

**“WE DON’T THINK OF IT AS SEXUAL  
HARASSMENT”:  
The Intersection of Gender & Ethnicity on Latinas’  
Workplace Sexual Harassment Claims**

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*“[T]hat’s right, we don’t think of it as sexual harassment . . .”<sup>1</sup>*

In the workplace, sexual harassment is broadly defined as the making of “unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.”<sup>2</sup> Workplace sexual harassment may arise as a single occurrence where sexual favors are demanded in exchange for hiring, promotions, or retention.<sup>3</sup> It may also be ongoing in the form of continuous sexually suggestive remarks, looks, or touches.<sup>4</sup> Either way, in society there are unequal power dynamics between the sexes that play out in the employment context where unequal power dynamics can result in the threat of job security if the woman addresses the unwelcomed statements or gestures.<sup>5</sup> Despite this broad understanding of the term “sexual harassment,” differences in race and ethnicity, gender, class, education, and economic status shape how different groups experience sexual harassment.

The focus of this paper is workplace sexual harassment of women at the intersection of gender and ethnicity, specifically pertaining to Latin American women.<sup>6</sup> Challenging the pervasive stereotype of the

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<sup>1</sup> Sandy Welsh et al., *“I’m Not Thinking of It as Sexual Harassment”*: *Understanding Harassment Across Race and Citizenship*, 20 GENDER & SOC’Y 87, 97 (2006).

<sup>2</sup> *Sexual Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [http://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](http://www.eeoc.gov/laws/types/sexual_harassment.cfm) (last visited Feb. 25, 2015).

<sup>3</sup> See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 2 (1979).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* at 1–2.

<sup>6</sup> The subjects of this paper are Latin American women. While there is some disagreement regarding the classification of Latinos/as as a racial or ethnic group, and the two classifications are often conflated, I categorize the two separately and will refer to Latina as an ethnicity. See

overly sexual, desirable, and hot-blooded Latina, this paper seeks to analyze how widely held beliefs about Latina sexuality influence Latinas' definition of what constitutes workplace sexual harassment and, in turn, how those beliefs influence how others view the harassment of Latinas. While most commonly depicted in the media,<sup>7</sup> this stereotype predominates in other spheres of everyday life, including the workplace, where it continues to reinforce mainstream beliefs about hypersexuality. I argue that stereotypes about hot-blooded and hypersexual Latinas in the United States push the boundary on what women consider to be socially permissible sexual behavior. In the workplace, this hypersexualization redefines what constitutes "unwelcome" sexual advances, negatively impacting the filing of sexual harassment claims.

Part I of this paper provides a legal framework for workplace sexual harassment claims in the United States. Part II discusses workplace sexual harassment from the perspectives of Critical Race Theory<sup>8</sup> and its "close cousin,"<sup>9</sup> Latino/Latina Critical Legal Theory.<sup>10</sup> Part III explores how gender and ethnicity intersect in shaping how Latinas experience

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*generally Explanation of Race and Hispanic Origin Categories*, U.S. CENSUS BUREAU (Sept. 15, 1999), <http://www.census.gov/population/estimates/rho.txt> (categorizing race and ethnicity separately).

<sup>7</sup> See e.g., Ediberto Román, *Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 42 (2000) (examining portrayals of Latinos and Latinas in five films with Latino/Latina protagonists and concluding that the hot-blooded role is one of the four most popular in these films).

<sup>8</sup> CRT is a broader countermovement that emerged out of critical legal scholarship in the late 1970s and early 1980s. It critiques the rule of law to challenge conventional cultural norms like white privilege. Its objective is to attain racial justice. Today, CRT has expanded to other academic disciplines, including political science, ethnic studies, and even education. See *generally Critical Race Theory*, THE BRIDGE: CRITICAL THEORY, <http://cyber.law.harvard.edu/bridge/CriticalTheory/critical4.htm> (last visited Feb. 25, 2015); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012); Gloria Ladson-Billings, *Just What Is Critical Race Theory and What's It Doing In a Nice Field Like Education?*, 11 INT'L J. OF QUALITATIVE STUD. IN EDUC. 7-24 (1998).

<sup>9</sup> Francisco Valdés, *LatCrit: A Conceptual Overview*, LATINA & LATINO CRITICAL LEGAL THEORY, INC., <http://latcrit.org/content/about/conceptual-overview/> (last visited Feb. 25, 2015) ("Because it was born of the CRT [Critical Race Theory] experience, LatCrit theory views itself as a 'close cousin' to CRT, a cousin that always welcomes CRT, both in spirit and in the flesh, to its gatherings.").

<sup>10</sup> See *id.* Latino/Latina Critical Theory (LatCrit) is a recent genre (originating in 1995) of critical legal scholarship that focuses on the "concerns and voices" of Latinos and Latinas in the law and social policy. LatCrit emerged from Critical Race Theory (CRT) and, in particular, CRT's "antisubordination vision." LatCrit seeks to attain social justice by transforming legal discourse and social policy and creating scholarship that focuses on the Latino community.

sexual harassment in the workplace. Part IV examines the unique sexual stereotypes ascribed to Latinas and their impact on the reporting of sexual harassment and the filing of sexual harassment claims in the workplace. Lastly, Part V proposes a meaningful consent standard as a promising standard that recognizes Latinas' intersectionality claims.

## I. THE LEGAL STANDARD FOR WORKPLACE SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964<sup>11</sup> ("Title VII") prohibits "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that are used as a term or condition of employment.<sup>12</sup> The U.S. Equal Employment Opportunity Commission (EEOC) Guidelines define three types of workplace sexual harassment: (1) submission to sexual conduct as a term or condition of employment; (2) submission to or rejection of sexual conduct as a basis of employment decisions; and (3) sexual conduct that unreasonably interferes with an employee's work performance or produces a work environment that is "intimidating, hostile, or offensive."<sup>13</sup> The focus of this paper is the third category, which is labeled as hostile environment sexual harassment.<sup>14</sup>

In 1986, the Supreme Court first recognized a claim for hostile environment sexual harassment in *Meritor Savings Bank, FSB v. Vinson*.<sup>15</sup> The case involved a former female bank employee, Mechelle Vinson, who sued her employer (the bank) and her male supervisor, alleging that the latter constantly subjected her to sexual harassment during her four years of employment at the bank, in violation of Title VII.<sup>16</sup> The male supervisor, Sidney Taylor, was the vice president of the bank and manager of one of its branches.<sup>17</sup> Vinson was hired as a teller trainee and was subsequently promoted to teller, then head teller, and then assistant branch manager.<sup>18</sup> According to Vinson's testimony at trial:

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<sup>11</sup> See 42 U.S.C. § 2000(e) (2012).

<sup>12</sup> See U.S. Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2012).

<sup>13</sup> *Id.* § 1604.11(a).

<sup>14</sup> *Id.* § 1604.11(a)(3).

<sup>15</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>16</sup> See *id.* at 59–62. See also 42 U.S.C. § 2000(e) (2012).

<sup>17</sup> See *Vinson*, 477 U.S. at 59.

<sup>18</sup> See *id.* at 60 ("It is undisputed that her advancement there [at the bank] was based on merit alone.").

[D]uring her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend. [Vinson] also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge.<sup>19</sup>

The district court denied Vinson relief, finding that any sexual relationship between her and Taylor was voluntary and not a condition of employment.<sup>20</sup> Therefore, it concluded, Vinson was not the victim of sexual harassment.<sup>21</sup> The court of appeals reversed, finding that Vinson had been subjected to hostile environment sexual harassment, and remanded for the district court to determine whether hostile environment sexual harassment had actually taken place.<sup>22</sup> The court of appeals also noted that voluntariness was immaterial and that any evidence about Vinson's provocative dress and "personal fantasies" was inadmissible.<sup>23</sup>

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<sup>19</sup> Specifically, Vinson testified that Taylor repeatedly asked for sexual favors during and after work hours; that they had intercourse about 40 or 50 times over the course of several years; that Taylor fondled her in front of other employees; followed her into the women's restroom, exposed himself, and forcibly raped her several times; and that the sexual favors stopped only after Vinson began a monogamous relationship with her boyfriend. *See id.* at 60-61.

<sup>20</sup> *See id.* at 61. *See also* *Vinson v. Taylor*, No.78-1793, 1980 WL 100 (D.D.C. Feb. 26, 1980), *rev'd* 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded sub nom.* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>21</sup> *See* *Vinson*, 477 U.S. at 61.

<sup>22</sup> *See id.* at 62.

<sup>23</sup> *See* *Vinson v. Taylor*, 753 F.2d 141, 146 & n.36 (D.C. Cir. 1985), *aff'd and remanded sub nom.* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) ("The District Court did not

The Supreme Court affirmed, holding that hostile environment sexual harassment is a form of sex discrimination that is actionable under Title VII.<sup>24</sup> It held that the proscription in Title VII against sexual discrimination in the workplace is not limited to economic harm.<sup>25</sup> The fact that Vinson's employment was not in jeopardy if she refused to submit to Taylor's sexual demands did not invalidate her sexual harassment claim. Likewise, even if Vinson voluntarily had sexual intercourse with Taylor, voluntariness is not a defense to a sexual harassment claim under Title VII.<sup>26</sup> "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"<sup>27</sup> The Court also remanded after declining to rule on the employer's liability, explaining that it did "not know at this stage whether Taylor made any sexual advances toward [Vinson] at all, let alone whether those advances were unwelcome, [or] whether they were sufficiently pervasive to constitute a condition of employment."<sup>28</sup>

*Vinson* was the first Supreme Court Title VII case that addressed workplace sexual harassment.<sup>29</sup> At first glance, *Vinson* appears to have made great strides for women. By ruling that hostile environment sexual harassment is actionable, the Court expanded the scope of sexual harassment law to include more subtle yet pervasive sexual conduct that often characterizes interactions between men and women.<sup>30</sup> For example, being "constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone, and generally taken advantage of at work."<sup>31</sup> This type of behavior is of-

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elaborate on its basis for the finding of voluntariness, but it may have considered the voluminous testimony regarding Vinson's dress and personal fantasies . . . Since, under *Bundy*, a woman does not waive her Title VII rights by her sartorial or whimsical proclivities . . . that testimony had no place in this litigation.").

<sup>24</sup> *Vinson*, 477 U.S. 57, 64–65, 67 (1986).

<sup>25</sup> *Id.* at 64.

<sup>26</sup> *Id.* at 68.

<sup>27</sup> *Id.* at 68 (quoting 29 C.F.R. § 1604.11(a)(1985)).

<sup>28</sup> *Id.* at 72.

<sup>29</sup> Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 44 (1990).

<sup>30</sup> *See id.* at 55 & n.65 ("Hostile work environment sexual harassment is often less blatant than quid pro quo harassment and consequently, is perceived as less threatening. Much of the behavior is considered normal male behavior or viewed as "an extension of the male prerogative . . . in male-female interaction.") (quoting Susan Martin, *Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status*, in WOMEN: A FEMINIST PERSPECTIVE 57, 59 (Jo Freeman ed. 4<sup>th</sup> ed. 1989)

<sup>31</sup> *See MacKinnon, supra* note 3, at 40.

ten viewed as “normal male behavior” and appears “less threatening.”<sup>32</sup> As long as such or similar behavior is sufficiently “severe or pervasive” that it alters an individual’s employment conditions and “create[s] an abusive working environment,” it is actionable under Title VII.<sup>33</sup> Further, because the employer could not use the target’s voluntary submission to the sexual advances as a defense, the Court’s decision appeared to sweepingly protect women.<sup>34</sup>

Upon closer inspection, however, it is less clear that *Vinson* is an unequivocal advance for women’s rights in the workplace. First, the Court does not define what it means by “unwelcome.”<sup>35</sup> As stated by the Court, “[t]he correct inquiry is whether the [target] by her conduct indicated that the sexual advances were unwelcome.”<sup>36</sup> By remanding, the Court never addresses whether *Vinson* indicated by her conduct that Taylor’s alleged sexual advances were unwelcome. More broadly, the “unwelcome” standard is a unilateral standard that only focuses on the target’s actions while overlooking the offender’s actions that initiated the sexual advances in the first place.<sup>37</sup> As a result, this standard creates a presumption that men’s sexual advances are always welcome *unless* the woman “affirmatively and unambiguously” indicates the contrary.<sup>38</sup>

Second, the Court’s standard also suggests that women may be to blame for men’s sexual advances at work.<sup>39</sup> Unlike the court of appeals, the Supreme Court found that evidence about a claimant’s (or target’s) “provocative speech or dress” could be admissible.<sup>40</sup> The Court stated that:

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<sup>32</sup> *Id.* at 55.

<sup>33</sup> *Vinson*, 477 U.S. 57, 67 (1986).

<sup>34</sup> Elvia R. Arriola, “What’s the Big Deal?” *Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 COLUM. HUM. RTS. L. REV. 21, 24 & n.8 (1990).

<sup>35</sup> See Pollack, *supra* note 30, at 58–59 (noting the *Meritor Sav. Bank, FSB v. Vinson* Court’s failure to define “welcomeness” and arguing that the “unwelcome” standard is a difficult standard to meet).

<sup>36</sup> *Vinson*, 477 U.S. at 68.

<sup>37</sup> See Pollack, *supra* note 29, at 58–59 (“[The ‘unwelcome’ standard in *Vinson*] puts the woman’s conduct under a microscope, ignores the offender’s conduct, and judges by a pseudo-neutral perspective.”). See also Maria L. Ontiveros, *Fictionalizing Harassment—Disclosing the Truth*, 93 MICH. L. REV. 1373, 1390–91 (1995).

<sup>38</sup> L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 824 (1997). See also Ontiveros, *supra* note 37, at 1392 (arguing that the *Vinson* unwelcome standard requires women to “respond to harassment—quickly and firmly”).

<sup>39</sup> See Hebert, *supra* note 38, at 824.

<sup>40</sup> *Vinson*, 477 U.S. 57, 69 (1986).

[w]hile ‘voluntariness’ in the sense of consent is not a defense to such a [sexual harassment] claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.<sup>41</sup>

By permitting evidence about a claimant’s conduct preceding the sexual advances, including her manner of dress and speech, the Court’s “unwelcome” standard gives undue weight to the target’s conduct, overlooking the seriousness of the offender’s conduct.

Third, the standard set forth in *Vinson* is a subjective standard in which the strength of the sexual harassment claim will vary according to different claimants’ perceptions of permissible workplace behavior. Although the Court does not expressly mention reasonableness or subjectivity in its opinion, it appeared to prescribe a subjective standard that relies on women employees’ individual notions of what is welcomed sexual behavior.<sup>42</sup> The difficulty with establishing a subjective standard for sexual harassment claims is that not all women perceive sexual harassment equally.<sup>43</sup> That means that sexual harassment claims will necessarily be decided on a case-by-case basis depending on the claimant, instead of being decided more broadly to impact all women. More broadly, establishing a subjective standard also overlooks the reasons underlying each claimant’s subjective interpretations. Just because a woman does not indicate through her conduct that she dislikes a male employer’s sexual advances does not mean that she considers such behavior welcome.<sup>44</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 68 (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’ . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”).

<sup>43</sup> See generally MacKinnon, *supra* note 3, at 53 (concluding that Black women “are the most vulnerable” to sexual harassment because of their “least advantaged” economic position); Pollack, *supra* note 30, at 75–76 n. 167 (quoting Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.–C.L. L. REV. 9, 13 (1989) (“[I]t is a combination of two degraded statuses, black and female, [that creates] a particularly low-ranking one . . . . In a society which sees as powerful both whiteness and maleness, black women possess no characteristic which is associated with power.”) (alteration in original).

<sup>44</sup> See Ontiveros, *supra* note 38, at 1393.

In *Harris v. Forklift Systems, Inc.*,<sup>45</sup> the Court reaffirmed the *Vinson* standard and established a two-prong analysis for determining whether alleged sexual advances constituted hostile environment sexual harassment. First, does the target perceive the work environment as hostile or abusive? Second, would a reasonable person find the environment hostile or abusive?<sup>46</sup> The first prong is a subjective inquiry, while the second is an objective, reasonable person inquiry. Once more, this new standard overlooks the unique sexual harassment experiences of women of color, including Latinas. If sexual harassment is supposed to be a function of power,<sup>47</sup> the *Vinson-Harris* standard overlooks how power may influence a woman's decision to submit to sexual advances, such as perceived or actual threats to job security, intimidation, or coercion.<sup>48</sup> By focusing on whether a target indicates that the sexual advances at work are unwelcome, the *Vinson-Harris* standard puts the burden on women to take proactive measures to reject these sexual advances at work. However, the power imbalance in the workplace may influence a woman's decision not to reject sexual advances at work, but this does not mean she welcomes such advances. The *Vinson-Harris* standard thus overlooks the influence of power as one factor in a woman's decision not to respond to perceived sexual harassment. Further, the standard may assume that a woman's inaction means the sexual advances are welcome.

Outside the workplace, other factors may also influence a woman's decision to submit to sexual advances at work. Race, ethnicity, education, class or economic status, relationship status, language ability, and citizenship status are some of the external factors that can play a role. Gender, along with these other factors, intersects and impacts responses to sexual harassment that can be looked at as consenting due to the framework set up by the courts. Critical Race Theory has focused on the intersection of race and gender from a new point of view: how race and gender shape the workplace sexual harassment experiences of African-American women.

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<sup>45</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

<sup>46</sup> *See id.* at 21–22.

<sup>47</sup> *See Ontiveros, supra* note 38, at 1399 (“Discrimination is about power and domination, but power and domination exercised against women is generally not solely about gender and sexuality.”).

<sup>48</sup> *See id.* at 1394.

## II. CRITICAL RACE PERSPECTIVES ON WORKPLACE SEXUAL HARASSMENT

Critical Race theorists have shed light on how the intersection of race and gender shapes the way that women of color experience sexual harassment in the workplace. In *Sexual Harassment of Working Women*,<sup>49</sup> Catharine A. MacKinnon explains how a woman's economic status influences her response to sexual harassment at work. Focusing her discussion on Black women, MacKinnon describes how Black women's need to retain employment creates a resistance against filing sexual harassment claims.

On the one hand, because they have the least to fall back on economically, Black women have the most to lose by protest, which targets them as dissidents, hence undesirable workers. At the same time, since they are so totally insecure in the marketplace, they have the least stake in the system of sexual harassment as it is because they stand to lose everything by it.<sup>50</sup>

MacKinnon's words suggest that Black women's vulnerable economic status makes them vulnerable to experiencing sexual harassment at work.

In *Sexual Harassment and Race: A Legal Analysis of Discrimination*,<sup>51</sup> Judy Trent Ellis examines racial and sexual harassment to understand the sexual harassment of Black women.<sup>52</sup> Ellis argues that Black women are "extremely vulnerable"<sup>53</sup> to sexual harassment for two reasons. First, society characterizes Black women as sexually promiscuous and available.<sup>54</sup> This characterization dates back to slavery and continues even after the emancipation of slaves.<sup>55</sup> According to Ellis, white men who make sexual advances to Black women can get more power by

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<sup>49</sup> See MacKinnon, *supra* note 3.

<sup>50</sup> *Id.* at 53.

<sup>51</sup> Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30 (1981).

<sup>52</sup> See *id.* at 32–33. Similar to sexual harassment, racial harassment arises when a group exercises control over, and intimidation of, another group. In her article, Ellis explains how racial and sexual harassment go hand in hand because sexual harassment can be manifested through race and vice-versa. Despite the similarities, Ellis also raises an important distinction between racial and sexual harassment—courts have paid more attention to racial harassment than sexual harassment. Ellis explains how the Supreme Court has imposed the highest burden of proof for racial classifications while requiring a lower burden for classifications based on sex.

<sup>53</sup> *Id.* at 39.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

“associating the sexual exploitation to a period in history where a master-slave relationship was possible.”<sup>56</sup> Meanwhile, Ellis explains, Black men’s historical subordination to white men leaves Black women unprotected against white men’s sexual advances.<sup>57</sup> Second, Black women are economically disadvantaged.<sup>58</sup> Ellis relies on statistics that illustrate the high number of Black women in the workforce<sup>59</sup> and the even higher number that are heads of households.<sup>60</sup>

In recent years, Black women’s labor force participation rate still surpasses the rate of other women. In 2013, the percentage of Black women employed full-time was 79.4%, compared to 72.8% for white women, 78.3% for Asian women, and 73.5% for Hispanic women.<sup>61</sup> In 2012, 59.8% of Black women were in the workforce, compared to 56.9% for white women, 57.1% for Asian women, and 55.7% for Hispanic or Latina women.<sup>62</sup> In 2011, 45% of Black families were supported by women as heads of households.<sup>63</sup> In this light, the sexual exploitation of Black women and the threat to job security impact Black women’s decision not to report workplace sexual harassment.<sup>64</sup>

In *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*,<sup>65</sup> Kimberlé Crenshaw discusses the difficulties that arise

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 39–40.

<sup>58</sup> *Id.* at 40.

<sup>59</sup> *See id.* at 40 (In 1979, 53% of Black women were in the workforce).

<sup>60</sup> *See id.* at 40 (noting that 25% of Black women workers were heads of households in 1978, compared to 12.5% of female workers).

<sup>61</sup> *See Latest Annual Data: Full-Time and Part-Time Employment*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wb/stats/recentfacts.htm#rates> (last visited Feb. 28, 2015).

<sup>62</sup> *See Labor force participation rates, by sex, race and Hispanic ethnicity, 2013 annual averages*, U.S. DEP’T OF LABOR, WOMEN’S BUREAU, [http://www.dol.gov/wb/stats/LF\\_prates\\_sex\\_race\\_13.htm](http://www.dol.gov/wb/stats/LF_prates_sex_race_13.htm) (last visited Mar. 23, 2015).

<sup>63</sup> *See The Economic Status of Women of Color: A Snap Shot, Women’s Contribution to Family Income*, U.S. DEP’T OF LABOR, WOMEN’S BUREAU, [http://www.dol.gov/wb/media/reports/WB\\_WomenColorFactSheet.pdf](http://www.dol.gov/wb/media/reports/WB_WomenColorFactSheet.pdf) (last visited Feb. 28, 2015).

<sup>64</sup> *See Ellis, supra* note 52, at 40 (internal footnotes omitted) (“[T]hese statistics portray a situation of despair and economic vulnerability. They indicate that black women are largely either looking for work or employed in marginal jobs, earning low wages. At the same time black women are very often the sole support of the family. Sexual harassment takes on an even more sinister tone when the threat of losing a job is seen against this desperate background.”).

<sup>65</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989).

when courts treat race and gender as mutually exclusive categories.<sup>66</sup> Crenshaw argues that “[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”<sup>67</sup> With courts focusing on either race or sex discrimination, discrimination against Black women appears as a “hybrid” that conflicts with the “pure claims” of Black male plaintiffs or white female plaintiffs, respectively.<sup>68</sup> As a result, Black women are forced to choose between their race and their gender when seeking protection under anti-discrimination laws.<sup>69</sup> Although Crenshaw’s article<sup>70</sup> does not discuss workplace sexual harassment, its findings are applicable since sexual harassment is a form of sex discrimination.<sup>71</sup>

Critical Race Theory scholarship on the sexual harassment of Black women offers an innovative and instructive framework for understanding how Latinas experience sexual harassment in employment. Like Black women, Latinas in the United States are, as a group, economically disadvantaged. Similarly, as will be discussed in detail in Part III below, Latinas are often characterized as sexually promiscuous and available. Finally, the lower socioeconomic status of Latinos deprives Latinas of protection within their communities from white male exploitation. Notwithstanding these comparisons between Black women and Latinas, differences among women of color are also important for a thorough understanding of workplace sexual harassment experiences.

One case, *Castellanos v. Wood Design, Inc.*,<sup>72</sup> illustrates how ethnicity and language ability can shape the sexual harassment experiences of Latinas in a way that is not applicable to Black<sup>73</sup> women. The plaintiffs were two Salvadorian women employed as sanders in the defendant’s commercial woodworking business. It was disputed whether the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 40.

<sup>68</sup> *Id.* at 42.

<sup>69</sup> *Id.* at 45.

<sup>70</sup> For more on the intersection of race and gender, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing how Black women experience domestic violence).

<sup>71</sup> See MACKINNON, *supra* note 3.

<sup>72</sup> *Castellanos v. Wood Design, Inc.*, No. CIV. 03-3416, 2005 WL 41628, at \*1 (D. Minn. Jan. 4, 2005).

<sup>73</sup> This is a reference to English-speaking Blacks, primarily African-Americans, and excludes non-English-speaking Caribbean Blacks.

plaintiffs spoke, read or wrote English. The plaintiffs filed a hostile environment sexual harassment claim, asserting that their male supervisors and co-workers participated in “sexually offensive and hostile conduct” towards them “on a daily basis,” including “repeated name calling, verbal and sexually charged insults, and unwanted physical touching.”<sup>74</sup> On “several occasions,” the plaintiffs reported the behavior to management but their “complaints were not investigated.”<sup>75</sup> The plaintiffs quit their jobs after two or three years<sup>76</sup> on the grounds of sexual harassment and hostile environment.<sup>77</sup> The court denied the defendant’s motion for summary judgment, finding that the plaintiffs had met their burden of proof, such that a reasonable jury could find in their favor.<sup>78</sup> The court cautioned, however, that it had “some concerns” about the plaintiffs’ failure to report any sexual harassment for their first two years of employment.<sup>79</sup>

In addition to their sexual harassment claim, the plaintiffs also alleged that they were harassed “on the basis of their race and ethnicity, specifically because they are Latina [sic].”<sup>80</sup> Applying the two-prong *Harris* standard, the court found that the plaintiffs did not meet their burden of proof of racial or ethnic animus.<sup>81</sup> The court gave some weight to the fact that the defendant employed other Latin Americans,<sup>82</sup> including other Salvadorans, and there was no evidence that they were harassed.<sup>83</sup>

It might be impossible to know whether the plaintiffs were subjected to sexual harassment because of their gender, ethnicity, or both.<sup>84</sup> The law and, often, society treat gender and race (or ethnicity) as mutually exclusive.<sup>85</sup> Society largely recognizes racial issues and women’s issues,

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<sup>74</sup> Castellanos, *supra* note 73, at \*1 (Specifically, the plaintiffs alleged that the conduct included “repeated name calling, verbal and sexually charged insults, and unwanted physical touching.”).

<sup>75</sup> *Id.* at \*4.

<sup>76</sup> The opinion states that the plaintiffs were hired between 1998 and 1999 and quit on November 7, 2001. *See id.* at \*1, \*3 n.4.

<sup>77</sup> *See id.* at \*3.

<sup>78</sup> *See id.* at \*5.

<sup>79</sup> *Id.* at \*4.

<sup>80</sup> *Id.* at \*2.

<sup>81</sup> *See id.* at \*6.

<sup>82</sup> *See id.* at \*1 (“[A]t the time [p]laintiffs worked for [d]efendant, approximately two-thirds of [d]efendant’s workforce were Hispanic.”).

<sup>83</sup> *See id.* at \*6.

<sup>84</sup> The opinion does not discuss what percentage of the Latin American employees were women.

<sup>85</sup> *See* Welsh et al., *supra* note 1, at 90 (citing studies that discuss how Black women have difficulty ascertaining whether they experience sexual harassment as a function of their

but not always both.<sup>86</sup> Similarly, Title VII requires separate sex and race claims.<sup>87</sup> Although Critical Race scholarship has analyzed the intersection of gender and race for Black women, little attention has been paid to the intersection of gender and ethnicity for Latinas.

Latina & Latino Critical Legal Theory (“LatCrit”) emerged to account for the lack of Critical Race scholarship about Latinos and Latinas in the United States. LatCrit combines Critical Race Theory with Feminist Legal Theory<sup>88</sup> to respond to the “sociolegal invisibility” of Latinos and Latinas in the United States and raise awareness about the concerns of this traditionally marginalized group.<sup>89</sup>

In *Fictionalizing Harassment—Disclosing the Truth*,<sup>90</sup> Maria L. Ontiveros uses popular fiction novels and sexual harassment law to discuss the contrasting ways that white men and marginalized women experience sexual harassment. In one novel, a Mexican immigrant housekeeper reflected on how her race affected whether she would be targeted for harassment, the statements the harasser would make, and her capacity to respond to the harassment. Because “[p]eople define themselves by more than one label [i.e., woman, Latina, married, Catholic],” Ontiveros proposes the need for more scholarship that highlights race and other social categories when assessing sexual harassment.<sup>91</sup> Similarly, Elvia R. Arriola considers the study of racism “essential” to understanding the sexual harassment of women of color, including Latinas, in the New York City construction industry.<sup>92</sup> In Arriola’s words, “[i]n order to tighten the relationship between feminist theory and feminist practice, issues of class, race, ethnicity and sexuality must inform the perspectives from

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gender, race or both). See also Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1468 (1992) (discussing that because feminism and antiracism movements “focus[] on gender or race exclusive of the other,” neither addresses the “intersectional interests” of Black women). See also Scales-Trent, *supra* note 44, at 10 (“By creating two separate categories for its major social problems—‘the race problem,’ and ‘the women’s issue’—society has ignored the group which stands at the interstices of these two groups, black women in America.”).

<sup>86</sup> See Crenshaw, *supra* note 86, at 1468.

<sup>87</sup> See 42 U.S.C. § 2000(e) (2012).

<sup>88</sup> LatCrit theory also combines critical legal studies, critical race feminism, Asian American legal scholarship, and queer theory. See *LatCrit: About LatCrit*, LATINA AND LATINO CRITICAL LEGAL THEORY, INC., <http://latcrit.org/content/about> (last visited Mar. 2, 2015).

<sup>89</sup> Valdés, *supra* note 9.

<sup>90</sup> Maria L. Ontiveros, *supra* note 38, at 1390–91.

<sup>91</sup> *Id.* at 1399–1400.

<sup>92</sup> Arriola, *supra* note 35, at 58–59.

which we evaluate the impact of feminist politics on the society we seek to change.” That is, studying the intersection of gender and other social categories provides a greater understanding of the unique workplace sexual harassment experiences of particular groups of women.

In an article that focuses exclusively on the sexual harassment of Latinas, Diana Vellos discusses how race, ethnicity, class, gender, and immigration status create hostile working environments for Latina domestic workers.<sup>93</sup> For undocumented domestic workers, immigration status impacts their employment decisions by limiting the kinds of jobs they can apply for.<sup>94</sup> Poverty, dependent families abroad, limited language skills, aspiration to legal status,<sup>95</sup> and fear of deportation and job loss make these women especially vulnerable to hostile environment sexual harassment.<sup>96</sup> These influences intensify in domestic employment given the more private and intimate setting of the home as well as the degree of control of its residents.<sup>97</sup>

In its brief existence, LatCrit has made modest contributions to scholarship on the workplace sexual harassment experiences of Latinas in the United States. Building on LatCrit scholarship, the rest of the paper will focus on the stereotyping of Latinas and explore the impact of internalized stereotypes on how Latinas define workplace sexual harassment.

### III. THE HYPERSEXUAL LATINA STEREOTYPE

The stereotype of the oversexed Latina is deeply rooted in gender and racial discrimination. While it is apparent how this stereotype constitutes gender discrimination by objectifying the female body, how the stereotype also constitutes racial discrimination is less apparent. Latina bodies<sup>98</sup> have long been fetishized, “sexualized and exoticized” in the

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<sup>93</sup> See Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 5 AM. U.J. GENDER & L. 407, 409–14 (1997).

<sup>94</sup> See *id.* at 420.

<sup>95</sup> See *id.* at 426–29 (noting that many undocumented domestic workers attain legal status with an employer sponsor).

<sup>96</sup> See *id.* at 418.

<sup>97</sup> See *id.* 410 & n.12.

<sup>98</sup> The same is true for the bodies of Black women. See generally Crenshaw, *supra* note 71; Ellis, *supra* note 52. However, because Latino ethnicity (brown) is racially and ethnically situated between Whites and Blacks, Latinas’ bodies “occupy that in between space between the White booty (or the pre-adolescent invisible androgynous White booty) and the Black booty whose excess falls beyond the boundary of acceptability and desirability within U.S. popular culture.” Isabel Molina Guzmán & Angharad N. Valdivia, *Brain, Brow, and Booty: Latina Iconicity in U.S. Popular Culture*, 7 THE COMM. REV. 205, 218 (2004).

United States and in Europe.<sup>99</sup> When contrasted with the bodies of white women, Latinas' bodies appear both “physically aberrant [and] sexually desirable.”<sup>100</sup> On-screen images focus on Latinas' breasts, buttocks, hips, and lips, marginalizing Latinas from white women. As Molina Guzman and Valdivia explain, “[t]he marginalization of Latina bodies is defined by an ideological contradiction—that is, Latina beauty and sexuality is marked as other, yet it is that otherness that also marks Latinas as desirable. In other words, Latina desirability is determined by their signification as a racialized, exotic Others [sic].”<sup>101</sup> This aberration of Latina bodies is illustrated in the stereotype of the hot, overly sexual Latina.

The stereotype is deeply entrenched in popular culture. In Hollywood, Jennifer Lopez,<sup>102</sup> Shakira, Eva Mendes, Jessica Alba, Sofia Vergara, Eva Longoria, and Salma Hayek<sup>103</sup> have all profited from their sexuality, curvaceous bodies, and titillating images.<sup>104</sup> Films like *Chasing Papi*<sup>105</sup> and *Wild Wild West* depict Latina characters as temptresses. In primetime television, shows like *Desperate Housewives*,<sup>106</sup> *Glee*,<sup>107</sup> *Devious Maids*,<sup>108</sup>

<sup>99</sup> See Guzmán & Valdivia, *supra* note 99, at 211.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 213; see Román, *supra* note 7, at 40–41 n.30 (quoting Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy In American Law*, 76 OR. L. REV. 261, 264 (1997)).

<sup>102</sup> See Guzmán & Valdivia, *supra* note 99, at 212 (“Whenever [Jennifer Lopez] appears in the popular press, whether it is a newspaper, a news magazine, or People, Lopez’s gorgeous stereotypical Latina butt is glamorized and sexually fetishized.”).

<sup>103</sup> See *id.* (“Hayek’s petite yet hyper-curvaceous frame embodies the romanticized stereotypical Latina hourglass shape . . . Profile shots of Hayek in movies and magazine covers show both her breasts and her perfectly shaped booty. Frontal shots of Hayek’s body highlight her deep cleavage as well as her long dark hair. . .”).

<sup>104</sup> There are many more Latinas who have commoditized their sexuality in Hollywood, but these examples illustrate some of the most famous and/or high-earning Latinas in the industry.

<sup>105</sup> See Review of *Chasing Papi*, ROTTEN TOMATOES, [http://www.rottentomatoes.com/m/chasing\\_papi/](http://www.rottentomatoes.com/m/chasing_papi/) (last visited Mar. 2, 2015).

<sup>106</sup> In *Desperate Housewives*, Eva Longoria plays a fiery young Mexican housewife/former supermodel that wears tight designer dresses and seduces her teenage gardener into having an affair.

<sup>107</sup> In *Glee*, Naya Rivera plays teenager Santana Lopez, a Latina who traps the white men around her with her sexuality.

<sup>108</sup> The show was originally acclaimed for casting five Latina protagonists, but was quickly criticized for perpetuating the stereotype of the sexual and hot Latina. Promotional items feature the actresses in tight, cut-out maid uniforms, bright red lipstick, and high stilettos. See Raul Reyes, ‘*Devious Maids*’: does a disservice to Latinos: Column, USA TODAY (July 9, 2013, 3:32 PM), available at <http://www.usatoday.com/story/opinion/2013/07/09/deviuous-maids-latinos-tv-show-column/2461193>; Ana Maria Defillo, ‘*Devious Maids*’: New Lifetime Show Stereotypes Latinas Instead of Letting Us Speak for Ourselves, POLICYMIC, available at

and *Modern Family*<sup>109</sup> have cemented this image. On *Modern Family*, Sofia Vergara plays a young, sultry Colombian housewife and mother married to a much older, rich, white husband played by Ed O'Neill. Vergara's character is always seen in skin-tight and cleavage-baring clothing, high stiletto heels, heavy make-up, long and voluminous hair, and big jewelry.<sup>110</sup> The storyline is replete with references about Vergara's character's body and looks. She is often the desire of many men on the show, including her step-son-in-law, a white man who is overawed by her good looks, despite his devotion to his white wife of twenty years.

The stereotypical hypersexuality of Latinas has pervaded mainstream culture for several decades.<sup>111</sup> On-screen images of the over-sexed Latina are transmitted to audiences in their homes and further transmitted into mainstream culture. Society accepts these depictions as "truths."<sup>112</sup> In *Castellanos*, the plaintiffs asserted that their male co-workers called them gender-based expletives, such as "bitches," "whores," and "culo,"<sup>113</sup> a Spanish word for "ass."<sup>114</sup> Similarly, in *Colon v. Environmental Technologies, Inc.*,<sup>115</sup> a Latina plaintiff, Glorimar Colon, sued her former employer for allegedly subjecting her to a sexually hostile work environment. The undisputed facts revealed that, upon seeing the plaintiff and her Latina co-worker (Elia Corona) standing at their workstation, a male co-worker called Corona "a Mexican expletive that translates to 'bitch,' 'whore' or 'person paid for sex,'" and made an offensive and suggestive

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<http://www.policymic.com/articles/52009/devious-maids-new-lifetime-show-stereotypes-latinas-instead-of-letting-us-speak-for-ourselves> (last visited Mar. 2, 2015); *'Devious Maids' Criticism: Lifetime Series Continues to Draw Cultural Backlash for Latina Stereotypes (VIDEO)*, HUFFINGTON POST, available at [http://www.huffingtonpost.com/2013/06/26/devious-maids-criticism-\\_n\\_3506174.html](http://www.huffingtonpost.com/2013/06/26/devious-maids-criticism-_n_3506174.html) (last visited Mar. 2, 2015).

<sup>109</sup> See *Modern Family* (ABC television broadcast), available at <http://abc.go.com/shows/modern-family>.

<sup>110</sup> See generally Guzmán & Valdivia, *supra* note 99, at 218 (describing the stereotype of the "spitfire female Latina characterized by red-colored lips, bright seductive clothing, curvaceous hips and breasts, long brunette hair, and extravagant jewelry").

<sup>111</sup> See Román, *supra* note 7, at 45-46 (listing films that perpetuate stereotypes about Latin American culture).

<sup>112</sup> See *id.* at 48 n.82 (citing Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 56, 57 (Richard Delgado ed., 1995)).

<sup>113</sup> See *Castellanos*, *supra* note 72, at \*1.

<sup>114</sup> See SPANISHDICT, <http://www.spanishdict.com/translate/culo> (last visited March 3, 2015).

<sup>115</sup> *Colon v. Env'tl. Technologies, Inc.*, 184 F. Supp. 2d 1210 (M.D. Fla.2001).

hand gesture “that signified the ‘f word.’”<sup>116</sup> In *Andrade v. Kwon, et al.*,<sup>117</sup> six Latina plaintiffs sued their employer—owners and managers of a nail salon—for hostile work environment sexual harassment and discrimination on the basis of ethnicity. It was undisputed that the male owner and co-manager told the plaintiffs that he “enjoyed touching women sexually” and that “Mexican women in particular liked hearing this kind of talk,” and “routinely” referred to Latina employees using gender-based derogatory language, like “bitch.”<sup>118</sup>

For Latinas, gender identity is intertwined with ethnicity and ethnicity is intertwined with gender. Through this intersection of gender and ethnicity, Latinas continuously receive sexual attention in the places they frequent, including work. How Latinas respond to such sexual attention at work is the subject of Part IV.

#### IV. PUSHING THE BOUNDARY OF UNWELCOME SEXUAL BEHAVIOR AT WORK

This stereotype of the hypersexual Latina prevalent in popular culture in the United States influences how Latinas perceive sexual harassment at work. The stereotype is like a benchmark, wherein Latinas evaluate what kind of workplace sexual behavior is commonplace and what kind is unlawful. Against this benchmark, the stereotype pushes the boundary by redefining the meaning of “unwelcome” sexual advances.

##### A. *Redefining Sexual Harassment*

There are Latinas who do not welcome the sexual advances but do not label the behavior as sexual harassment because it is so pervasive, in large part, due to the oversexed Latina stereotype. One psychological study found that women who are targets of unwanted sexual behavior at work do not label this experience sexual harassment, despite negative consequences related to their job, health, and psychology.<sup>119</sup> One explanation is that “the particular situation [a woman] experienced does not conform to her personal definition of harassment.”<sup>120</sup> Women draw different boundaries around what they consider to be acceptable sexual

<sup>116</sup> *Id.* at 1214.

<sup>117</sup> *Andrade v. Kwon*, No. 3:08CV479, 2012 WL 3059616, at \*1 (D. Conn. Mar. 26, 2012).

<sup>118</sup> *Id.* at \*2.

<sup>119</sup> See Vicki J. Magley et al., *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOL. 390, 391 (1999).

<sup>120</sup> *Id.*

behavior at work.<sup>121</sup> Even women who regard the sexual advances as offensive, unwanted or insulting may still refuse to legally label the behavior sexual harassment,<sup>122</sup> much less file a claim.

Here, I propose that the stereotype of the oversexed Latina serves as a frame of reference that pushes the boundary on what sexual behavior Latinas should and should not allow in the workplace. In other words, the societal stereotypes about Latinas not only impact their experiences with sexual harassment but also impact the ways in which Latinas define and confront offensive sexual behavior at work. Media depictions of hypersexual Latinas and mainstream references about hypersexuality turn otherwise actionable workplace sexual into innocuous workplace banter. A male supervisor's repeated and offensive remarks about a Latina employee's curvy body, which would constitute the legal definition of hostile environment sexual harassment, become an imitation of the Hollywood stereotype.

#### B. *Failure to Report Sexual Harassment*

There are other Latinas who view the sexual advances as harassment but are unwilling to file claims due to in-group loyalty, unfamiliarity with sexual harassment law, and economic vulnerability. Women draw different boundaries around what they consider to be acceptable sexual behavior at work.<sup>123</sup>

##### 1. *IN-GROUP LOYALTY*

One line that is drawn is whether the accuser and the target are the same race or ethnicity. Women are generally less likely to label sexual advances as sexual harassment if the accuser is a member of the same race or ethnicity.<sup>124</sup> For women of color, a common racial or ethnic identity often mitigates the offensiveness of the unwelcome sexual advances. For some of these women, harassment by a member of their own race falls outside of their definition of sexual harassment.<sup>125</sup> In one study, a

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<sup>121</sup> See Patti A. Giuffre & Christine L. Williams, *Boundary Lines: Labeling Sexual Harassment in Restaurants*, 8 GENDER & SOC'Y 378, 379 (1994).

<sup>122</sup> See Magley, *supra* note 120, at 299; Giuffre & Williams, *supra* note 121, at 379 (quoting Michele Paludi and Richard B. Barickman, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 68 (1991)).

<sup>123</sup> See Giuffre & Williams, *supra* note 122 at 379.

<sup>124</sup> See *id.*; see also Welsh et al., *supra* note 1, at 98-99 (discussing how Black women are less likely to label sexual advances from Black male workers as sexual harassment).

<sup>125</sup> See generally Magley et al., *supra* note 120, at 391.

Black woman explained why she does not label sexual behavior at work as sexual harassment:

[W]e do not define it [sexual harassment] and I think we are offended but we have grown to accept that as a norm, within our society. 'Cause the guys think it's normal and so do we. You see the young girls. The young girls, sometimes I get offended for them when these guys with their old ugly self trying to say and do things, and they just 'hee hee hee.'<sup>126</sup>

This comment highlights the difficulty for women of color in differentiating between workplace sexual harassment on the one hand and other types of workplace sexual interactions on the other.<sup>127</sup>

Applying this research to Latinas suggests that Latinas are less likely to consider unwelcome sexual advances by Latinos as sexual harassment. After all, the hypersexual Latina stereotype has been widely internalized within, and perpetuated by, Latin American culture.<sup>128</sup> To complicate matters, the oversexed Latina stereotype is often accompanied by the Latino womanizer stereotype.<sup>129</sup> Together, these two stereotypes would suggest that sexual interactions are normal in interactions among Latinas and Latinos at work. When sexual interactions are normalized, even behavior that is otherwise offensive can be passed off as innocuous.<sup>130</sup>

## 2. UNFAMILIARITY WITH SEXUAL HARASSMENT LAW

Another reason that Latinas might normalize the sexual advances of Latinos is that the concept of sexual harassment law might be foreign to them. In many Latin American countries, sexual harassment laws are

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<sup>126</sup> Welsh et al., *supra* note 1, at 97; *but see* Vinson, *supra* note 21. Although mentioned nowhere in the Court's opinion, Mechelle Vinson and her supervisor, Sidney Taylor, were both African-American. *See* Sam Fullwood III, *Black Women Seen as Reluctant to Claim Harassment: Rights: They are under pressure to preserve race solidarity. However, their reaction in Thomas-Hill case indicates that the issue has struck home*, L.A. TIMES, Oct. 10, 1991, available at [http://articles.latimes.com/1991-10-10/news/mn-327\\_1\\_Black-women](http://articles.latimes.com/1991-10-10/news/mn-327_1_Black-women).

<sup>127</sup> Giuffre & Williams, *supra* note 122, at 380.

<sup>128</sup> *See generally* Román, *supra* note 7.

<sup>129</sup> *See id.* at 39.

<sup>130</sup> *See* Giuffre & Williams, *supra* note 122, at 382. Researchers interviewed 18 wait staff (men and women of various races and ethnicities, ages, sexual orientations, and relationship statuses) in restaurants in Austin, Texas, to learn how different people define sexual harassment. They found that although most viewed their workplace as "highly sexualized, several dismissed the constant sexual innuendo and behaviors as 'just joking,' and nothing to get upset about." Some women quickly dismissed the advances as "just the way men are."

underdeveloped. In contrast to most white and Black women who have full citizenship rights in the United States, many Latinas lack full citizenship rights.<sup>131</sup> Thus, white and Black women are more likely to understand sexual advances because they have full citizenship and adhere to norms in America, where sexual harassment law is much more developed. In some instances, even Latinas that have full citizenship rights might still adhere to Latin American norms, including underdeveloped sexual harassment laws. One study contrasts the sexual harassment experiences of white women, Black women, and Filipinas in Canada.<sup>132</sup> Filipinas, who lack full citizenship rights, have a limited understanding of sexual harassment law that is partly a result of underdeveloped sexual harassment laws in the Philippines.<sup>133</sup> This limited understanding means that the Filipina workers in the study could not always “distinguish[] between sexual harassment and other forms of sexual interactions in the workplace.”<sup>134</sup>

Due to the shared immigration history (and concomitant language ability), Latinas’ sexual harassment experience is more akin to the experience of Asian women than that of white and Black women. Immigration history makes it less likely that Latinas understand the legal standards for workplace sexual harassment in the United States. In this context, the research would suggest that rather than defining permissible workplace sexual behavior according to a broad understanding of sexual harassment law, Latinas might turn to other factors for guidance.

### 3. *ECONOMIC VULNERABILITY*

Another reason for why Latinas are more likely to endure sexual harassment in the workplace is whether the accuser occupies a superior employment position. This view reflects the traditional view about the power imbalance underlying workplace sexual harassment. In recent years, like in recent decades, an overwhelming majority of workplace sexual harassment claimants have been women. In each of the past five fiscal years, 2010 to 2014, data on the percentage of sexual harassment claims filed indicate that males filed only 16-18% of charges.<sup>135</sup> Data

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<sup>131</sup> See generally Welsh et al., *supra* note 1.

<sup>132</sup> *Id.*

<sup>133</sup> Welsh et al., *supra* note 1, at 99-102.

<sup>134</sup> Giuffre & Williams, *supra* note 122, at 380.

<sup>135</sup> See Charges Alleging Sexual Harassment FY2010-FY2014, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Mar. 23, 2015). This data is based on charges only filed with the EEOC. Data showing charges filed with the EEOC and state and local Fair Employment Practices agencies reveal similar patterns of gender

for earlier years reveals even greater gender disparity, with males filing only 11 to 16% of charges in any given year.<sup>136</sup> This and other evidence suggests that workplace sexual harassment systematically affects women as a group.<sup>137</sup> Moreover, as a group, women are less likely to occupy managerial and other supervisory positions at work. Therefore, it is not uncommon for the accuser to occupy a position of power over the target. This power imbalance, in turn, shapes women's definition of sexual harassment. In one study, women of all races and ethnicities were more likely to label unwelcome sexual advances as sexual harassment if the accuser was a manager or other supervisory employee.<sup>138</sup> One female subject described sexual advances as sexual harassment when they come from her male superiors, but not from her male co-workers.<sup>139</sup>

I argue that for Latinas, the boundary might be pushed further. Because Latinas, as a group, occupy lower-ranked positions in the workforce, they are more vulnerable to being sexually harassed by male superiors. Factoring in the pervasive stereotype of the oversexed Latina, Latinas are especially vulnerable to being sexually harassed by male superiors.

By narrowly focusing on whether a Latina target "indicate[d] by [her] conduct that the alleged sexual advances were unwelcome," the current *Vinson-Harris* standard overlooks how gender and ethnicity, along with unfamiliarity with sexual harassment law and economic vulnerability, are ever-present in how Latinas perceive workplace sexual harassment and how others perceive the sexual harassment of Latinas. The next section proposes an alternative standard based on meaningful consent.

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breakdowns. See Sexual Harassment Charges EEOC & FEPAs Combined: FY1997 - FY 2011, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm) (last visited Mar. 23, 2015). The EEOC data does not list the percentage of sexual harassment charges filed by females per fiscal year.

<sup>136</sup> See Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 - FY 1996, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment-a.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment-a.cfm) (last visited Mar. 23, 2015).

<sup>137</sup> See MacKinnon, *supra* note 3, at 27 (arguing that since workplace sexual harassment affects women as a group, it is a product of sex discrimination).

<sup>138</sup> Giuffre & Williams, *supra* note 122, at 384-87; see *id.* at 384 (citing Shmuel Ellis et al., *Moderating Effects of Personal Cognitions on Experienced and Perceived Sexual Harassment of Women at the Workplace*, 21 J. APPLIED SOC. PSYCHOL. 1320-37 (1991)).

<sup>139</sup> See *id.* at 384.

## V. A MEANINGFUL CONSENT STANDARD FOR WORKPLACE SEXUAL HARASSMENT

A meaningful consent standard would inquire whether the female target “overtly consented” to her male offender’s sexual advances at work.<sup>140</sup> Although this standard is applied in rape<sup>141</sup> cases, parallels<sup>142</sup> between rape and sexual harassment make this standard instructive for addressing the shortcomings of the *Vinson-Harris* standard.

In rape, meaningful consent means “words or overt actions . . . indicating freely given agreement to have sexual intercourse or sexual contact.”<sup>143</sup> Applying this definition to sexual harassment law, meaningful consent would consist of a woman’s words or overt conduct indicating that she freely welcomes sexual advances at work. Rather than asking whether the woman *rejected* a man’s sexual harassment at work, as the *Vinson-Harris* standard currently asks, this new standard would instead focus on whether the woman *consented* to the sexual advances.<sup>144</sup>

There are several advantages to applying a meaningful consent standard for workplace sexual harassment claims. Meaningful consent provides predictable and uniform outcomes.<sup>145</sup> Rather than inquiring about a plaintiff’s subjective state of mind<sup>146</sup> in refusing alleged sexual advances, meaningful consent is an objective standard that would require courts to review evidence about a plaintiff’s words or overt actions indicating her consent. That is, words or overt actions that any reasonable person would understand to indicate consent. “What is a ‘reasonable’ manifestation of consent is what any ‘reasonable person would understand from the plaintiff’s conduct.’”<sup>147</sup>

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<sup>140</sup> Mary Jo Shaney, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1112 (1986); see Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN’S L.J. 143, 155 (1983).

<sup>141</sup> See Wiener, *supra* note 140, at 155 n.72 (citing WIS. STAT. ANN. § 940.225(4) (West 1982)).

<sup>142</sup> See generally MacKinnon, *supra* note 3 (analogizing sexual harassment to rape).

<sup>143</sup> Wiener, *supra* note 141, at 155 n.72 (quoting WIS. STAT. ANN. § 940.225(4) (West 1982)). Overt actions mean actions that are unequivocal under all the circumstances. See Leach v. State, 83 Wis. 2d 199, 215 (1978).

<sup>144</sup> See Shaney, *supra* note 141, at 1112 (proposing a meaningful consent standard that would require courts to “focus on whether the [target] overtly *consented* to the sexual conduct rather than on whether the [target] *resisted* a harasser’s behavior.”) (emphasis added).

<sup>145</sup> *Id.*

<sup>146</sup> See *id.* at 1129 (“The tort consent standard is an objective standard; courts must look to ‘overt works and acts of others’ rather than at what is in someone’s mind.”).

<sup>147</sup> *Id.*

In *Vinson*, the Court recognized the difficulty behind the “unwelcome” standard, noting that “the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact.”<sup>148</sup> Mechelle Vinson testified that she had sexual relations with her then-supervisor, Taylor, approximately forty or fifty times during her four years of employment at the bank. Although the Court clarified that a target’s “voluntariness” does not dispose of her sexual harassment claim,<sup>149</sup> assessing Vinson’s conduct to determine whether she rejected Taylor’s advances can be difficult because it relies entirely on Vinson’s individual state of mind. While the second prong of the *Harris* standard is more instructive than the *Vinson* standard because it assesses the conduct from the viewpoint of a reasonable person, the *Harris* standard also presents difficulties due to the focus on *welcomeness*. Since different groups of women experience sexual harassment differently, assessing how a reasonable person would reject unwelcome sexual advances leaves some groups of women unaccounted for.

From the vantage point of the traditional reasonable person, the meaningful consent standard should increase predictability and uniformity of outcomes. While some courts and scholars have rejected the reasonable person standard in sexual harassment because it ignores important gender differences that shape how men and women each experience sexual harassment,<sup>150</sup> the reasonable person standard, when applied with meaningful consent, takes into consideration women’s unique experiences with sexual harassment.

A meaningful consent standard also empowers women with the choice of whether to engage in sexual conduct at work. In other words, “[f]ocusing on overt consent also allows a woman to define her

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<sup>148</sup> *Vinson*, *supra* note 15, at 68.

<sup>149</sup> *See id.* (“[T]he District court in this case erroneously focused on the ‘voluntariness’ of [Vinson’s] participation in the claimed sexual episodes. The correct inquiry is whether [Vinson] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”).

<sup>150</sup> *See generally* Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 205-06 (2001) (discussing circuit split over which reasonable standard to apply). Four circuit courts applied a reasonable woman standard. *See id.* at 206 n.53. The Sixth Circuit applied a reasonable person standard. *See id.* at 206 (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986)).

sexuality.”<sup>151</sup> Sexual harassment, like rape, is a function of power.<sup>152</sup> The power imbalance between men and women is reflected in the workplace, where men exercise power over women. The present *Vinson-Harris* “unwelcome” standard presumes that sexual advances are always welcome unless the female target resists. This standard results in men having the power to “choose and impose [sexual] conduct”<sup>153</sup> on women, while women are forced to respond by either submitting to or rejecting the sexual advances. In addition, this standard assigns the responsibility for the alleged sexual advances to women, not the employer.<sup>154</sup> In stark contrast, a meaningful consent standard could allow women to make the sexual choice for a change. Instead of men choosing to make sexual advances towards women, consent would allow women to indicate to men that the sexual advances are welcome, limiting men’s freedom to approach any woman of their choosing and rebutting the presumption that sexual advances are always welcome. A woman can choose if she wants to partake in sexual contact at work, potentially tilting the concomitant power imbalance.<sup>155</sup>

Despite its advantages, the meaningful consent standard also has its drawbacks. For instance, even if a woman consents, consent is not always voluntary. For Latinas, who experience sexual harassment at a crossroads of varying factors, including gender and ethnicity, consent might not be voluntary.<sup>156</sup> To address this concern, one researcher proposed a two-prong meaningful consent standard: whether the target overtly expressed her consent, and whether consent was coerced.<sup>157</sup> “Under this standard, even a [target] who has said ‘yes’ to a harasser should not be regarded

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<sup>151</sup> *Shaney*, *supra* note 141, at 1132.

<sup>152</sup> *See generally* MacKinnon, *supra* note 3.

<sup>153</sup> *Shaney*, *supra* note 141, at 1132.

<sup>154</sup> *See id.* at 1123 (noting that under the “unwelcome” standard, “by attributing work problems to the plaintiff’s conduct, the court in effect shifted responsibility for the claimed harassing environment from the employer to the plaintiff”); *see id.* at 1132 (discussing how under the “unwelcome” standard, “a court challenges the [target] to defend her actions: ‘What did you do to resist?’”).

<sup>155</sup> *See id.* at 1132 (“Focusing on a woman’s overt consent, rather than her resistance, could provide a means of altering male perceptions of female sexuality, of shifting control of sexual choice, and of shifting power in sexual choice.”).

<sup>156</sup> *See supra* Part IV (discussing factors that impact a Latina’s sexual harassment experience, including language skills and socioeconomic status).

<sup>157</sup> *Shaney*, *supra* note 141, at 1124-25. This two-prong standard mimics the two-prong standard established in *Harris* because it consists of objective (the first prong) and subjective (the second prong) inquiries.

as having consented until a court has examined whether the 'yes' was coerced."<sup>158</sup> For Latinas, the hot-blooded stereotype might suggest that men are likely to assume that they consented (or will consent) to sexual advances. After all, the stereotype is widely accepted. The meaningful consent standard, however, would contradict this assumption by eroding men's power to stereotype Latinas. Through meaningful consent, Latinas would be able to indicate if they choose to engage in the stereotypical behavior. This way, Latinas, too, can "define [their] sexuality."<sup>159</sup>

On balance, a meaningful consent standard is instructive in sexual harassment cases and provides a powerful framework for addressing the shortcomings of the *Vinson-Harris* standard. The meaningful consent standard proposed in this section surpasses the subjective "unwelcome" standard in *Vinson* because it brings predictability and uniformity by analyzing claims from an objective reasonable person. It surpasses the subjective-objective *Harris* "unwelcome" standard by shifting the focus from a woman's resistance to her consent. It surpasses objections to the use of the reasonable person in sexual harassment because it is a gendered standard that considers women's experiences with sexual harassment at work. More importantly, meaningful consent incorporates the intersectionality arguments that neither the *Vinson-Harris* nor the reasonable person standards consider. By shifting the focus from the target's resistance to her consent, this standard recognizes that, for many women, sexual advances are presumptively unwelcome and her submission to such advances can be influenced by factors other than gender.

## VI. CONCLUSION

This paper is an attempt to begin assessing Latinas' perception of workplace sexual harassment through the intersection of gender and ethnicity. Employing the stereotype of the hot-blooded, sexy, desirable, and hypersexual Latina, this paper has presented how the stereotype confounds Latinas' ability to label unwelcome sexual advances at work as workplace sexual harassment. The topic, which originated from a similar discussion in Critical Race scholarship about Black women, aims to springboard an academic conversation about matters unique to Latinas.

Pervasive stereotypes about Latina hypersexuality push the boundary lines on their definition of workplace sexual harassment. Stereotypical

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1132.

depictions of hypersexual Latinas in the media and mainstream references about hypersexuality turn otherwise actionable workplace sexual harassment into innocuous workplace banter. The oversexed Latina stereotype suggests that Latinas have higher tolerance for sexual advances in the workplace.

Implications of this stereotype are wide-ranging. Rather than labeling the offensive conduct as sexual harassment, Latinas will dismiss it as permissible workplace sexual behavior that results from their ethnicity. Because the current *Vinson-Harris* standard emphasizes the actions of the target instead of her accuser, the stereotype of the oversexed Latina can negatively impact Latinas' decision to find recourse in the law. Meaningful consent offers a promising alternative to the current standard by taking into consideration a Latina's decision to consent to sexual contact at work and whether that decision was voluntary. By shifting the focus from whether a woman welcomed the sexual advances to whether she consented to them, a meaningful consent standard can challenge Latinas' present understanding of workplace sexual harassment law and, in turn, inform their decision to file lawsuits.