sive interpretations of the first amendment.[112]

Although news reporters may suggest otherwise, an approach that accommodates interests other than those of the press would not destroy the fourth estate. Indeed, as Professor Miller has observed,

> The press seems to regard anyone who wants to limit its freedom in order to protect another important social value as a threat, someone who, by definition, is bent on destroying the media. Journalists apparently think that they are challenged by one Goliath after another and that they, media Davids, must sally forth to slay the enemy. . . . The special status of the press will not come tumbling down like a house of cards unless every competing interest is subordinated to it. . . . Why, despite their power, do the media react like a terrified hemophiliac to the slightest pinprick of criticism? No doubt journalists feel that recognizing the importance of any other public policy may inhibit news gathering and lead ultimately to the debilitation of their special status.[113]

While an approach that considers privacy interests along with first amendment interests will obviously not lead to the debilitation of the press, the Court's present approach has already led to the debilitation of many individuals by granting the press an absolute privilege to invade their privacy. Unless the Court abandons this approach, the press will continue to destroy the privacy of anyone whose life has attracted its morbid curiosity and trial participants will have little to celebrate on the one hundredth anniversary of Warren and Brandeis' landmark article.

112 Although the "need to know" test may be applied in all public disclosure tort cases, this standard is particularly important in helping to prevent the needless intrusion of such privacy interests as those explored in this Article. Of course, the mere fact that the press has published titillating gossip will not and should not subject it to liability. Before the press may be held liable for unnecessary public disclosures, plaintiffs must prove that these facts "would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652D (1977). *See supra* note 9. Considering the difficulty in sustaining this burden, plaintiffs will likely succeed in holding the press liable only where the press has invaded such compelling privacy interests as those held by the trial participants discussed above.

113 Miller, *supra* note 25, at 849.

NO FILM AT 11: THE INADEQUACY OF LEGAL PROTECTION AND RELIEF FOR SEXUALLY HARASSED BROADCAST JOURNALISTS

I. INTRODUCTION

One of the more confusing areas in current civil rights litigation is hostile environment sexual harassment. The confusion results from the lack of definitive guidance provided by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*.[1] Although recognizing hostile environment sexual harassment as a form of sex discrimination and as a valid cause of legal action under Title VII of the Civil Rights Act,[2] the Court failed to elucidate concrete standards for proceeding with such a claim. As a result, women[3] and their lawyers question whether this legal theory is an effective vehicle for validation of their claims. The Court's failure to articulate definitive guidelines for both assessing the validity of and proceeding with their claims indicates that the avenue for presenting such claims and obtaining remedies is narrow indeed.

Women in broadcast journalism who are victimized by a hostile environment and consequently want to proceed with a claim face doubts regarding the viability of doing so. Since the media's inception, women have been discriminated against and subjected to a plethora of elements that have fostered a hostile work environment.[4] The *Vinson* decision does not, in either fact or effect, open the doors of the legal system for these women. In fact, there are no *documented* cases, either officially reported or published, concerning hostile environment sexual harassment in the

1 477 U.S. 57 (1986).

2 42 U.S.C. § 2000e (1982 & Supp. V 1988).

3 Throughout this Note, the harassment victims are referred to as women and the pronouns "she" and "her" are used when referring to a plaintiff. This generic usage is employed for two reasons: to avoid the awkward grammatical situation which would result if both genders were used; and because, in the overwhelming majority of cases, the plaintiffs are female. Likewise, the pronouns "he," "him," and "his" are used when referring to a defendant, as the majority of sexual harassment cases involve male supervisors and/or male co-workers.

4 *See* United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television*, United States Government Printing Office, Washington, D.C. (Aug. 1977) [hereinafter *Window Dressing on the Set*]; United States Commission on Civil Rights, *Window Dressing on the Set: An Update*, United States Government Printing Office, Washington, D.C. (Jan. 1979) [hereinafter *Window Dressing: An Update*]; J. Gelfman, *Women in Television News: The On-Air Woman Newscaster in New York* (1974) [hereinafter Gelfman] (dissertation for Doctor of Education Degree at Columbia University); M. Watt, *A Critical Analysis of the Roles of Women in a Local Media Industry* (1978) [hereinafter Watt] (dissertation for Doctor of Philosophy Degree at the State University of New York at Buffalo).

broadcast journalism industry.[5] *The lack of documented case law* thus supports this Note's proposition that *Vinson* has not provided an adequate forum for women in broadcasting to air and proceed with their claims because the absence of complaints means that the women "—even the best educated and most forceful—are afraid to complain."[6] "The unnamed [therefore] should not be mistaken for the nonexistent . . . [for] [s]ilence often speaks of pain and degradation so thorough that the situation cannot be conceived as other than it is. . . ."[7]

Primarily, it is necessary to acknowledge that those who are sexually harassed are entitled, by right, to a forum in which to air their legal complaints.[8] Theoretically, it is through the laws governing sex discrimination and sexual harassment, that the victims of sexual harassment purportedly "have been given a forum, legitimacy to speak, authority to make claims, and an avenue for possible relief."[9] Whereas theoretically this is a recognized right, it does not exist on a practical level.[10]

[5] There were two individual cases filed: one by Cecily Coleman against ABC and the other by Elissa Dorfsman against CBS. As neither woman was employed in an on-air position in broadcasting, their cases are technically moot for the purposes of this Note. However, since they are the only notable cases close to being on point, they will be discussed. Both were settled out of court and the records of the proceedings are not published or otherwise available.

The obtainable information regarding these two suits comes from media reporting of the settlements. *See* Rosenberg, *CBS Settles Suit on Sex Harassment*, L.A. Times, June 28, 1985, § VI, at 1, col. 5 [hereinafter Rosenberg]; Flander, *Women In Network News — Have They Arrived Or Is Their Prime Time Past?*, Wash. Journalism Rev., Mar. 1985, at 39 [hereinafter Flander]; Landis, *Women from ABC Air Grievances*, The Wash. Woman, Mar. 1986, at 13 [hereinafter Landis]. For a discussion of the substantive allegations, see Part VI of this Note.

There was also a class action filed by the women of the "Nightwatch" staff against CBS, Inc. That complaint, although analogous to a Title VII action, charged sexual assault in violation of the District of Columbia's Human Rights Act. As with the individual suits, information regarding this case comes from the above listed media reportings in addition to Carmody, *Suit Settled*, The Wash. Post, Aug. 4, 1987, The TV Column, at D6 [hereinafter Carmody]. *See* Part VI of this Note for a discussion of the substantive allegations.

[6] Burleigh & Goldberg, *Breaking The Silence: Sexual Harassment In Law Firms*, A.B.A. J., Aug., 1989, 46, 52 (women attorneys, as in other professions, still face subtle forms of sexual harassment) [hereinafter *Breaking The Silence*].

[7] C. MacKinnon, Sexual Harassment of Working Women 28 (1979) [hereinafter Working Women] (explores the economic, social, and political underpinnings of the legal problems involved with sexual harassment in the work environment).

[8] For a philosophical discussion of the rights vested in each citizen by the laws of this country, see generally R. Dworkin, Taking Rights Seriously (1978).

[9] C. MacKinnon, Feminism Unmodified — Discourses on Life and Law 104 (1987) (collection of discourses exploring and developing the author's theories and proposals regarding the relationship of sexual politics to various aspects of the law. The author, a recognized legal scholar, professor, and feminist, propounds that gender functions as a system of social hierarchy which distributes power inequitably).

[10] Indeed, "having a legal right doesn't mean it will be exercised. It's not surprising that most women lawyers deal with sexual harassment by quitting their jobs or suffering silently. . . ." *Breaking The Silence*, *supra* note 6, at 46.

This Note explores the development of sexual harassment as a form of sex discrimination in the workplace, and includes an in-depth discussion of the *Vinson* decision and its impact on women in broadcasting. Part II discusses the development of the two avenues of relief available to sexual harassment victims in the workplace under Title VII. Part III delineates the history of sexual discrimination in the broadcast industry which has made the industry a ripe environment for claims of sexual harassment. Part IV focuses on challenges to the discriminatory practices of the broadcast industry. Part V describes the facts and legal consequences of the *Vinson* decision as the seminal hostile environment sexual harassment case. Part VI demonstrates the futility women in broadcasting have faced in seeking relief post-*Vinson*. Part VII highlights the issues, problems, scope, and impact of *Vinson* as per the interpretations of the various circuits in hostile environment sexual harassment cases and their applicability to women in broadcasting. Finally, Part VIII concludes that, while there are no *pat* answers to solve the problem of hostile environment sexual harassment in the workplace, there are alternative solutions worth exploring.

II. Sexual Harassment as a Form of Sex Discrimination

Title VII of the Civil Rights Act of 1964 states that it is "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. . . ."[11] Although the addition of "sex" to Title VII was originally introduced by Representative Howard W. Smith in an effort to defeat the entire bill itself, the bill's passage and the subsequent development of sex discrimination law belie that congressman's original intent.[12]

Congress intended that Title VII discrimination be subject to broad interpretation while simultaneously focusing on the individual.[13] However, it was not until the mid-1970's that federal

[11] 42 U.S.C. § 2000e-2(a)(1) (1982 & Supp. V 1988).

[12] 110 Cong. Rec. H2577-84 (1964). For a discussion of the development of Title VII, see generally *infra* note 13.

[13] Comment, *Employment Discrimination — The Expansion in Scope of Title VII to Include Sexual Harassment as a Form of Sex Discrimination:* Meritor Savings Bank, FSB v. Vinson, 12 J. Corp. L. 619, 620 (1987) [hereinafter *The Expansion in Scope of Title VII*] (construing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

The Comment is an in-depth exploration of the development of sexual harassment law and *Vinson*'s impact on it. In his discussion of the broad construction afforded con-

courts afforded sexual harassment claimants a viable avenue for relief under Title VII.[14] The early sexual harassment decisions, in failing to recognize sexual harassment as an actionable form of sex discrimination, dismissed the conduct complained of as insufficiently tied to the workplace context.[15]

The long and arduous road taken in an effort to merge the Title VII hostile work environment theory, as set forth in *Rogers v. EEOC*,[16] with the contention that workplace sexual harassment is actionable as a form of sex discrimination culminated in the 1980 publication of *Guidelines on Discrimination Because of Sex* by the Equal Employment Opportunity Commission ("EEOC").[17] The EEOC recognized a need for a definitive statement on sexual harassment due to the increasing number of Title VII cases filed.[18] The *Guidelines* set forth the following criteria:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[19]

gressional intent regarding the application of Title VII, the author cites, "[w]e must be acutely conscious of the fact that Title VII . . . should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of ethnic discrimination." *Id.* at 620 n.17 (quoting *Rogers*, 454 F.2d at 238).

14 *Expansion in Scope of Title VII*, *supra* note 13, at 622.

15 *See, e.g.*, Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977). According to these early decisions, the acts lacked the requisite tangential ties because (1) they were either manifestations of personal proclivities, peculiarities, or mannerisms of the offender, or (2) there was no evidence that employer policies either imposed or condoned consistent sex-based discrimination on a definable employee group. *Id.*

16 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). This seminal case established that a racially hostile work environment is actionable under Title VII. The Court took this position because

> employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

Id. at 238.

17 29 C.F.R. § 1604 (1988) [hereinafter *Guidelines*].

18 1 M. MORROW, EQUAL EMPLOYMENT PRACTICE GUIDE, III-192 to -194 (L. Lorber, K. McGovern & R. Sampson 1st ed. 1981) *construed in Expansion in Scope of Title VII*, *supra* note 13, at 626.

The *Guidelines* indicate, and indeed, reinforce, the existence of two avenues of legal attack for a sexual harassment cause of action under Title VII. The first, addressed in (1) and (2), involves the granting or denial of economic benefits as conditioned upon the receipt of sexual favors. This is most often referred to as the *quid pro quo* approach.[20] The second avenue of legal attack, as addressed in (3), refers to the "hostile environment" approach.[21] Although the victim need not show that she suffered economic reprisal or detriment, she must show that she was "forced to suffer 'sexually stereotyped insults and demeaning propositions' in an environment pervaded by hostile sexual innuendo and behavior."[22]

In 1986 the Supreme Court decided *Meritor Savings Bank, FSB v. Vinson*,[23] a case premised on the hostile environment theory. The Court's decision, written by Justice Rehnquist,[24] unanimously[25] upheld the "extension of [T]itle VII to embrace claims premised on either the quid pro quo or the hostile environment approach."[26] The impact of *Vinson* and its progeny on the women of broadcast journalism is more comprehensible after a thorough examination of

19 *Guidelines*, *supra* note 17, at § 1604.11 (footnote omitted).

20 As the Latin phrase indicates, it is a tradeoff—one valuable thing for another, something for something. BLACK'S LAW DICTIONARY 1123 (5th ed. 1979).

For application of the *quid pro quo* theory of harassment, see, *e.g.*, Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (female attorney hired as manager of Equal Employment Opportunity Program failed to prove that job benefit was conditional upon her acceptance of sexual harassment); Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983) (former female employee successfully established tangible job detriment throughout employment and as a result of wrongful termination); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (discussing differences between *quid pro quo* harassment and hostile work environment harassment); Schroeder v. Schock, 42 Fair Empl. Prac. Cas. (BNA) 1112 (D. Kan. 1986) (store owner and supervisor held liable for discharge of female employee who refused supervisor's advances).

21 The term "hostile environment" was first cognizable in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). *See supra* note 16 and accompanying text.

22 *The Supreme Court, 1985 Term — Leading Cases*, 100 HARV. L. REV. 276, 277 (1986) [hereinafter *Leading Cases*] (footnote omitted) (quoting Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981)).

23 477 U.S. 57 (1986).

24 Although Justice Rehnquist is presently Chief Justice, he was not at the time of the *Vinson* decision.

25 Justice Rehnquist delivered the opinion of the Court, joined by Chief Justice Burger and Justices White, Powell, Stevens, and O'Connor. An opinion concurring in judgment was filed by Justice Marshall, in which Justices Brennan, Blackmun, and Stevens joined. Justice Stevens also filed a separate concurrence.

26 *Leading Cases*, *supra* note 22, at 277.

the pervasive sexual discrimination historically present in broadcast journalism.

III. Sex Discrimination in Broadcasting

The Federal Communications Commission ("FCC") is vested with the responsibility of assuring that the public good is served by preventing abuse by the media and the media's inherent limitations.[27] One method of maintaining and monitoring the integrity of the media has been through license renewal constraints.[28] By 1977, public interest groups[29] had increasingly challenged the license renewal provisions afforded those broadcasters who were perceived as failing to uphold their public interest programming responsibilities.[30] One such challenge came to the FCC in 1964 from the United Church of Christ, which proposed that the FCC adopt a rule proscribing employment discrimination against blacks in programming.[31] The FCC responded by announcing that it would review employee complaints of discrimination promulgated by broadcast licensees.[32] In June of 1969, the FCC formally adopted a nondiscrimination rule which protected the same designated groups as Title VII, with the exception of "sex."[33] The rule also provided for the adoption of equal employment opportunity measures "in every aspect of station employment policy and practice."[34]

In 1970, The National Organization for Women ("NOW") began pressuring the FCC. NOW filed a petition requesting that the mandatory affirmative action report filings also cover employment of women.[35] Despite vigorous objections from the National Association of Broadcasters ("NAB"), which claimed that there was no established pattern of discrimination against women in broadcasting, the FCC amended its rule in 1971 to include women.[36]

The women in broadcasting then began to form action committees themselves so that they could point out their "under-utilization" to management. For example, at WABC-TV in New York, the Women's Action Committee, after meeting with the president of the company, formed an employee relations committee that met regularly every four to six weeks to discuss recruitment, promotion, grievance, and pay issues, among others.[37] The women of WNBC-TV in New York filed a lawsuit against the company documenting their complaints regarding the lack of advancement and employment opportunities, job gradings, pay scale differentials, and programming portrayals of women.[38] Similarly, the women at WCBS-TV formed an advisory committee that met regularly with senior management to resolve issues of equal pay, promotion discrepancy, and other discriminatory practices.[39]

Although these inroads into equal opportunity for women in broadcasting appeared great, the advisory committee programs essentially failed, and "[i]n spite of the progress, equality for women [was] not . . . achieved."[40] Unfortunately, while the FCC had "provided the policy and the tool for ascertainment to be effective[,] . . . it has not *acted* to reinforce its demands."[41]

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27 47 U.S.C. § 151 (1982 & Supp. V 1988). The FCC is also responsible for the regulation of radio broadcasting, cable broadcasting, and common carriers.

28 *Window Dressing on the Set*, *supra* note 4, at 59:

> Every 3 years the FCC evaluates licensee performance in the public interest and compliance with programming rules and regulations. The Broadcast Branch of the Renewal and Transfer Division of the Broadcast Bureau reviews program logs and programming reports to assure that the licensee's program service is in the public interest.

Id.

29 *See, e.g.*, *id.* at 60-65 (discussion of challenges brought by the Office of Communication of the United Church of Christ, the Alabama Educational Television Commission, The National Organization for Women, and The Coalition of Women for Better Broadcasting).

30 *Id.* at 59-65.

31 Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). For a comprehensive outline of the long process of litigation which ensued from this initial challenge, see *Window Dressing on the Set*, *supra* note 4, at 60-61.

32 Memorandum Opinion and Order and Notice of Proposed Rulemaking in the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 13 F.C.C.2d 766 (1968). *See also Window Dressing on the Set*, *supra* note 4, at 74.

33 Report and Order in the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 18 F.C.C.2d 240 (1969).

34 *Id.* at 245 and Appendix A.

35 In the Matter of Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340, and 342, and Adding the Equal Employment Program Filing Requirement to Commission Rules 73.125, 73.301, 73.599, 73.680, and 73.793, 32 F.C.C.2d 708 (1971) [hereinafter FCC Forms].

See also M. Sanders & M. Rock, Waiting for Prime Time: The Women of Television News 124-125 (1988) [hereinafter Sanders]. Sanders was the first woman to anchor a prime-time newscast and has been the only woman ever to obtain the position of vice president at a network news division. This book recounts both her personal struggles and experiences, in addition to those faced by all women in the industry. It is a comprehensive inside look at the industry, its practices, and personalities.

36 *See* FCC Forms, *supra* note 35, at 708-09.

37 Sanders, *supra* note 35, at 129-32.

38 *Id.* at 133, 135.

39 *Id.* at 133.

40 D. Hosley & G. Yamada, Hard News: Women in Broadcast Journalism 123 (1987) [hereinafter Hard News] (recounts the history of women in broadcast news, focusing primarily on the pioneers of the industry, subsequently discussing both their impact and the evolution of women in news from a societal perspective).

41 Watt, *supra* note 4, at 16 [emphasis in original].

Whereas "[t]elevision executives first claimed that viewers would not accept female newscasters at all[,] . . . female newscasters have been accepted, and it [has been] the more subtle aspects of employment decisions that remain potentially discriminatory."[42] "Men still dominated the airwaves. Men generally were paid more than women. And men remained in the top decision-making positions. . . . [T]rue equality remained an elusive goal."[43] The problem with placing women in choice positions at the networks seemed to be that the men in management felt "[w]omen had no place on the front line. . . . In short, putting the broads in broadcasting would flat out ruin the party. Or so it was thought, if not said."[44]

Two extensive studies regarding discrimination against women in broadcasting were promulgated by the United States Commission on Civil Rights. The first was conducted during 1974 and 1975 and released in 1977.[45] It found that there had been little improvement in women's representation in the media since the 1950's and stated, that of all the correspondents' appearances, only 9.9% were by women, as compared to 90.1% by men.[46] The second study, released in 1979,[47] reported that there was a *lower* percentage of women covering stories on the evening

[42] Note, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443, 472 (1985) (citing Smith, *TV Newswoman's Suit Stirs a Debate on Values in Hiring*, N.Y. Times, Aug. 6, 1983, at 1, col. 1, and at 44, col. 2).

> This Note argues that the current judicial deference to viewer surveys used by television stations in newscasting employment decisions is unwarranted. . . . [It further] explores how different treatment of women newscasters constitutes sex-plus discrimination, . . . [how] sex discrimination resulting . . . from viewer surveys cannot be justified, . . . [and how] policy considerations [are] involved in the use and scrutiny of viewer surveys.

Id. at 446-47.

[43] HARD NEWS, *supra* note 40, at 123.

[44] L. ELLERBEE, "AND SO IT GOES": ADVENTURES IN TELEVISION 100-01 (1986) [hereinafter ELLERBEE]. Linda Ellerbee, a veteran journalist, recounts her fourteen year career by telling humorous, often hilarious, anecdotes concerning the broadcast journalism industry and its practices.

Ellerbee also states that women were considered to have no place in the front line because:

> Certainly, they were too frail to carry those big cameras. They would faint at the sight of a little blood. They would blush at the language of your average camera crew. . . . They would complain about spending hours standing outside the courthouse, waiting. They would trip over their high heels chasing some fellow who didn't want his picture taken. They would giggle, shriek, simper, fall, bitch, flirt, screw up (and around), blow the story, blow the boss and take jobs from men.

Id.

[45] WOMEN'S MEDIA PROJECT, NOW LEGAL DEFENSE & EDUCATION FUND, UPDATE: WOMEN & THE MEDIA, WOMEN & MEDIA UPDATE 4 (Aug. 15, 1984) [hereinafter UPDATE]. (interpreting *Window Dressing on the Set*, *supra* note 4).

[46] *Id.*

[47] *Window Dressing: An Update*, *supra* note 4.

news; women were down to reporting only 8.8% of the stories, while men were up to 91.1%.[48]

In 1984, the Women's Media Project of the NOW Legal Defense and Education Fund conducted its own study as a part of its preparation of an Amicus Brief in support of Christine Craft ("Craft"), whose suit was on appeal to the United States Court of Appeals for the Eighth Circuit. The study found that "[s]ince 1975, the percent [sic] of women reporting the news has increased by only 3/10ths of one percent," thereby indicating that "women remain 'window dressing on the set.' "[49] The study also revealed that there were no regular women anchors at any of the three major networks, and that "at least one-third of the broadcasts had *no* women correspondents reporting the news."[50] This study explicitly indicates that:

> [m]ore than a dozen years after the networks were pressured by lawsuits and federal regulators to recruit and promote women, white males still rule the airwaves. Somewhere along the line the gallop toward equal time turned into a crawl. Both on and off the air, the lot of women in TV news may be dramatically better than 15 or 20 years ago, but it's only marginally better than 5 or 10 years ago.[51]

There are numerous other studies which verify the "crawl" of women towards equality in broadcasting.[52] These studies clearly show that women have been, and still are, discriminated against in the broadcast industry.[53] According to one woman journalist, "[t]he status of women in broadcast journalism is 'at a standstill' . . .

[48] *Id.* at 27, 29.

[49] *Id.*

[50] *Id.* at 2 (emphasis in original).

[51] Alter & Weathers, *TV Women: Give Us Some Air*, NEWSWEEK, July 22, 1985, at 70.

[52] *See, e.g.*, AMERICAN WOMEN IN RADIO AND TELEVISION, AWRT STUDY RESULTS RELEASED, AWRT NATIONAL CONVENTION PRESS RELEASE, June 11, 1987 [hereinafter AWRT STUDY]; Stone, *Women Hold Almost a Third of News Jobs*, RTNDA Communicator, Apr. 1986, at 28 [hereinafter *Stone*]; J.G. Wilson, *Women And Minorities In The Media: Are Their Situations the Same? Are Their Solutions the Same?*, A Paper for the Institute for Journalism Education National Conference in Washington, D.C., Mar. 9-10, 1987 [hereinafter *Wilson*]; NOW LEGAL DEFENSE AND EDUCATION FUND, FACTS ON WOMEN AND MEDIA, NOW LEGAL DEFENSE AND EDUCATION FUND MEDIA RELEASE, June 1988 [hereinafter FACTS ON WOMEN AND MEDIA]; Holcomb, *The ABC's of sexism*, COL. JOURNALISM REV., May/June 1986, Chronicle Section, at 8 [hereinafter *The ABC's of sexism*]; Stilson, *Net Femmes Facing Upper-Level Block?*, Variety, Mar. 4, 1987, Radio Television Section, at 87 [hereinafter *Net Femmes*].

[53] *Id.* For example, the following statistics for 1985 were reported in *Stone*, *supra* note 52, at 28-30. Only portions of the table relevant to the topic of this Note have been reproduced.

and that status is not likely to change until women make a stand."[54]

V. Taking a Legal Stand Against Sex Discrimination

One member of the news media who challenged the industry and thrust its discriminatory practices to the forefront of public attention was Christine Craft. Her case, in a sense, identified many of the issues and hurdles that women in broadcast journalism currently face.[55]

Craft sued her former employer, Metromedia, Inc. ("Metromedia"), on three grounds: sex discrimination under Title VII, violation of the Equal Pay Act,[56] and fraud.[57] Craft alleged sex discrimination based upon the contention that she had been fired from her news anchor position because she was too old, too ugly, and not deferential enough to men.[58] Her equal pay claim rested on the allegation that she was paid less than men in the same position, and her fraud allegation charged that the station executives intentionally misrepresented their intentions in their job offer.[59]

"The case became two separate trials. One of them was in

TABLE 4: Men and Women as Anchorpersons/Newscasters

	Stations with Female Anchors	Anchorwomen per Staff		% of Women Who Anchor	Anchormen per Staff		% of Men Who Anchor	% of Anchors Who Are Women
		Mean	Median		Mean	Median		
All TV Stations	84%	2.1	2.0	26%	3.7	3.2	22%	36%
Network	92%	2.4	2.2	27%	4.2	3.5	22%	36%
Independent	45%	.8	.4	25%	1.1	.5	18%	40%

54 Rhein, *Ellerbee: Women in TV at a 'standstill,'* Des Moines Sunday Register, May 4, 1986, Fine Tuning Section, at 3TV (quoting Linda Ellerbee, former NBC correspondent).

In fact, as one professor of journalism has noted:

> In the past, government pressure in the form of lawsuits and the threat of revoking broadcast licenses forced the news media to give women a chance. Now, in the hands of a conservative administration, the tools by which that pressure is exerted—the EEOC and the FCC—are being allowed to rust. It is up to the news media, then, to spur themselves on toward greater equality in the newsroom and resist the temptation to backslide into the patterns of discrimination that have limited and punished women because of their sex.

Schultz & Brooks, *Getting There: Women in the Newsroom*, Colum. Journalism Rev., Mar./Apr. 1984, at 31. *See The ABC's of sexism*, *supra* note 52, at 31.

55 Hard News, *supra* note 40, at 145.

56 Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982 & Supp. V 1988).

57 Craft v. Metromedia, Inc., 572 F. Supp. 868 (W.D. Mo. 1983), *modified*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

58 While this phrase may not be a legal argument *per se*, Craft maintains that it was both the reason given for her dismissal as well as an indicator of the pervasiveness of sex discrimination that she endured. C. Craft, Too Old, Too Ugly, And Not Deferential To Men (1988) [hereinafter Craft].

59 *Craft*, 572 F. Supp. at 868.

the courtroom. But the more significant, the second, was the public debate that grew out of the lawsuit, the trials, and the ensuing rulings."[60] The incredulousness of the judges' determinations after the trials gave rise to the second of these "two trials." At the district court level, the jury found in favor of Craft on the counts of sex discrimination and fraud, awarding her $375,000 actual damages and $125,000 punitive damages. Metromedia won on the Equal Pay Act count. Judge Stevens then threw out the jury awards and ordered a retrial on the fraud issue. He stated that the award was both "excessive" and "the result of passion, prejudice, confusion, or mistake on the part of the jury."[61]

On retrial, the jury again found for Craft, awarding her $225,000 actual and $100,000 punitive damages. Metromedia appealed and Craft cross-appealed both the Title VII and Equal Pay Act determinations. The Eighth Circuit affirmed the judgment of the district court judge on the Title VII and Equal Pay Act claims, and reversed the jury verdict on the fraud claim,[62] directing the district court to enter judgment for Metromedia. Subsequently, the Supreme Court denied *certiorari*.[63]

At the heart of the public debate concerning the *Craft* decision were the issues of whether (1) women broadcasters were to be judged more by their appearance than their male colleagues, and (2) management, in adhering to this practice, was allowed to

60 Hard News, *supra* note 40, at 146. For examples of the press coverage and amount of discourse this case generated, compare Henry, *Requiem for TV's Gender Gap?*, Time, Aug. 22, 1983, at 57 [hereinafter Henry] (quoting the jury foreman of the first trial: "[w]e hope we have helped women in broadcasting.") and Smith, *TV Newswoman's Suit Stirs A Debate on Values in Hiring*, N.Y. Times, Aug. 6, 1983, at 44 [hereinafter Smith] (quoting Marlene Sanders: "she is raising issues that it is good for everyone to think about.") with Smith at 44 (quoting a former station manager: "If an anchor doesn't work because she looks old or baggy or doesn't fit into the chemistry you have created, and the latitude to fire is denied, then stations are going to have a lot of trouble.").

It is also interesting to note that this was not the first time that the media has played a part in the overall dispute:

> The curious thing about women's ascendancy in TV journalism is the degree of hostility they have encountered among critics as well as their male colleagues. . . . [M]any critics react as though women alone are the interlopers, as though the very *presence* of a woman on a newscast constitutes a sellout to show business.

Powers, The Newscasters 168 (1977) (emphasis in original).

61 *Craft*, 572 F. Supp. at 881; Hard News, *supra* note 40, at 148.

62 Craft v. Metromedia, Inc., 766 F.2d 1205, 1221 (8th Cir. 1986).

63 475 U.S. 1058 (1986). Although *certiorari* was denied Craft, she was "heartened to know that in the . . . decision not to rehear . . . there was one dissent from Justice Sandra Day O'Connor. This leads me to understand that we need more women in the legislatures, more women on the Supreme Court, more on all the courts of our nation." Craft, *supra* note 58, at 205.

treat them differently.[64] In fact,

> [t]he Craft case [still] highlights many of the issues affecting the status of women in television news. It is undeniable that television is an entertainment medium and that one's appearance does affect one's reception by an audience. . . . Sadly, the thing news directors may have learned as a result of the Craft case is to be careful about what they say; as Reuven Frank commented when he was president of NBC News in 1983, "What will happen is legal departments will instruct news executives on what to say." In other words, news directors will just tell *more* lies about why someone is being hired or fired.[65]

The poignancy of this statement may, indeed, be reflected in the cases involving pure sex discrimination. Its relevant application to sexual harassment cases and the implications for women in broadcasting cannot, however, be effectively evaluated without discussion and examination of the parameters of *Vinson*.

V. *MERITOR SAVINGS BANK, FSB v. VINSON*

The plaintiff in *Meritor Savings Bank, FSB v. Vinson*[66] claimed that her immediate supervisor, an Assistant Vice-President (also a named defendant), at Capital City Federal Savings and Loan Association (the predecessor to Meritor Savings Bank) ("the bank") sexually harassed her from May, 1975 through 1977.[67] Ms. Mechelle Vinson ("Vinson") alleged that Mr. Sidney Taylor ("Taylor") made repeated demands for her sexual favors, forced her to engage in sexual relations, caressed her, fondled her (as well as other females employees), followed her into the ladies' room when she was alone, exposed himself to her, and brutally assaulted or raped her on several occasions.

Vinson met Taylor in a parking lot in September of 1974 where she inquired about employment at the bank. Taylor gave her an application which she filled out and returned the following day. She was called by Taylor that day and informed that she was

64 *See* HARD NEWS, *supra* note 40, at 145-55; Henry, *supra* note 60, at 57; Smith, *supra* note 60, at 44. *See also* CRAFT, *supra* note 58, at 186-91; SANDERS, *supra* note 35, at 144-48.

65 SANDERS, *supra* note 35, at 147 (emphasis added). Along these lines, Sanders also quotes Judy Mann, a journalist, as saying, "Television, whatever else it does, is a mirror of society. The Craft case shows that the mirror does not come close to reflecting the presence and interests of half of society. It is as distorted a picture of America as an amusement hall mirror." *Id.* at 147.

66 477 U.S. 57 (1986).

67 Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 38 (D.D.C. 1980). All of the subsequent facts, unless otherwise noted, come directly from the district court's opinion.

hired as a teller-trainee. She began work on September 9, 1974. After successfully completing her ninety day probationary period, she was promoted to teller. Subsequently, she was promoted to head-teller and then to assistant branch manager. It was undisputed that all of her promotions were based solely on merit. She was not required, nor asked for sexual favors in exchange for any promotion. In fact, Vinson stated that during her probationary period, and on occasion thereafter, Taylor was very helpful and acted like a father figure.

Vinson stated that the problems began in May of 1975, when Taylor took her out for Chinese food. During dinner, he suggested that they go to a motel and have sex. She alleged that she initially refused this invitation. Taylor, however, told her that she "owed him" since he had gotten her the job. She alleged that she continued to resist, but after dinner acquiesced because she was afraid that failure to comply would have resulted in her dismissal.

Thereafter, according to Vinson, she was forced to engage in sexual relations with Taylor forty to fifty times over the next two years and, on numerous occasions, was assaulted or raped. He also continually fondled her, caressed her, followed her into the ladies' room when she was alone, and exposed himself to her. Vinson stated that these encounters, although technically "voluntary," were all against her will, that she was afraid of Taylor, and that the incidents only stopped because she had become involved with a steady boyfriend.

Vinson took indefinite sick leave in September of 1978. She was terminated in November of 1978, allegedly for excessive use of sick leave. Vinson brought her Title VII action against both Taylor and the bank alleging sex discrimination in the form of sexual harassment.[68] Vinson claimed that she was the victim of sex discrimination in the form of sexual harassment, although admittedly, not *quid pro quo*. Taylor denied all allegations and maintained that Vinson was terminated for the sick leave violation.[69] He also stated that charges were brought against him in retaliation for a dispute they had had over bank business matters.[70] The bank also denied all of Vinson's allegations, and argued that even if the allegations were true, they were neither known nor approved.[71]

68 *Id.* at 37.
69 *Id.* at 39.
70 *Id.*
71 *Id.*

The district court, after trying the case as a pure *quid pro quo* action,[72] found for both defendants, holding that Vinson did not establish a claim of sex discrimination against Taylor because, "[i]f the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with Capital, that relationship was a voluntary one by plaintiff having nothing to do with her continued employment . . . or her advancement or promotions."[73] The court also held that the bank was not responsible for Taylor's acts because Vinson failed to establish that the bank had notice of Taylor's alleged acts.[74]

Vinson appealed to the United States Court of Appeals for the District of Columbia. The court held that Vinson's case was properly brought under Title VII, stating that whenever an employer has created or condoned a discriminatory work environment, it is actionable under Title VII regardless of whether any tangible job benefits were lost.[75] The court held that under the hostile environment sexual harassment theory, the crucial element is one of "unwelcomeness," and therefore, "Vinson's 'voluntar[iness]' had no materiality whatsoever."[76] In so holding, the court explained that

> [t]he District Court did not 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 [prior precedent in this circuit], a woman does not waive her Title VII rights by her sartorial or whimsical proclivities . . . , that testimony had no place in this litigation.[77]

The court therefore reversed the district court's decision and remanded the case for reconsideration under the hostile environment theory.[78]

Furthermore, the court addressed an employer's vicarious liability under Title VII, an issue of first impression, and found that, in light of the absence of any legislative history, the EEOC's guidelines provided that employers be held strictly liable for sexual harassment.[79] An *en banc* rehearing of the case was requested by the defendants and was denied.[80]

72 *Id.* at 37.
73 *Id.* at 42.
74 *Id.* at 43.
75 Vinson v. Taylor, 753 F.2d 141, 144-45 (D.C. Cir. 1985), *aff'd*, 477 U.S. 57 (1986).
76 *Id.* at 146.
77 *Id.* at 146 n.36 (citations omitted).
78 *Id.* at 145.
79 *Id.* at 146-52.

The Supreme Court granted *certiorari*[81] and heard the case in March of 1986. The two issues on appeal were: "(1) whether a claim of abusive environment sexual harassment is actionable under [T]itle VII; and (2) whether employers are strictly liable for acts of sexual harassment by their supervisors."[82] Justice Rehnquist, writing for the Court, affirmed the court of appeals' decision on the first issue and unequivocally established that hostile environment sexual harassment, like *quid pro quo* sexual harassment, is actionable as sex discrimination under Title VII.[83] The Court defined hostile environment sexual harassment as conduct which is "sufficiently severe or pervasive, 'to alter the conditions' of employment" and "affects a 'term, condition, or privilege' of employment within the meaning of Title VII."[84] Under either the *quid pro quo* theory or the hostile environment theory, the Court stated that employees have a right to be free from *unwelcome* sexual harassment.[85] However, the Court noted that,

> [w]hile "voluntariness" in the sense of consent is not a defense to such a 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.[86]

On the second issue, the Court disagreed with the court of ap-

80 Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985) (per curiam). Although rehearing was denied, Judge Bork wrote a strong dissent which Judges Scalia and Starr joined. The dissent from the rehearing *en banc* is noteworthy in that it fully anticipated the Supreme Court's decision. The dissent primarily disputed the imposition of vicarious strict liability on employers. It also discussed the exclusion of certain evidence which tended to show that Vinson's dress and behavior may have invited or solicited Taylor's advances. Judge Bork, in his discussion of the exclusion of evidence, stated:

> In this case, evidence was introduced suggesting that the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to other employees at the bank. While hardly determinative, this evidence is relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in. Obviously, such evidence must be evaluated critically and in the light of all the other evidence in the case, but it is astonishing that it should be held inadmissible.

Id. at 1331 (footnotes omitted).
81 Meritor Savings Bank, FSB v. Vinson, 474 U.S. 815 (1985).
82 Holtzman & Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 ST. LOUIS U. L.J. 239, 255 (1987) [hereinafter Holtzman & Trelz].
83 *Vinson*, 477 U.S. 57, 58 (1986).
84 *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
85 *Id.* at 64-67 (emphasis added).
86 *Id.* at 69.

peals' holding that vicarious strict liability should be imposed on the employer for the acts of a supervisor in all instances.[87] Rather, the Court asserted that strict liability should not always be imposed on an employer because it would be, in some circumstances, inappropriate.[88] The case was remanded for trial on the hostile environment theory.[89]

The problem with the *Vinson* decision is elementary. The Court's language, although seemingly straightforward, is too broad and elusive to be applied by the courts with any degree of consistency. The Court, while rejecting the court of appeals' strict liability perspective, declined to establish a set of standards for assessing an employer's liability.[90] Instead, the Court adopted the position set forth by the EEOC in its brief as *amicus curiae*.[91] The EEOC's *amicus* position, surprisingly enough, directly contradicted its own *Guidelines*[92] by advocating a bifurcated approach to employer liability, arguing for strict liability for a supervisor's *quid pro quo* violation, but a "focus on the systemic relation between the conduct of particular individuals . . . and the employer" in hostile environment cases.[93]

The lack of definitive guidance from the Supreme Court is also blatantly evident in its discussion of the hostile environment approach. While holding that hostile environment sexual harassment is actionable under Title VII as sex discrimination, the Court failed to elucidate those factors it considers sufficient to give rise to a level of "actionable" hostility. As stated earlier, the only guideline provided by the Court is that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.' "[94] However, the Court also stated that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title

87 *Id.* at 72.

88 *Id.*

89 *Id.* at 73. Justice Marshall, concurring, agreed with the Court's opinion insofar as hostile environment sexual harassment is actionable under Title VII. *Id.* at 74. However, he urged that the Court should adopt the EEOC's guidelines for strict employer liability regardless of whether the employer had notice of the offense. *Id.* He recognized that employer liability should be limited in certain specific cases, but did not feel that a separate rule was warranted. *Id.* at 76-77. He reasoned that because "[a]n employer can act only through individual supervisors and employees[,]" liability has always been imputed and should continue to be. *Id.* at 75.

90 *Id.* at 72.

91 *Id.* at 71-72.

92 *Guidelines*, *supra* note 17, at § 1604.11.

93 Brief for EEOC as *Amicus Curiae* at 23, 26, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979) [hereinafter EEOC Brief].

94 *Vinson*, 477 U.S. at 66 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

VII."[95] In support of the latter statement, the Court, quoting *Rogers v. EEOC*, said the " 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII."[96]

Not only does *Vinson* fail to establish the criteria for actionable hostile environment sexual harassment, but it also compounds the victimization of complainants. Any woman who pursues legal action risks trial herself, due to the Court's ruling on the admissibility of evidence regarding her dress and speech. The Court, consistent with its failure to establish concrete standards, said "there is not a *per se* rule against its admissibility,"[97] rather, it is up to the district court to determine "the potential for unfair prejudice."[98] This ruling leaves victims of sexual harassment in the same predicament as rape victims, which is a foreseeable outcome, as "[t]he history of rape . . . is a history of . . . sexism."[99] *Vinson* has established that "the evidentiary rules relating to prior sexual conduct by the victim . . . place the victim as much on trial as the defendant,"[100] just as they have done in rape trials.

VI. Sexual Harassment Cases in Broadcasting

"Sex discrimination can [therefore] be blatant, as described by Christine Craft, or it can surface in the much more subtle and destructive form of sexual harassment,"[101] as evidenced by *Vinson*. Because women in broadcasting have historically occupied a subordinated position in the industry, they have lacked the power to effectively deal with the problem.[102] "Some women try to ignore it, others are forced to leave their jobs because of it, and

95 *Id.* (quoting *Henson*, 682 F.2d at 904). *See also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

96 *Vinson*, 477 U.S. at 67 (citing *Rogers*, 454 F.2d at 238). *See also Henson*, 682 F.2d at 904.

97 *Vinson*, 477 U.S. at 69.

98 *Id.*

99 Estrich, *Rape*, 95 YALE L.J. 1087, 1089 (1986) [hereinafter Estrich] (focus on sexism in criminal rape law and its application, including a proposal for reform).

100 *Id.* at 1094.

101 SANDERS, *supra* note 35, at 148.

102 *See generally* Part III of this Note and the discussion of women's inability to achieve equality in the industry. This lack of equality equates with a lack of power in all respects. For if one is not on equal footing, then there is a distinct dichotomy in the power to effect change, be it economic or environmental.

Sexual harassment itself is considered to be a manifestation of power. In fact, "the sexual harassment of women can occur largely because women occupy inferior job positions and job roles; at the same time, sexual harassment works to keep women in such positions. Sexual harassent [sic] in itself, then, uses and helps create women's structurally inferior status." WORKING WOMEN, *supra* note 7, at 9-10.

some women go to court over it."[103]

Those women who have "taken on the industry" have all succeeded, if one considers hushed settlements and failure to obtain parallel positions in their chosen fields as success. The problem has not been allayed in any real sense because the message that ripples throughout the broadcasting industry amounts to something akin to sue and yes, we'll pay you, but you'll never enjoy your current status again. This sentiment was specifically echoed by a CBS spokesperson, who, after the settlement of a sexual harassment case, stated that "it [did not] represent . . . a victory for anybody."[104]

As stated earlier, there have been no documented cases brought by women in broadcast journalism.[105] However, because the facts giving rise to out-of-court settlements in specific instances are indicative of the general industry practice and treatment of women, they merit discussion.[106] Cecily Coleman ("Coleman"), Executive Director of the Advisory Committee on Voter Education at ABC, was fired after complaining confidentially to the company personnel manager about being sexually harassed by a vice-president.[107] Coleman maintained that when she did what she was supposed to do by informing her superiors of this behavior, she was isolated, and co-workers were discouraged from being witnesses. When she asked for written assurance and protection for herself and other ABC women, urging ABC to develop a program to protect female employees from sexual harassment, officials of ABC ransacked her office while she was away on company business and then fired her. When she asked for reinstatement, ABC allegedly offered to buy out her contract in exchange for silence. Coleman refused.[108]

She "responded to her dismissal with a multimillion dollar lawsuit against ABC charging . . . sexual harassment, retaliation, intentional infliction of emotional distress and defamation."[109]

103 SANDERS, *supra* note 35, at 148.
104 Rosenberg, *supra* note 5, § VI, at 1, col. 6.
105 *See supra* note 5.
106 Material for the discussion of the following lawsuits comes from a culmination of four sources, because the author was unable to obtain any legal documents to cite directly. SANDERS, *supra* note 35, at 150-52; Flander, *supra* note 5, at 39; Rosenberg, *supra* note 5, § VI, at 1, col. 6; and Landis, *supra* note 5, at 13.
107 Coleman alleged that the vice president "repeatedly touched her, brushed up against her, and demanded sexual favors coupled with implied threats about her job. He demanded she admit him into her hotel room when on business trips. He called her into his office, shut the door, and made unwelcome sexual advances." SANDERS, *supra* note 35, at 150-51.
108 SANDERS, *supra* note 35, at 150-51.
109 *Id.* at 150.

In a written statement by Coleman in the spring of 1984, she stated that she had been "blacklisted" and "unable to get another job in the industry."[110] Since then, she has reportedly received an "estimated $500,000" as settlement, and obtained a position as an associate producer for a "two-hour documentary" being produced by a public television station.[111]

Elissa Dorfsman ("Dorfsman"), a general sales manager, sued her employer, CBS, and one of its top sales executives in September of 1984.[112] She charged CBS with sexual harassment, sex discrimination, violation of the Equal Opportunity Act, breach of contract, and gross negligence.[113] Apparently, the charges were rooted in the actions of the sales executive at a company sales dinner in 1982.[114] Neither CBS nor the sales executive in question denied the incident.[115]

When she reported this incident, CBS, following its company policy, reprimanded the executive privately. Dorfsman was angered by this because she felt this type of action (or inaction) demonstrated that CBS either impliedly approved of, or expressly condoned such behavior. After filing suit, Dorfsman continued to work, but was then subjected to anti-Semitic comments from the general manager and a "discriminatory and retaliatory" suspension for a week. During the year that CBS investigated her, in an attempt to allegedly discredit her, both her past and current colleagues were asked questions about her sexual tendencies and likings. In essence, CBS sought to categorize her as "either a lesbian or a slut."[116] Finally, "Dorfsman was accused of being unprofessional by speaking out. And she claimed that she was warned by a top CBS executive that she could not successfully sue the network and [that he] would destroy her career if she tried."[117]

Dorfsman settled out-of-court for a purported $250,000. However, "the status of . . . [her] career is still to be deter-

110 Flander, *supra* note 5, at 39.
111 SANDERS, *supra* note 35, at 151.
112 Rosenberg, *supra* note 5, § VI, at 1, col. 5; SANDERS, *supra* note 35, at 151.
113 Rosenberg, *supra* note 5, § VI, at 1, col. 5; SANDERS, *supra* note 35, at 151.
114 Rosenberg, *supra* note 5, § VI, at 1, col. 5; SANDERS, *supra* note 35, at 151. Dorfsman said that during the dinner, she was approached by the man at her seat, and " '[t]he next thing I know is that he's running his fingers all the way up my leg. . . . And then he took the fur tail from my shawl and made like he pulled it out from my crotch.' " Allegedly, he then proceeded to whip the tail around over his head and shout an obscenity about her. SANDERS, *supra* note 35, at 151.
115 Rosenberg, *supra* note 5, § VI, at 1, col. 5.
116 *Id.* at 19, col. 3.
117 *Id.* at 19, col. 5.

mined."[118] As of 1988, she was selling syndicated shows in Hollywood.[119]

The final case in the sexual harassment trilogy was brought by seven women employees of CBS's "Nightwatch" program.[120] The women charged that the executive producer of the show had caused both intentional infliction of emotional distress and sexual assault, in violation of the District of Columbia's Civil Rights Act. The women alleged that he created a hostile work environment through unwelcome sexual advances, gestures, touchings, and comments. They also stated that he conditioned their continued employment on "cooperation with and tolerance of his actions,"[121] and he encouraged other men to behave in a like manner.

The women reported the harassment and were answered with a complete lack of positive administrative action. In retaliation for their complaints, however, the executive producer fired four of the women outright and forced another one to leave. Soon afterwards, the management at CBS News changed and an internal investigation did take place. The case was settled in September of 1987 for an undisclosed amount. It is not yet known if those discharged have been able to procure new positions in the industry.[122]

VII. Sexual Harassment: Issues, Problems, Scope, and Impact

Marlene Sanders, the first female national network news division vice-president, has addressed one of the fundamental issues involved with cases of sexual harassment. She noted, "[a]s seen in the cases of Coleman, Dorfsman, and 'Nightwatch,' the companies immediately sided with the executives and not with the women. How can a woman complain if she will not be taken seriously and is doubted, or even punished, for making the problem public?"[123] The other fundamental issue involved is that "[s]exual harassment has a devastating effect on both the economic opportunities and the physical and emotional well-being of working women."[124]

118 *Id.*
119 Sanders, *supra* note 35, at 151.
120 The information regarding this case comes from two sources. *See* Carmody, *supra* note 5, at D6 and Sanders, *supra* note 35, at 151-52.
121 Sanders, *supra* note 35, at 152.
122 *Id.*
123 *Id.* at 154.
124 Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. Pa. L. Rev. 1461, 1462 (1986) [hereinafter *Tort Liability*]. "Title VII, as presently interpreted by the federal courts, fails to redress fully the severe emotional and physical harm caused by sexual harassment in the workplace . . . [and] courts [should] recognize an independent cause of action in tort for sexual harassment in the employment context." *Id.* at 1463.

The two issues, taken together, are once again strikingly analogous to the "Catch-22" presented victims of rape:

> a victim who resists is more likely to be killed, but unless she fights back, it is not rape, because she cannot prove coercion. With sexual harassment, rejection proves that the advance is unwanted but also is likely to call forth retaliation, thus forcing the victim to bring intensified injury upon herself in order to demonstrate that she is injured at all. . . . In addition, it means that constant sexual molestation would not be injury enough to a woman or to her employment status until the employer retaliates against her *job* for a sexual refusal which she never had the chance to make short of leaving it. . . .
>
> . . . .
>
> . . . Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry.[125]

In addition, sexual harassment, like any other sexual incident, is intensely personal and private. It is not a subject that women are extremely comfortable bringing to the forefront of any conversation, much less reporting to a corporate officer.[126]

The problem then becomes circular because women, instead of "being continually placed in situations where they must defend their dignity, . . . often will choose to disregard offensive actions or do nothing rather than create a scene"[127] or risk putting themselves on trial. Additionally, how often can a woman, while meeting with a vice president, economically afford to get up and walk out when asked if she is willing to engage in sexual relations?[128] *Vinson* should have opened the doors for these victims. It did not, how-

125 *Working Women*, *supra* note 7, at 46-47 (emphasis in original). *See* Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women*, Working Women's Institute Research Series, Report No. 3, at 4 (1979) (study showing that almost all harassment victims demonstrated such psychological symptoms as fear, nervousness, anger, and feelings of powerlessness). "Victims [of sexual harassment] suffer from insomnia, depression, nervousness, and other symptoms of psychological harm. . . . The physical effects . . . include headaches, backaches, nausea, loss of appetite, weight change, and fatigue. Harassment clearly poses a serious threat to an employee's physical and mental well-being. . . ." *Tort Liability*, *supra* note 124, at 1464.
126 *See Working Women*, *supra* note 7, at 27.
127 Waldrop, *My Name's Not Honey*, 34 Army Reserve Magazine 14, 15 (1988) [hereinafter Waldrop].
128 Castro, *Women in Television: An Uphill Battle*, Channels Magazine, Jan. 1988, at 42 (quoting Mary Alice Williams, who stated that she was specifically asked, "Do you fuck?").

ever, because the language used was not definitive enough to give the federal courts absolute guidelines for proper enforcement.

The various circuits consider five conditions in evaluating whether a plaintiff has established a prima facie case of hostile environment sexual harassment, consider five conditions. These five conditions were set forth in *Henson v. City of Dundee*,[129] a 1982 Eleventh Circuit case cited by the Supreme Court in *Vinson*.[130] For a plaintiff to prevail on a sexual harassment claim, she must show that (1) "she belongs to a protected group," (2) "she was subject to unwelcome sexual harassment," (3) the harassment was "based on sex," (4) the harassment "affected a 'term, condition, or privilege' of employment," and (5) "the employer knew or should have known of the harassment in question and failed to take proper remedial action."[131]

Examples of the variety of interpretations of these conditions enumerated in *Vinson* can easily be found in a sampling of the circuits. Although these cases deal with women working in industries other than broadcast journalism, they are relevant because, while "[s]ome of the issues that have faced American women . . . are specific to their industry, . . . for the most part, women in this business have experienced the same problems as women in the workplace in general."[132] Specifically, "[t]he issue[] of . . . sexual harassment ha[s] faced women in most fields, including broadcast news."[133]

In the Second Circuit, a district court dismissed a plaintiff's complaint of sexual harassment because the defendant's behavior appeared to have been quite sporadic and innocuous.[134] The court also determined that, although there was an element of sexual tension, and her supervisor had shown some unwelcome and ungentlemanly behavior towards her, the behavior was not so severe or pervasive as to create an abusive working environment *per se*.[135] This case demonstrates what Marlene Sanders has found to be a specific sexual harassment problem in broadcasting: "[u]nfortunately, the supervisors are the worst offenders because they have the most power."[136] For, as is the situation for women broadcast journalists, the "women must get someone in power to believe in the complaint."[137] The plaintiff in this case did not.

The Fourth Circuit affirmed a Title VII claim in favor of a defendant employer solely because the plaintiff had not also named the perpetrator of the harassment as a defendant.[138] The plaintiff, a stewardess, alleged that a pilot had directed embarrassing and demeaning behavior towards her.[139] It is readily apparent, given the facts of this case, that the pilot in question, like certain men in the newsroom, saw this woman as a sex object first and as a worker second.[140]

From the Fifth Circuit comes possibly the only case that distinguishes actionable harassment from harassment which is offensive, but does not rise to an actionable level.[141] The case involved two women who were sexually harassed by their supervisor at work. The court found for one woman and against the other. In arriving at its decision, the court considered four factors: 1) the nature of the unwelcome sexual acts or words; 2) the frequency of the offensive encounters; 3) the total number of days over which the offensive meetings occurred; and 4) the context in which the sexually harassing conduct occurred.[142] Emphasizing that sexual harassment need not exist over a long period of time for it to be considered a pattern, the court held that if it is frequent and/or intensely offensive, a pattern can be established over a short period of time.[143]

The first woman was forced to deal with lewd comments and actions from her superiors over a two-day period — the first two days of her employment.[144] Considering the totality of the circum-

129 682 F.2d 897 (11th Cir. 1982).
130 477 U.S. 57, 66 (1986).
131 Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (construing Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)).
132 HARD NEWS, *supra* note 40, at Preface X.
133 *Id.*
134 Christoforou v. Ryder Truck Rental, Inc., 668 F. Supp. 294 (S.D.N.Y. 1987).
135 The plaintiff testified that her supervisor made personal remarks to her; put his hand on her thigh and told her that if she would play with him he would help her on the job; put his hands on her breasts and behind on four or five occasions; sat on her desk while she was trying to work; tried to kiss her by pinning her to a wall forcibly; and made lewd remarks. The plaintiff had not complained of these incidents, and in light of this, the court found her testimony to be inconsistent and somewhat incredulous. *Id.* at 298-99.
136 SANDERS, *supra* note 35, at 154.
137 *Id.* at 148.
138 Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987). The court affirmed the Title VII claim due to the lack of credibility of the plaintiff's testimony. The plaintiff did not name the pilot as a defendant in the Title VII claim and the court held "supervisory status would not automatically result in [vicarious] liability." *Id.* at 557.
139 She alleged that the embarrassing and demeaning behavior consisted of his reaching under her skirt and grabbing her genitals, having another grab her breasts on his behalf, making obscene comments, dropping to his knees and sniffing her, and making obscene phone calls to her home. *Id.* at 555.
140 *See* SANDERS, *supra* note 35, at 154.
141 Ross v. Double Diamond, Inc., 45 Fair Empl. Prac. Cas. (BNA) 313 (N.D. Tex. 1987). It is interesting to note that the Fifth Circuit is the home of Rogers v. E.E.O.C., 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the seminal hostile environment case for racial discrimination. *See supra* note 16.
142 *Ross*, 45 Fair Empl. Prac. Cas. (BNA), at 320.
143 *Id.* at 321.
144 She was asked if she "fooled around." A picture was requested and taken of her after she was asked to raise her skirt. A salesman put a camera on the floor under her and took a picture up her dress. She was also physically touched, pulled across her

stances, the court found that she had been sexually harassed and tormented to such a degree that her psychological well-being was seriously impaired. The second woman, the court found, was not subjected to a level of sexual harassment severe or pervasive enough to be actionable.[145] However, both of the women prevailed on a theory of retaliatory discharge.

The court, in establishing the four factors by which to evaluate the severity or pervasiveness of the harassment, specifically excluded evidence of the women's speech and dress. Instead of focusing on the women's behavior and lack of tenure, proper attention was directed at the perpetrators' actions in the workplace. If the Supreme Court in *Vinson* had evaluated the allegations in light of similar factors, its outcome might not have yielded the present difficulties and confusion.

In a case arising out of an "unfortunate acrimonious working relationship," the Court of Appeals for the Sixth Circuit affirmed in favor of the defendant.[146] The plaintiff's charge of sexual harassment was directed against a supervisor of another section. The gentleman in question was "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff."[147] Additionally, other male employees openly displayed pictures of women either scantily clad or nude in the office and work areas shared with female employees. The court, in its discussion of hostile environment sexual harassment, stated that the totality of circumstances must be examined by the trier of fact from the perspective of a reasonable person's reaction to a similar environment.

> Thus, in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile and/or abusive work environment regardless of whether the plaintiff was actually offended by the defendant's conduct.[148]

supervisor's lap, requested to pant heavily on the phone to him, and requested to bend over and clean up some mustard on his wall. *Id.* at 315.

145 This woman was allegedly harassed in the following manner: 1) it was suggested to her that she wears black boots and carries a whip in the bedroom; 2) she was segregated on three separate days from the male employees who were also in training; 3) she was not permitted to take her books home with her to study after she complained of the treatment she was receiving; and finally, 4) she was subjected to threats from the vice-president regarding the loss of her home and her husband's loss of his job if she filed a complaint. *Id.* at 315-16.

146 Rabidue v. Osceola Refining Co., 805 F.2d 611, 615 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

147 *Id.* at 615.

The court went on to state that in assessing an alleged hostile environment, both subjective and objective factors must be taken into consideration. These factors include:

> the nature of the alleged harassment, the background and experience of the plaintiff, her co-workers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into [it], coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.[149]

The Sixth Circuit, in considering both subjective and objective factors, has, in a sense, opened the doors for the application of a "reasonable woman" standard. A reasonable woman standard, as opposed to the hypothetical reasonable individual standard, would enable triers of fact to weigh the evidence in light of what a hypothetical reasonable woman would have expected and reacted to in similar circumstances. Although the court failed to go this far, instead imposing the reasonable individual standard, it did take into account the plaintiff's expectations, the lexicon of obscenity, and the totality of the physical work environment. By narrowing the standard of review, it has therefore opened doors which *Vinson* failed to open.

In one of two cases with incredulous allegations decided in the Eighth Circuit, the Court of Appeals affirmed the district court's imposition of liability on the former employer and one of its crew foremen for hostile environment sexual harassment that resulted in the constructive discharge of three female traffic controllers.[150] The three women were "flag persons" for road construction sites in Iowa and were the only women on the crew. The men on the crew, immediately after the women started work, began inflicting very offensive verbal sexual abuse.[151] The crew foreman was present while some incidents transpired and, on one occasion, participated in using the offensive language himself. The women told him that they

148 *Id.* at 620.

149 *Id.*

150 Hall v. Gus Const. Co., 842 F.2d 1010 (8th Cir. 1988). The other case mentioned is Jones v. Wesco Investments, Inc., 846 F.2d 1154 (8th Cir. 1988).

151 The men continually referred to the women as "fucking flag girls"; nicknamed the three "Herpes," "Cavern Cunt," and "Blonde Bitch"; asked the named plaintiff if she wanted to "fuck"; and asked two of the women to engage in oral sex with them. *Hall*, 842 F.2d at 1012.

were offended by this abuse and that it upset them. He talked to the crew, but the abuse continued. Two of the women were also subjected to unwelcome and offensive touching.[152]

It may have been the case that the women, through their presence alone, were perceived as threats to a typically male occupation. The crew members may have felt, as men in broadcasting "feel[,] that their male domain of power ha[d] been invaded, challenged."[153] If this was indeed the case, women may be facing a "testing [that] never ends."[154]

Finally, in the Eleventh Circuit, a district court found that the plaintiff was entitled to relief in her suit against her former employer and its president for both hostile environment sexual harassment and constructive discharge.[155] The defendant president had harassed her verbally and physically to such a degree that she was forced to terminate her employment.[156] The court stated that the harassment she suffered was both severe and pervasive, revealing a pattern of conduct that was neither subtle nor oblique.[157] The court also referenced the fact that "the Eleventh Circuit has established that an employee's psychological well-being is a condition of employment."[158]

In applying the aforementioned standards and conditions to a

152 "Crew members would corner the women in between two trucks, reach out the windows, and rub their hands down the women's thighs." The named plaintiff also had her breasts grabbed and, on one occasion, was picked up by a crew member and held up to the window so that other men could touch her. The crew foreman specifically observed the latter incident. Additionally, all three women were "mooned" by crew members; a crew member exposed himself to the named plaintiff; obscene pictures were flashed at the women; one of the crew urinated in the named plaintiff's water bottle while several urinated in the gas tank of another woman's car; and the women were observed through surveying equipment when they relieved themselves in a ditch. The women found it necessary to relieve themselves in a ditch because they were denied trips into town to do so. *Id.*

153 SANDERS, *supra* note 35, at 154.

154 *Id.* at 153.

155 Ross v. Twenty-Four Collection, Inc., 681 F. Supp. 1547 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989).

156 Allegedly, he had: 1) told the plaintiff that he found her extremely attractive and wanted to spend the night with her; 2) asked the plaintiff to spend the night with him while on a business trip; 3) left a sealed envelope marked "personal and confidential" on her desk containing an article announcing an "extra-marital affairs without guilt" seminar; 4) asked her several times to spend the weekend with him in New York; 5) entered her hotel room during a buying trip, wearing only a bathrobe, and attempted to climb into bed with her; 6) made explicit sexual comments to her repeatedly; 7) entered her hotel room on another buying trip and asked her to shower with him; 8) attempted to massage her neck and body and forced her to lie down with him on the bed after entering her room wearing only a robe on yet another trip; 9) told her she would be fired if she did not accompany him on a buying trip which she had refused to go on; and 10) tried to place his arms around her and kiss her on the mouth. It was after this last incident that the plaintiff terminated her employment. *Id.* at 1549-50.

157 *Id.* at 1551.

158 *Id.*

given fact pattern evaluating the severity of the alleged harassment, the Sixth Circuit has alluded to a possible move from the generic tort concept of the "reasonable person" standard towards that of a "reasonable woman" standard.[159] In examining case law, it is apparent that this distinction is vital when evaluating whether a "term, condition, or privilege" of employment has been affected. For if the reasonable person standard is applied, the woman's burden of proof is more difficult because, again, as in rape cases, the focus is on "the appropriateness of the woman's behavior, according to male standards of appropriate female behavior."[160] For example, a man similarly situated would not necessarily consider the conduct as anything more than conviviality with his co-workers, or, more precisely, "one man's sexual flirtation can be one woman's harassment."[161]

To the contrary, a reasonable woman standard allows for conduct such as the posting of nude female pictures, offensive speech, and the like, to rise to such a level as effecting terms, conditions, or privileges of employment.[162] In essence,

> [f]rom the perspective of discrimination law, women and minorities are subjected to a hostile or offensive work environment precisely *because* they belong to a group that is viewed by society as inferior. Consequently, the race and sex of the harassment victim must be a substantial consideration in evaluating the effect of the defendant's conduct on the plaintiff.[163]

As it presently stands, however, the reasonable woman stan-

159 *Compare* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) *with* Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987). *Yates* marked the departure from the reasonable person standard established in *Rabidue*, stating that:

> [i]n a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.

Yates, 819 F.2d at 637. The court further stated: "we acknowledge that men and women are vulnerable in different ways and offended by different behavior." *Id.* at 637 n.2.

The court adopted this approach, as opposed to the *Rabidue* approach, for this case *only* "because of the differing levels of responsibility of the harassers." *Id.* at 636 n.1. The parties in *Rabidue* were on the same level, whereas in this case, the defendant was plaintiff's supervisor.

160 Estrich, *supra* note 99, at 1094.

161 SANDERS, *supra* note 35, at 149.

162 In a sense, this line of reasoning is endorsed by Catherine MacKinnon. MacKinnon advocates what she terms as a "differences approach." She states that the differences approach poses the basic question of "how can you tell that this happened because one is a woman. . . ." She then states that the "basic answer . . . is: a man in her position would not be or was not so treated." *Working Women*, *supra* note 7, at 192.

163 *Tort Liability*, *supra* note 124, at 1487 (emphasis in original).

dard is not in place to any measurable degree and it seems as though the plaintiff, in order to succeed in a hostile environment suit, has a very heavy burden to bear. The onerous success formula seems to be clear. If the plaintiff has repeatedly suffered both verbal abuse and unwelcome touching, and has expressed her disdain for this type of treatment by complaining promptly, she will succeed.

Vinson, then, has not done much for either women in general or women in broadcasting, an industry plagued with a discriminatory history. As Marlene Sanders, describing the broadcast environment, eloquently states:

> It is not unusual for men to try to intimidate women by telling dirty jokes around them; keeping pornographic pictures visible, using obscenities, and even showing favoritism to men over women. There is pressure on women to become 'one of the guys,' which means putting up with all of this. Perhaps women are easily intimidated by these tactics. . . . Unfortunately, the supervisors are the worst offenders because they have the most power. If a woman does complain, she cannot usually go high enough to save herself from retaliation or even sabotage of her work. There is often pressure on women not to talk to each other because they will be suspected of plotting against the men. So the harassment can take on the form of a negative work environment — not necessarily a physically aggressive harassment but that of a more psychological nature.[164]

If women in broadcasting do find themselves in these situations, their choices after *Vinson* are threefold: they can leave the industry; file a charge and pray they will not be blacklisted whether they win or lose; or file a charge, knowing that factually, the court will not deem the harassment pervasive enough, but hoping, at best, for a reasonable settlement to see them through a career change. However, whichever path they take, they are assured "wounds to the psyche . . . [and] rape of the spirit."[165]

164 SANDERS, *supra* note 35, at 153-54.

165 CRAFT, *supra* note 58, at 197. Dorfsman, echoing Craft's sentiments, phrased it differently:

> This has been a living hell, and it's changed me forever. . . . I felt like I was standing on the 15th floor of a burning building with the flames eating at my behind. I had a choice of standing there and being eaten by the flames or jumping out the window and maybe ending up dead or very injured or walking away alive. I had to jump. I just had to. I could not stay there and be eaten by the flames.

Rosenberg, *supra* note 5, § VI, at 19, col. 3.

VIII. CONCLUSION

Courts, in striving to adjudicate hostile environment sexual harassment cases after *Vinson*, have fluctuated greatly in affixing a standard regarding the degree necessary for an actionable claim. Judging by the variety of definitions of what constitutes an actionable claim, the courts seem to be as perplexed today as when *Vinson* was decided. If courts are this uncertain about the appropriate standards, women, employers, and litigators cannot proceed to handle these charges without a high degree of uncertainty — a position the law should eliminate, not foster.

One solution may be that employers should, as company policy, strictly forbid any harassment, be it verbal or physical, and severely discipline, if not terminate, those who violate the policy. Another solution may lie with the development of the reasonable woman standard, which would help to refine the definition of hostile environment sexual harassment somewhat. More verbal and pornographic abuse claims may be allowed to stand on their own, absent physical harassment, if this standard is adopted because women's sensibilities will not be measured against their male counterparts'.[166] Yet another solution may lie in the adoption of criteria for assessing actionable harassment such as that proffered by either the Fifth or the Sixth Circuit.[167]

This Note does not profess to have *the* answer to the problems generated by hostile environment sexual harassment case law for either women in broadcasting or any other industry, simply because there is not *one* answer. However, above all else, it is of fundamental importance at this juncture for courts, employers, and all employees to realize and "[r]emember, sexual harassment is a demeaning and demoralizing form of behavior, to both the victim and the offender."[168] "From the sociological surveys to prime time television, one can find ample support in society and culture for even the most oppressive views of women,

166 If the reasonable woman standard were to take root, some might argue that it runs directly contrary to the fundamental premise of Title VII in that it differentiates between the sexes. While this may be considered a valid contention initially, as the *Yates* court recognized, plaintiffs in sexual harassment cases are required to be members of a protected class, to which women belong, and men and women are vulnerable in different ways. *See supra* note 159.

167 *See supra* notes 141-49 and accompanying text.

168 *Waldrop*, *supra* note 127, at 15. Waldrop, a woman captain of the Armed Forces, also poignantly states that "[i]f [sexual harassment is] not addressed and corrected, unit morale, cohesion, and mission accomplishment suffer." *Id.*

and the most expansive notions of seduction enforced by the most traditional judges."[169] Therefore,

> We can't just withdraw and ignore it. We can appreciate that there are differences between men and women, but use these differences as a source of strength rather than as a source of discrimination. We all need to remember that it is better to build yourself up by doing a good job than by tearing others down.[170]

Anne P. Pomerantz

169 Estrich, *supra* note 99, at 1180.
170 *Waldrop*, *supra* note 127, at 15 (quoting General Carey).

THE CONFLICT BETWEEN FAIR USE AND THE LANHAM ACT IN THE SECOND CIRCUIT

I. INTRODUCTION

Although initially created to protect trademark owners as well as consumers relying on trademarks, the Lanham Act (the "Act")[1] is not presently confined to protecting official trademarks or products in the stream of commerce.[2] Courts have extended the Act to protect a person's interest in his name, personal reputation, and interest against another's reference to him in public.[3] As a result, the law restricts a parodist's[4] intentional mockery and ridicule of not only the thought and style of an original work, but of a celebrity as well.[5] Several interpretations of the Act may per-

1 15 U.S.C. § 1125(a) (1987) [hereinafter the Act]. For an explanation of the Act and its derivation, see *infra* notes 28-33 and accompanying text.
2 For an explanation of the extension of the Act, see *infra* notes 157-201 and accompanying text.
3 Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985). *See infra* notes 157-72, which detail how the District Court for the Southern District of New York applied the Act to protect a celebrity from public reference to him. *But see* Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) (court less willing to protect a celebrity's interest in his name through the Act).
4 Although this Note refers to parodists, other types of entertainers and writers such as satirists and comedians are potentially affected by the Act.

> Parodies are artistic compositions which mimic and ridicule the thought and style of an original work. The parodist strives for the twin goals of amusing and enlightening an audience. The artist creating the original work will normally be discontented by the close reproduction of the work, especially if the reproduction contradicts the positive public image of the original.

Chagares, *Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies*, 12 COLUM. J.L. & ARTS 229, 229 (1988) [hereinafter Chagares]. Furthermore,

> parody is one of the oldest and most popular forms of artistic expression. This ancient art form has firm roots, for example, in Spanish, French, and English literature, as exemplified by such classic works as *Don Quixote* by Cervantes, *Virgil Travest* by Scarron, *Canterbury Tales* by Chaucer and *Gulliver's Travels* by Swift. Similarly, parodies have taken an important role in American literature. Parodies have been so historically prevalent that one author has stated "[i]ndeed, it is safe to say that where there is literature, there is parody."

Id. at 230.
5 *See* L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 28 (1st Cir.), *cert. denied and appeal dismissed*, 483 U.S. 1013 (1987); Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490, 493 (2d Cir. 1989). Famous American parodists include Mark Twain, S.J. Perelman, and James Thurber. Chagares, *supra* note 4, at 230 & n.13.

The First Circuit defines parody as "a composition in which the characteristic turns of thought and phrase of an author are mimicked to appear ridiculous, especially by applying them to ludicrously inappropriate subjects." *L.L. Bean*, 811 F.2d at 28. *See* Dorsen, *Satire Appropriation and the Law of Libel, Trademark, and Copyright; Remedies Without Wrongs*, 65 B.U. L. REV. 923, 939 (1985) [hereinafter Dorsen]. *See generally* R. Falk, AMERICAN LITERATURE IN PARODY (1955) (history and description of parody and culture).