . . . because of . . . sex." Under *Oncale*, must a plaintiff prove that his or her harasser participated in "sexual" forms of harassment in order to prove "discriminat[ion] . . . because of . . . sex"? Or, could a plaintiff prove "discriminat[ion] . . . because of . . . sex" by proving that, because of his or her sex, he or she received "less favorable work assignments, lack of training opportunities, etc."?[88] The *Oncale* Court listed a few examples, but the Court raised more questions about its interpretation of "discriminat[ion] . . . because of . . . sex" than it answered.[89]

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77. Franke, *supra* note 16, at 716.

78. *See id.* at 716-17.

79. "Much of what is harmful to women in the workplace is difficult to construe as sexual in design." Schultz, *supra* note 16, at 1689.

80. Juliano & Schwab, *supra* note 16, at 580.

81. *See id.* at 580-81 (discussing the works of Professors Bernstein, Franke, Abrams, and Schultz).

82. 523 U.S. 75 (1998).

83. *See id.* at 78-82.

84. *Id.* at 77, 79.

85. *Id.* at 77.

86. *Id.* (quoting Oncale v. Sundowner Offshore Services, Inc., No. CIV.A.94-1483, 1995 WL 133349, at *2 (E.D. La. Mar. 24, 1995)).

87. *Id.* at 79.

88. *See* Juliano & Schwab, *supra* note 16, at 555 n.32.

89. Indeed, the *Oncale* Court affirmatively stated that "harassing conduct need not be motivated by sexual *desire* to support an inference of discrimination on the basis of sex," but this statement merely clarified that a plaintiff need not prove that his harasser wanted to sleep

When plaintiffs presented hostile work environment claims following *Oncale*, the lower courts scrambled to decipher the Supreme Court's true meaning behind "discriminat[ion] . . . because of . . . sex." The result has been that almost no two courts interpret this phrase in the same way. Courts continue to draw arbitrary lines between "sexual" hostile work environment claims and "nonsexual" claims.[90] Legal scholars note that courts often acknowledge claims based on invidiously "sexual" conduct as "because of . . . sex" more readily than "nonsexual" claims based on subordination or disrespect of women.[91] Thus, courts' interpretations of "discriminat[ion] . . . because of . . . sex" have created a confusing doctrine that more readily protects plaintiffs that allege conduct of a sexual nature, when "sexual" sexual harassment is merely a "subset" of Title VII's overall purpose of eliminating "employment practices that illegitimately take into account . . . [one's] sex."[92]

Courts usually favor claims based on conduct of a "sexual" nature, but courts struggle so much with the meaning of "discriminat[ion] . . . because of . . . sex" that they even countermand this trend at times. For example, compare the reasoning in *Newtown v. Shell Oil Co.*[93] to *Young v. Houston Lighting & Power Co.*[94] In *Newtown*, the plaintiff complained that a coworker's abusive behavior caused a hostile working environment; specifically, the plaintiff alleged that:

> 1) on one occasion in the fall of 1994, [her coworker] referred to her as a "wench"; 2) on one occasion in October 1994, [her coworker] called her a "cunt," outside of her presence but within the hearing of several other employees who reported to the plaintiff; and 3) [her coworker] frequently referred to her as "woman" in a derogatory manner . . . .[95]

The court determined from this allegation that the coworker's harassment occurred because of sex, and thus the plaintiff's claims progressed past the summary judgment stage.[96] On the other hand, in *Young*, the plaintiff's long list of allegations of sexual harassment read as follows:

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with him; that is, a male plaintiff can prove sexual harassment from a male coworker without proving that his harasser is homosexual. *Oncale*, 523 U.S. at 80 (emphasis added). In other words, Oncale's coworkers were capable of harassing Oncale even if they did not desire to have sex with him. *See id.* This statement did not, however, address whether, after *Oncale*, a harasser's language or conduct must be "sexual" in nature. There is a difference between "sexual desire" and language or conduct that is "sexual" in nature.

90. *See* Juliano & Schwab, *supra* note 16, at 580-82.

91. *See id.* at 577-82 (discussing the works of Professors Bernstein, Franke, Abrams, and Schultz).

92. Franke, *supra* note 16, at 706; *see id.* at 716.

93. 52 F. Supp. 2d 366 (D. Conn. 1999).

94. 11 F. Supp. 2d 921 (S.D. Tex. 1998).

95. *Newtown*, 52 F. Supp. 2d at 369.

96. *Id.* at 372 ("Here, the conduct complained of in the underlying sexual harassment claim consisted of the use of offensive epithets focusing on plaintiff's sex."). The plaintiff in *Newtown* eventually lost her hostile work environment claim on other grounds: at trial, the court ruled that, as a matter of law, the harassment she faced did not rise to the level of "severely persuasive" to meet the Supreme Court's standard in *Meritor*. *See* Newtown v. Shell Oil Co., No. 3:97 CV 0167(GLG), 2000 WL 49357, at *1 (D. Conn. Jan. 18, 2000).

> (1) the atmosphere at [her employment] includes sexual jokes, "women are routinely spoken of in terms of being obviously less qualified, more emotionally out of control, having been promoted because of who they are supposedly having a sexual relationship with and generally have less value to the company other than male counterparts"; (2) the male employees talk about the details of their sex lives and tell jokes that degrade females; . . . (4) [her employer] allegedly stopped hiring women for positions in chemical operations; (5) sexually explicit posters at watch stations; (6) when Young complained about the lack of small uniforms for women, she was told (by an unknown person) "girls like to go shopping, you go shopping"; (7) when Young complained of a co-worker who did not like working with girls, [her employer] "allowed him to work on his own, actually doing nothing productive for the company," rather than making him work with women; and (8) men who are assigned to help the women hang labels will either lose them or throw them away each time, causing the women to have to do the job themselves.[97]

The court determined from these allegations that "Young has not established that the incidents she complains of were based on her sex," so the court dismissed Young's claims at the summary judgment stage.[98]

Obviously, the *Newtown* and *Young* courts cannot share the same interpretation of "discriminat[ion] . . . because of . . . sex." Ms. Newtown furthered allegations of a "gender discrimination" manner. The most "sexual" of Newtown's allegations were the inherently sexual connotations carried with the words "wench" and "cunt;" Newtown's allegations principally averred that her coworkers treated her as a second-class employee because of her sex. Yet, the court believed that this qualified as "discriminat[ion] . . . because of . . . sex" for summary judgment purposes. Ms. Young, however, furthered allegations based on *both* "gender discrimination" and "sexual" conduct.[99] Young certainly alleged that women were treated differently or had their work sabotaged due to their gender; furthermore, the misconduct that Young alleged suggested harassment of a "sexual" nature as well.[100] These two courts must view the phrase "discriminat[ion] . . . because of . . . sex" in different lights—and nothing in *Oncale* directed them to do differently.

Moreover, additional support for the theory that courts perversely twist the meaning of "discriminat[ion] . . . because of . . . sex" emerges from the "equal opportunity harasser" cases. Lower courts continue to struggle to determine whether harassment occurred "because of . . . sex" when someone harasses both men and women.[101] For example, in *Holman v. Indiana*,[102] the plaintiffs (a husband and wife couple who worked together) complained that their supervisor harassed Mrs. Holman "by touching her body, standing too closely to [her], asking her to go to bed with him and making

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97. *Young*, 11 F. Supp. 2d at 932.

98. *Id.* at 933; *see* John W. Whitehead, *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMP. L. REV. 773, 800 (1998).

99. *See* Whitehead, *supra* note 98, at 800-02.

100. *See id.* at 800.

101. *See* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 82 n.76 (2002).

102. 211 F.3d 399 (7th Cir. 2000).

sexist comments and otherwise making [her] work in a sexually hostile work environment."[103] The plaintiffs then further alleged that their supervisor "had sexually harassed [Mr. Holman] by grabbing his head while asking for sexual favors."[104] The court held that because the supervisor discriminated against both a man and a woman, then the impetus of the supervisor's behavior could not have been to *discriminate* because of sex—he treated both sexes equally badly.[105] Yet other courts disagree with this reasoning and allow claims when someone harasses members of both sexes, because these courts have focused on the "sexual" nature of the harasser's conduct rather than the lack of discrimination between the genders.[106] The courts' conclusions diverge simply because they interpret "because of . . . sex" differently. This is a problem.

In turn, the reasoning from the cases that require a showing of "sexual" conduct also clashes directly with the reasoning of the cases that require a showing of different treatment of the two sexes. For example, in *Young*, the Court stated that "[m]erely alleging that women were treated differently than men is insufficient" and "[n]owhere does [Young] allege the sort of highly offensive 'verbal or physical conduct of a sexual nature' required for sexual harassment."[107] Thus, this court focused narrowly on the lack of "sexual" conduct and excluded the plaintiff's strong allegations of gender inequality. Conversely, in *Holman*, the court stated that

> because Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes . . . is outside the statute's ambit. Title VII does not cover the "equal opportunity" or "bisexual" harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).[108]

Thus, this court focused narrowly on the lack of gender discrimination present in the case and ignored the blatantly "sexual" nature of the Holmans' claims. How can these two courts be interpreting the same statute and the same Supreme Court precedent? What sense can prospective plaintiffs make of such conflicting results?

Clearly, courts continue to struggle to follow the Supreme Court's lead in

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103. *Id.* at 401 (quoting Holman v. Indiana, 24 F. Supp. 2d 909, 911 (N.D. Ind. 1998)).

104. *Id.*

105. *Id.* at 403-05.

106. *See, e.g.*, Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994):

> even if Trenkle [the plaintiff's supervisor] used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward women. . . . [W]e do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment. (emphasis in original).

See generally Brown v. Henderson, 257 F.3d 246, 252-55 (2d Cir. 2001) (stating that "there might even be circumstances that are actionable under Title VII when both men and women suffer sexually discriminatory harms in the same workplace, but for different reasons," but ultimately ruling against the plaintiff); Zatz, *supra* note 101, at 82 n.76.

107. *Young*, 11 F. Supp. 2d at 933 (citing Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986).

108. *Holman*, 211 F.3d at 403 (emphasis in original).

interpreting "discriminat[ion] . . . because of . . . sex" after *Oncale*. Courts continue to experience difficulties in the way that they conceptualize "discriminat[ion] . . . because of . . . sex." The current understandings of the phrase are too unclear and too difficult for lower courts to apply. Courts conflict with each other while grounding their decisions on reasoning that vacillates between whether "sexual-based" discrimination or "gender-based" discrimination will qualify as "discriminat[ion] . . . because of . . . sex" for a given fact pattern. More concerning, however, is that courts' understandings of "discriminat[ion] . . . because of . . . sex" are often underinclusive—courts exclude plaintiffs' claims as not based on sex when, logically, sex constitutes a large part of the plaintiffs' allegations. How, if male employees tell jokes that degrade females and refer to female coworkers as having less value to the company than their male counterparts (as they did in *Young*), can a court determine that the alleged harassment did not occur because of sex? Why, if a supervisor harasses one female employee, is this discrimination because of sex; but if the supervisor harasses one female employee *and* one male employee, is this not discrimination because of sex (as in *Holman*)? The current interpretation lacks clarity; a new interpretation is sorely needed.

B. Real-World Harms

Sexual harassment cases conflict in their interpretations of "discriminat[ion] . . . because of . . . sex." Courts generate logical inconsistencies when they try to place strained limits on the outer boundaries of what actions may constitute "discriminat[ion] . . . because of . . . sex." However, in addition to creating logical inconsistencies, courts also cause real-world harm when they restrict the outer boundaries of a sex discrimination suit. Various legal scholars have revealed how a narrow judicial interpretation of sexual harassment harms many deserving, but currently unprotected, plaintiffs.

Even before the Supreme Court decided *Oncale*, legal scholars were asking "What's Wrong With Sexual Harassment?"[109] and calling for courts to "Reconceptualiz[e]"[110] their interpretations of the meaning of Title VII's prohibition against "discriminat[ion] . . . because of . . . sex." Basically, these legal scholars noticed that courts construed this phrase much too narrowly, thus excluding many deserving plaintiffs from Title VII's protection.[111]

For example, in 1997, Professor Katherine M. Franke analyzed three theories that attempted to describe why sexual harassment is "discriminat[ion] . . . because of . . . sex": (1) because sexual harassment violates formal equality principles, (2) because sexual harassment is sexual, and (3) because sexual harassment subordinates women to men.[112] Unsatisfied with these theories, Franke posited that courts should conceptualize sexual harassment as "discriminat[ion] . . . because of . . . sex" because it enforces "gender norms that seek to feminize women and masculinize men."[113]

In 1998, right at the time of *Oncale*, Professor Vicki Schultz argued that courts

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109. *See* Franke, *supra* note 16, at 691.

110. *See* Schultz, *supra* note 16, at 1683.

111. *See* Juliano & Schwab, *supra* note 16, at 580 (discussing the works of Professors Bernstein, Franke, Abrams, and Schultz).

112. *See* Franke, *supra* note 16, at 704-05.

113. *Id.* at 696.

currently place too much emphasis on the "sexual" aspects of sexual harassment.[114] Therefore, courts penalize only the most egregious, "sexualized" instances of sexual harassment.[115] For Schultz, the harm of the "sexual-based" approach is that is excludes deserving plaintiffs—women who face "nonsexual" or "gender-based" forms of harassment—from Title VII's protection.[116] Instead, she argued, courts should construe any conduct (both sexual and nonsexual) that undermines women's competence in the workplace as actionable under Title VII.[117]

Writing before *Oncale*, Professor Carlin Meyer also warned that, by focusing on the "sexual" aspects of sexual harassment, courts "misrepresent the causes of gender inequality."[118] To illustrate this point, Meyer chose to discuss the plight of women attempting to break into traditionally all-male blue-collar jobs.[119] Women who begin working in blue-collar jobs certainly face "sexual" sexual harassment, but they also endure physical and verbal threats, assaults, sabotage of their tools to prevent them from completing tasks at work, and exclusion from certain jobs altogether.[120] By focusing primarily on the "sexual," Meyer concluded, courts (and the media covering the courts) condemn the symptoms, but not the cause of sexual harassment—the cause is the gender bias felt by men threatened by women intruding into their theretofore all-male domain of blue-collar work; acting out this anxiety sexually is merely the symptom of this fear.[121]

More recently, and much later than *Oncale*, scholar Noah D. Zatz argued that, if men show solidarity toward women at their workplace when their supervisors expect them to act in a discriminatory manner toward the women, and the men in turn receive harassment from the supervisors, then those men should receive the right to pursue a Title VII claim in their own right.[122] According to Zatz, "[i]f employers insist that employees conform to sex- or race-based stereotypes regarding interactions with other race or sex groups, employment practices enforcing those stereotypes constitute actionable discrimination because of race or sex."[123]

All of these scholars uncovered potential problems that loomed ahead because courts interpreted "discriminat[ion] . . . because of . . . sex" too narrowly. Part III.A of this Article highlighted logical inconsistencies in the current Title VII doctrine, but these scholars have exhibited specific, real-world ills that derive from an overly narrow interpretation of "discriminat[ion] . . . because of . . . sex." These scholars all attacked very similar problems: they recognized a group of people who (undeservingly, in their minds) stood outside of the protection of Title VII, and they formulated a way that courts could, in Schultz's words, "reconceptualize" their understanding of

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114. *See* Schultz, *supra* note 16, at 1689.

115. *See id.* at 1713-21.

116. *See id.*

117. *See id.* at 1691-92.

118. Carlin Meyer, Feminism, Work and Sex: Returning to the Gates (1995) (unpublished manuscript, on file with author).

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Zatz, *supra* note 101. Zatz addresses racial intergroup solidarity as well, but this Article will focus solely on sex discrimination under Title VII.

123. *Id.* at 108.

"discriminat[ion] . . . because of . . . sex" to bring this unprotected group within the purview of Title VII.

Likewise, this Article spotted another group—female laborers in the garment industry—that, for various reasons, might now stand unprotected under current Title VII doctrine. The following Part addresses the reasons why sweatshop workers might not enjoy a right to a cause of action for sexual harassment under Title VII.

IV. COURTS SHOULD EXPAND THE MEANING OF "DISCRIMINAT[ION] . . . BECAUSE OF . . . SEX"

Like Franke's and Schultz's women in gender-biased workplaces, like Meyer's women in blue-collar jobs, and like Zatz's sympathetic third parties, female laborers in the garment industry qualify as deserving plaintiffs who may not enjoy protection from the types of harassment they most commonly endure—the "nonsexual" harassment that nonetheless occurs because of sex. Judges could essentially "lock the courthouse doors" to sweatshop workers by interpreting Title VII's prohibition against "discriminat[ion] . . . because of . . . sex" in either of the two most common manners that judges interpret this phrase: (1) by emphasizing "sexual" conduct and thereby overlooking "gender-based harassment,"[124] or (2) by mandating a showing of different treatment between the sexes and thereby overlooking issues of both "sexual" conduct and "gender subordination."[125]

If courts require a showing of language or conduct of a "sexual" nature for a plaintiff's allegation to qualify as "discriminat[ion] . . . because of . . . sex" in their jurisdiction—as Professors Franke, Schultz, and Meyer described as the dominant stance of today's judiciary[126]—then sweatshop laborers' potential claims of sexual harassment stand a good chance of failing. Although "sexual" sexual harassment must certainly occur in sweatshops (as it does in most other work settings), the majority of the horrors described in Part II derive not from "sexual" language or conduct by supervisors, but from an invidious form of "nonsexual" harassment that may be more devastating and pernicious than any unwelcome sexual advances experienced by women in more genteel workplaces. Women in sweatshops experience a form of "gender subordination" sexual harassment that most women probably cannot fathom experiencing themselves. Constant verbal belittling, threats of physical violence, restricted bathroom use, two-week maternity leave, assignment to lower paying job positions, and forced separation from family obligations[127] may not constitute a "sexual" form of sexual harassment, but, taken together, these acts serve to reinforce the (often male) supervisor's dominance over his (nearly all female) employees. These "nonsexual" acts serve to discriminate because of sex—they degrade women and subordinate them to men. If a court were to refuse to recognize a claim based on these types of "nonsexual," "gender-based" acts, the court would not serve to uphold Title VII's purpose of prohibiting discrimination based on sex.[128]

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124. *See supra* notes 97-100, 107-08 and accompanying text (discussing *Young*).

125. *See supra* notes 101-08 and accompanying text (discussing *Holman*).

126. *See supra* Part III.B.

127. *See supra* Part II.

128. "Title VII's central mission is to dismantle race- and sex-based barriers to full participation in the American workplace." Zatz, *supra* note 101, at 69-70.

Another way a court could fail to stay true to Title VII's purpose would be to overemphasize the unequal treatment of men and women in its sexual harassment jurisprudence. If a court required a showing that men and women were literally treated differently at the workplace (similar to the *Holman* court), then female sweatshop workers may not possess a claim, because often, women make up the *entire* workforce in a sewing shop. Thus, courts might overlook a claim based on the subordination of women (through verbal harassment or though harsh maternity leave rules, for example), because there were no men with which to compare them. Furthermore, a court applying such a standard would force itself to overlook even the most blatantly "sexual" incidents of sexual harassment, which the court would probably recognize in other settings.

True, the *Oncale* court stated that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[129] Some lower courts, however, seized this statement and have applied it with unwavering allegiance, including in places where it clearly was not intended to apply. (In fact, Mr. Oncale himself worked on an all-male, "eight-man crew."[130] Why would the Supreme Court remand that case for further consideration if the Court truly believed that Oncale must prove that he was exposed to harassment to which women were not exposed?) These courts overlook obvious forms of sexual harassment (which they would recognize under any other circumstance) simply because the harasser harassed both men and women—or presumably only women when there were no men—and thus the plaintiff could not prove differing treatment of the sexes. Certainly, under the rationale adopted by the Seventh Circuit in *Holman*, a female sweatshop worker in an all-female sewing shop in Chicago might face a difficult time pursuing a Title VII claim against her male supervisor, even for the most egregious forms of sexual harassment—be it "sexual" or otherwise.

The Seventh Circuit has not addressed the issue of an all-female (or an all-male) workplace since it handed down the *Holman* decision. Nevertheless, this case provides another excellent example of a court drawing a line in the sand that excludes certain causes of action as not based on sex. This line-drawing by courts is confusing and unnecessary. Courts could eliminate some of the logical inconsistencies in current Title VII law and draw unprotected groups under Title VII's protection by expanding the types of claims that qualify as "discriminat[ion] . . . because of . . . sex."

Women in sweatshops face an inherently sexual form of harassment nearly everyday at the workplace. Courts should allow sweatshop workers to seek remuneration for this sexual harassment through a recognized cause of action under Title VII. To do this, courts must expand their interpretation of "discriminat[ion] . . . because of . . . sex."

Parts III and IV have shown the need for an expanded interpretation of "discriminat[ion] . . . because of . . . sex." Part V will now suggest a model for enacting this expansion.

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129. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

130. *Id.* at 77.

V. HOW COURTS COULD EXPAND THE MEANING OF "DISCRIMINAT[ION] . . . BECAUSE OF . . . SEX"

The Supreme Court left the language of what constitutes a Title VII cause of action very open after *Oncale*. Since *Oncale*, lower courts understandably tried to define the outer parameters of that cause of action; that is, lower courts—faced with real-life plaintiffs and defendants quarreling whether a given defendant mistreated an employee because of sex—have tried to define who may sue and who may be sued.[131]

These courts are taking the *Oncale* decision in the wrong direction, however, and they are failing to take full advantage of the potential broadness and flexibility of its understanding of "discriminat[ion] . . . because of . . . sex." This Article will now propose a new model: courts should accept the broadest possible interpretation of "discriminat[ion] . . . because of . . . sex" and acknowledge causes of action for any plaintiffs who allege anything logically tied to sex (in the broadest possible interpretation of that word—including, but not limited to, sex, sexual conduct, sexuality, gender, gender inequality, perpetuation of gender stereotypes, and enforcement of gender norms). The goal of this new model is to clear up logical inconsistencies between courts and expand Title VII to cover deserving yet unprotected plaintiffs, without "transform[ing] Title VII into a general civility code for the American workplace."[132]

Some courts, like *Young* (discussed above),[133] currently expend much time and effort determining whether their jurisdiction should accept "gender-based" harassment claims as discrimination based on sex when the plaintiff cannot prove any "sexual" conduct or language. Other courts, like *Holman* (also discussed above),[134] expend an equal amount of effort deciding whether to accept sexual harassment claims based on "sexual" conduct if plaintiffs fail to allege different treatment between the sexes. With a broader interpretation of "discriminat[ion] . . . because of . . . sex," courts need not draw these arbitrary lines between cognizable and noncognizable claims. A jurisprudence where courts accept both "gender-based" and "sexual" conduct-based claims makes better logical sense than one that accepts one but not the other. There is no reason why "sex" cannot mean both "sex" (as in sexual conduct or sexual desire) and "sex" (as in gender).

The term "sex" in the phrase "discriminat[ion] . . . because of . . . sex" need not be limited to narrow judicial interpretations. Support for this idea derives from legal scholars such as John W. Whitehead, who, after *Oncale*, argued that the question of whether a plaintiff alleges "discriminat[ion] . . . because of . . . sex" is a question of

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131. *See supra* Part III.

132. *Oncale*, 523 U.S. at 80. The defendant employers and their amici argued in *Oncale* that, by extending Title VII protections into the same-sex arena, the Supreme Court would "transform Title VII into a general civility code for the American workplace." *Id.* This Article recognizes the dangers that these parties warned of in *Oncale*; however, this Article also recognizes that many deserving plaintiffs currently enjoy no protection under Title VII. Therefore, I will argue for an interpretation of "discriminat[ion] . . . because of . . . sex" that expands the protections of Title VII while remaining mindful not to overexpand these protections to the point that Title VII becomes a "civility code."

133. *See supra* notes 97-100, 107-08 and accompanying text.

134. *See supra* notes 101-08 and accompanying text.

fact more properly answered by a jury than by a judge.[135] Whitehead presents an interesting argument that carries logical force, particularly in light of additional cases interpreting *Oncale* that occurred after Whitehead finished his article. Courts have shown a reluctance to understand some complaints by plaintiffs as "discriminat[ion] . . . because of . . . sex," where attorneys, legal scholars, and the plaintiffs themselves thought otherwise.[136] According to Whitehead, the fact that the plaintiff "perceived [that] the mistreatment was based on her sex" shows that "reasonable people might have agreed with her."[137] Thus, under Whitehead's analysis, courts would view the interpretation of "discriminat[ion] . . . because of . . . sex" as a question of fact, and *Oncale* would "limit the availability of summary judgment in cases of sexual harassment."[138]

This Article has shown that there is a need for courts to broaden the interpretation of "discriminat[ion] . . . because of . . . sex." Placing more trust in juries to make this determination may be one way to adjust Title VII law to comport with society's current views about sex.[139] However, by placing the question entirely within the purview of the jury, courts risk the possibility that a confused jury would award a judgment to a plaintiff under the rubric of Title VII, where the plaintiff's claim more properly belonged as an assault claim, for instance. Judges need not relinquish all control over the interpretation of "discriminat[ion] . . . because of . . . sex." Instead, courts should construe the determination of "discriminat[ion] . . . because of . . . sex" as a mixed question of law and fact, with judges interpreting the phrase very broadly and deferring to juries whenever possible, but still retaining some limited summary judgment power.

Currently, "some courts do not shrink from judging [an alleged harasser's] motive"[140]—that is, whether he discriminated because of sex.[141] Courts should refrain from this type of decisionmaking; courts should not step into the jury's shoes and proclaim that a plaintiff's claim does not allege discrimination based on sex if the plaintiff furthers an argument logically interpretable as based on sex. Regardless of whether the court, in its own mind, more readily understands "discriminat[ion] . . . because of . . . sex" to mean "gender-based harassment" or "sexual" conduct-based harassment, the court should be cognizant that other forms of harassment might reasonably be viewed by a jury as based on sex.

Rather, courts should exercise restraint, and dismiss a plaintiff's claim at summary judgment only if a jury could not reasonably decide that the alleged harassment was

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135. *See* Whitehead, *supra* note 98, at 799-803.

136. *See id.* at 800-03.

137. *Id.* at 800.

138. *Id.* at 799.

139. *See id.* at 800, 802-03.

140. *Id.* at 800. Whitehead keys on the harasser's motive, likely because many courts view the harasser's motivation as relevant to whether he or she discriminated because of sex. *See, e.g.*, Young v. Houston Lighting & Power Co., 11 F. Supp. 2d 921, 927, 930 (S.D. Tex. 1998); White v. Midwest Office Tech., Inc., 5 F. Supp. 2d 936, 946-48 (D. Kan. 1998). However, under the new model proposed in this Part, the harasser's motive is immaterial. Sexual harassment is no less harmful and occurs no less "because of . . . sex" whether the harasser consciously wished to discriminate because of sex or whether his or her unconscious actions affected someone more harshly because of sex.

141. *See* Whitehead, *supra* note 98, at 799-800.

based on sex, while interpreting the word "sex" in a more all-encompassing manner, as proposed above. Before ever dismissing a claim at summary judgment, courts should remember that not all of society shares the same interpretation of "sex" as a federal judge.

> "[A] federal judge is not in the best position to define the current sexual tenor of American culture in its many manifestations." Since "gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation."[142]

As guidance in applying this new summary judgment standard, courts should follow the example of the United States District Court for the District of Kansas in *White v. Midwest Office Technology, Inc.*[143] to allow all "conduct that could be possibly construed as gender-based by a reasonable fact-finder"[144] to survive summary judgment and proceed to the jury for the ultimate determination of whether the claim constituted "discriminat[ion] . . . because of . . . sex." This statement shows the proper mindset a court should adopt before deciding, as a matter of law, that no one could reasonably understand the plaintiff's claim as based on sex.

Moreover, this new, broader interpretation of "discriminat[ion] . . . because of . . . sex" does not "transform Title VII into a general civility code for the American workplace"[145] for two reasons. First, even under this much more inclusive interpretation of "discriminat[ion] . . . because of . . . sex," courts still retain the power to dismiss a claim at summary judgment if the plaintiff furthers no tenable argument that the defendant discriminated because of sex. For example, in *Kelm v. Arlington Heights Park District*,[146] a discharged employee brought a sexual harassment suit after he failed a random drug test.[147] In this case, the plaintiff himself failed to create an argument that the defendant mistreated him because of sex. When the court pressed the plaintiff to explain why he was discriminated against because of sex, he could not coherently respond—drug tests are not sexual in nature, and the plaintiff was not targeted for the random test because he was a man.[148] The plaintiff basically could not explain why the defendant's conduct had anything to do with sex (under even the broadest understanding of that word). Thus, the court rightly granted summary judgment in this case. The new model permits such an exercise of a court's summary judgment power.

Second, this new model for interpreting "discriminat[ion] . . . because of . . . sex" will not create a "civility code" because the plaintiff must still prove that he or she endured harassment "severe or pervasive enough to create an objectively hostile or

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142. *Id.* at 803 (quoting Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998)).

143. 5 F. Supp. 2d 936 (D. Kan. 1998).

144. *Id.* at 949; *see* Whitehead, *supra* note 98, at 802.

145. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998); *see supra* note 132 and accompanying text.

146. No. 98 C 4786, 2000 WL 263830 (N.D. Ill. March 1, 2000).

147. *See id.* at *5-6.

148. *See id.* at *6.

abusive work environment."[149] The *Oncale* court offered this very argument: the severe and pervasive standard should serve as a safeguard against penalizing "ordinary socializing in the workplace."[150] "Severe and pervasive" is in part a question of fact suited for a jury,[151] and juries will stand as perfect watchdogs to ensure that plaintiffs' claims—although broadly construed on the question of based on sex—will meet with close scrutiny during jury deliberations.[152] Juries are perfectly suited to answer the "severe and pervasive" question—everyone works, everyone knows how coworkers should be treated, everyone knows the difference between innocuous conversation and harassment, and everyone knows a frivolous lawsuit when they see one. Thus, plaintiffs' Title VII claims will not run amok and create a "civility code," because plaintiffs still must satisfy the watchful and discriminating eye of the jury.

This model for a broader interpretation of "discriminat[ion] . . . because of . . . sex" resolves some of the problems identified in Part III and Part IV of this Article. Part III.A showed that, currently, logical inconsistencies exist in the reasoning that different courts apply when deciding whether a plaintiff furthers a claim of harassment that is based on sex. This model addressed this problem by including all possible interpretations of the word "sex" within Title VII's purview. Thus, courts no longer must draw lines and decide that plaintiffs who complain of "sexual" conduct-based harassment have proven "discriminat[ion] . . . because of . . . sex" whereas plaintiffs complaining of "gender-based harassment" have not, or vice versa. Hopefully, under this model, courts will construe "discriminat[ion] . . . because of . . . sex" more broadly, and rely more heavily on the common sense of juries to reward valid sexual harassment claims and disregard invalid ones.

Moreover, this model addresses the deserving yet unprotected plaintiffs identified in Parts III.B and IV. These Parts explained that, under a narrow interpretation of "discriminat[ion] . . . because of . . . sex," many groups of plaintiffs that face systematic harassment at work currently enjoy no valid claims under Title VII, even though the harassment these groups face undeniably can be traced back to the employees' sex. Women in sweatshops face ruthless discrimination that can be tied to their sex—verbal harassment designed to subordinate women to men, unreasonable maternity leave, or inferior job assignments, for instance[153]—but yet Parts III and IV showed that these women might currently stand outside of Title VII's protection. Part V's model for a broader interpretation of "discriminat[ion] . . . because of . . . sex" sweeps these women under Title VII's protection, and provides them with a powerful cause of action to redress the wrongs inflicted against them at the workplace.

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149. *Oncale*, 523 U.S. at 81 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

150. *See id.*

151. *See* Whitehead, *supra* note 98, at 799-800. However, as with the "discriminat[ion] . . . because of . . . sex" standard, courts often resolve claims at summary judgment because they fail to meet the "severe and pervasive" standard. *Id.*; *see, e.g.*, Sandvik v. Sec'y of Health & Human Servs., 246 F.3d 676 (9th Cir. 2000)(unpublished table decision); White v. Midwest Office Tech., Inc., 5 F. Supp. 2d 936, 949 (D. Kan. 1998).

152. *See* Whitehead, *supra* note 98, at 802-03.

153. *See supra* notes 49-72 and accompanying text.

VI. CONCLUSION

Construing the harassment that faces women in sweatshops as "discriminat[ion] . . . because of . . . sex" forms just one step of many needed to actually improve these women's lives. However, granting a downtrodden group legal rights in an area where before they enjoyed none at all nudges the law in the right direction. Many legal scholars have argued for a broader interpretation of "discriminat[ion] . . . because of . . . sex." The time has come for courts to make this move. A broader interpretation *might* produce a more coherent Title VII jurisprudence; a broader interpretation *will* protect more persons, including female sweatshop workers, who have been victimized by discrimination because of their sex.