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**Sexual Harassment and Communication:
Opening a Closed Discourse**

By
Deanna-Lea Sitter

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Masters of Arts

Department of Law
Carleton University
Ottawa, Canada

January, 1996

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**“Sexual Harassment and Communication: Opening a Closed
Discourse”**

submitted by Deanna-Lea Sitter, B.A.
in partial fulfillment of the requirements for
the degree of Masters of Arts

A handwritten signature in black ink, appearing to read "Neil Chagnon", written over a horizontal line.

Thesis Supervisor

A handwritten signature in black ink, appearing to read "B. Dawson", written over a horizontal line.

Chair, Department of Law

Carleton University

Abstract

This thesis examines the concept of sexual harassment law and policy. Two transformative projects with regard to the workplace and social relations are examined: MacKinnon's legal feminist approach, and a Habermasian approach. First, it is argued that Catharine MacKinnon has been one of the dominant theorists in the development of the definition and scope of sexual harassment law and policy. Questions are raised about this dominant model. Then, Habermas' work is applied in three respects: first to critique our present law and policy; second as a theoretical framework to analyze modernity, the workplace and social relations; and third, in providing a potential model for an alternative transformative project utilizing discourse ethics to develop a different type of law and policy on sexual harassment.

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To Randy

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Chapter 1

Introduction

This thesis will explore, examine, and investigate the concept of sexual harassment law and policy in the workplace. My interest in this area stems from previous work experience which profoundly affected and reinforced my view that there needs to be a reevaluation of how sexual harassment is handled in the workplace. As an employee, it was my understanding that sexual harassment law and policy represented what women wanted, however it did not represent what I wanted. In fact, what constituted sexual harassment appeared to be arbitrarily decided for employees in accordance with a theory of sexual harassment developed by feminist theorists, most notably Catharine MacKinnon, which in turn was interpreted and enforced by management.

My employment history began as the first female on a fourteen-person crew in a British Columbia pulp mill.¹ At that time, the only female employees of the mill were office staff, laboratory assistants, and first-aid workers, none of whom worked within the mill proper. The mill, itself, was an all male environment. As I began work in 1977, considerable debate ensued as to how the introduction of a female worker would logistically affect the mill operation, both from a practical/physical perspective (i.e. equipment, showers) and from a relationship perspective (i.e. appropriate behavior).

¹Northwood Pulp and Paper, Prince George, B.C., 1977-1985, April to September.

Management dictated the parameters of the work relationship, indicating what was or was not appropriate behavior for men towards women employees.² This dictate created a great deal of resentment and hostility among workers and between workers and management. Although it could be argued that most new or different situations are met with resistance, the introduction of women into this workplace could likely have been handled with a great deal less disruption and resistance by all. While I was the only woman at the mill, I was able to negotiate with my co-workers an acceptable informal agreement on our working relationship despite management dictates. However, as more and more women entered the mill, it became necessary to have one set of formal rules and regulations since coordination of acceptable behavior was imperative to the integration of a variety of positions on what constituted sexual harassment. This was not done with significant input from the existing workforce or the entering female employees. In effect, the rules and regulations implemented were solely decided by management, who relied on the law and government policy to set up the resulting employment policy on sexual harassment. This again resulted in resentment and at times an unpleasant work environment. When I left the mill in 1985, relations between male and female employees were still strained.

When I first started my work life (at the mill), sexual harassment was a relatively new term and the definition referred to a narrow scope of behavior. However, as time progressed (approximately fifteen years throughout my employment history), the behavior which was deemed to constitute sexual harassment widened to include a broad range of behavior.³ The degree of consensus in the employment environment (between workers and between management and workers) on what was to be consid-

²At this time, management did not consider the possibility of sexual harassment of men by women.

³Behavior such as verbal comments, jokes, looks, physical contact, etc..

ered sexual harassment diminished. It became clear that sexual harassment was not a simple issue, nor easily regulated.

There is no question that all employees should be protected against sexual harassment. However, what constitutes sexual harassment has been dominated by voices other than those of employees.⁴ Since sexual harassment law and policy, in fact, structures interpersonal relationships in the workplace, it is necessary that the people most predominantly affected by sexual harassment law and policy are heard and have a role in its definition and implementation. As sexual harassment continued to be an issue in my work environments, I became more interested in who was defining the problem and the associated behaviors. If the problem and definition were not a reflection of my ideas or the ideas of my co-workers, whose were they?

The concept of sexual harassment is articulated by myself and feminists as a method to transform the workplace from its traditional:⁵ authoritarian, management worker, supposedly homogeneous culture.⁶ An ideal for the workplace in relation to sexual harassment, organized around a participatory framework, will be proposed which allows for recognition of a diversity of perspectives within the workplace. This model of workplace interpersonal relations would not be hierarchically organized explicitly in terms of management- workers and would not be monological⁷ in terms of assuming one perception of the workplace. Rather workplace interpersonal relations would be organized through discourse ethics in conjunction with law as an institu-

⁴As this thesis will show, feminists, particularly Catharine MacKinnon, have dominated the definition and scope of sexual harassment.

⁵I am not suggesting the traditional workplace is not still firmly entrenched in today's work environment.

⁶Discussion of this articulation of transformation of the workplace is included in Chapter 5, whereas the dominant feminist stream is articulated in Chapter 3.

⁷Monological is defined as communication that originates from a particular discipline, paradigm, group or individual. With respect to disciplines and groups it requires that they share key assumption[s]. Monological is defined as lacking intersubjectivity, is non-discursive.

tion operating as an external constitution, to include a multitude of perceptions. Communication between workers, management, feminists and law-makers is critical in particular instances in order to develop policy and law on a certain level.

Further, an Habermasian analysis of law will be offered for consideration. It will not speak of law *per se*, so much as how we should look at law. If we look at the legal regulation of sexual harassment, we should try to evaluate sexual harassment law in terms of whether it moves beyond the function of a constitution. It will be argued that the current definition of what behavior is deemed sexual harassment can be conceptualized as a continuum from demanding sexual favors for employment benefit on one extreme to behaviors which are considered to create a hostile work environment on the other and that law at one end of the continuum is by no means clear or uncontested. The suggestion is not the eradication of law altogether. The necessity for law is recognized, but the necessity of only traditional formal written law is questioned. It is argued that discourse ethics should be used as a compliment to present legal regulation, thus avoiding an over-legislation of sexual harassment in the workplace which potentially produces pathological effects.

A primary concern is the intrusion of law and policy into the interpersonal relations of workers. Present sexual harassment law and policy constructs social relations in the workplace in a particular way,⁹ which I feel has negative consequences and dangers. Sexual harassment law appears to create an us-them dichotomy (men vs women) that cannot facilitate an harmonious and egalitarian work environment. As with the workplace, transformation of social relations is best facilitated by methods that encourage participation, dialogue/communication, diversity and mutual understanding. The method I believe that best promotes this overall objective is discourse.

⁹eg. men harass women, it is a power relation of which men have power and women are powerless.

Two transformative projects with regard to the workplace and social relations will be examined. First, MacKinnon's legal feminist approach to articulate some concerns about sexual harassment law and policy. Second, a Habermasian approach which enables an articulation of these concerns in a specific context and further allows one to examine methods of addressing these concerns.

It will be argued that one of the dominant theorists in the development of sexual harassment law and policy to date has been Catharine MacKinnon and therefore review of her work is crucial. MacKinnon makes two major contributions, in my view, to the concept (scope and definition) of sexual harassment. First, she identifies sexual harassment as a legal problem within the workplace, but she also uses it as a method to facilitate change for women in the workplace. For MacKinnon, sexual harassment is constructed in a specific way-in a legal context as sex discrimination. Second, she contributed to making sexual harassment visible. However, she made it visible in a particular form that is problematic. MacKinnon attempts to shift the structure of the parameters of the workplace-a transformative project which is explicitly about participation by women in the workplace on equal terms. Sexual harassment is one part of MacKinnon's project and is seen as one tool to precipitate change in work relations for women.

There are significant doubts regarding traditional formal law's ability, in the case of sexual harassment, to effectively transform the workplace. A top-down, external development of law and policy on sexual harassment may not capture the whole experience, problem, or solution. There is concern that law and policy does not reflect consensus in the workplace and therefore undermines the goal of eliminating sexual harassment. Further, there is apprehension that a monological approach may cause a backlash of discord between employees within the workplace.

Habermas' work is important for this thesis in three respects: first as critique of our present law and policy; second as a theoretical framework to analyze modernity, the workplace and social relations; and third, in providing a potential model for an alternative transformative project utilizing discourse ethics to develop a different type of law and policy on sexual harassment in the workplace. Habermas furnishes a parsimonious model of how the workplace and social relations can be understood and constructed. His explanation of the negative effects of law on social relations which he terms *juridification* enables articulation of why a solely formal legal solution for sexual harassment is undesirable. His Theory of Communicative Action tenders the necessary theoretical framework that may be adapted to explain and examine workplace social relations relative to sexual harassment. Discourse ethics offers a discursive, participatory, dialogical, consensus oriented alternative on normative validity to our present development of sexual harassment law and policy within the workplace.

There are several themes that emerge from MacKinnon's and Habermas' theoretical frameworks that merit preliminary discussion: law, power, participation, discourse ethics, dialogical/monological, truth, diversity and public/private. The following will consider each of these themes and the link to be made here between MacKinnon and Habermas.

A key component of MacKinnon's transformative project is law and her assumption that law can be used to effectively change the workplace. For MacKinnon, laws can be drafted for women by women which can potentially transform women's subordinate position in the workplace and society generally. She uses an external top-down, analysis. MacKinnon's faith in the ability of law to significantly change women's role in society is somewhat optimistic. She claims that the law is substan-

tially influenced by patriarchy and male dominance. It therefore seems questionable to advocate that women should use law so extensively to effectively modify their subordinate position.⁹ Although MacKinnon briefly acknowledges that the law has not necessarily worked in the best interest of women in the past, nowhere in her work does she address the theme of juridification,¹⁰ and therefore she does not take into account the problems that may result from a reliance on law.¹¹ Habermas' analysis of law is intrinsically different. Habermas is more pessimistic and identifies the potential dangers of a reliance on law, and an increase in the number and breadth of law. He emphasizes some of the problems of juridification such as atomization of social relations. The dangers of juridification manifest themselves in the restructuring of interventions in the lifeworld, in the form of bureaucratic implementation and monetary redemption.¹² Further, he suggests there are two different kinds of law: law as medium and law as an institution. The latter can be dialogically based, whereby development and formulation of law can be accomplished through discourse ethics. It is law as an institution as an external constitution and the use of discourse which is significant to the regulation of interpersonal relations, and thus sexual harassment in the workplace.

Fundamental to MacKinnon's theory is her analysis of power in relation to gender. She assumes power is external to women, and located only with men. In MacKinnon's view of patriarchal power, men act, and women are acted upon. In this interpretation, power ultimately comes from outside for women, not from inside.

⁹MacKinnon, C.A., *Sexual Harassment of Working Women: A Case of Sex Discrimination*, New Haven, CO: Yale University Press, 1979 at p. 3.

¹⁰Juridification is a Habermasian term that speaks to the increase in formal positive written law. Germane here is the increase in law's pathological and paradoxical effects on social relations (the lifeworld).

¹¹This is one of the problems which will be elaborated on in Chapter 3.

¹²Habermas, J., *The Theory of Communicative Action Vol. 2, Lifeworld and System: A Critique of Functionalist Reason*, trans. Thomas McCarthy, Boston, MA: Beacon Press, 1987 at p. 362.

Power is constructed in dichotomous terms: powerful-men and powerless-women. This conception of power leaves little room for the personal empowerment of women. It portrays women as powerless and conceptualizes women solely as victims. This is problematic. A victimization interpretation of women has several consequences for a transformative project of gender relations. For example, it statically constructs women in the workplace in a subordinate role. Questions arise from this: How does one go from being a victim to becoming an active agent? How can one move beyond this position of subordination of women?¹³ Habermas, on the other hand, does not have an explicit analysis of power and gender. However many of his theoretical constructs could potentially be applied to power and gender.¹⁴

Mackinnon's approach to participation regarding sexual harassment law and policy is explicitly about participation by women for women. She prioritizes and hierarchicalizes one form of participation, that of women. The participants in the development of law, she suggests should be women who reflect a feminist approach to sexual harassment. For Habermas, participation in developing law takes a wider view. Possible participants would include all those potentially affected. In Habermas' theory of discourse ethics, participation does not simply mean to participate, but there is an assumption that democratically generated norms require a process of discourse because of the presumption that one voice cannot speak for everyone. Further, the goal of participation is to reach a mutual understanding through a process of ideal role taking.

Habermas conceptualizes a forum whereby participation, discourse and ideal role taking can take place. This is elaborated in his philosophy of discourse ethics. Fun-

¹³Although the discussion is specific to women, it is not meant to suggest that sexual harassment is precluded from happening in other contexts, i.e. to homosexuals.

¹⁴Discussion of power and gender in relation to Habermas is included in Chapter 5.

damental to discourse ethics, and significant to my thesis, is the requirement of rational discourse, that each participant in ideal role taking needs to recognize and understand the point of view of the other, and further that discourse occurs through rational argumentation. A point of view has to be explicable and understandable to all participants in the discourse. It does not necessarily have to be shared or agreed to by everyone; but it has to be understandable to everyone, and therefore be able to form the basis from which to reach a rational consensus on a conflicted norm. MacKinnon, on the other hand, identifies a *universal* women's experience (which might not be all women's experience), that is arrived at through a process of feminist consciousness raising. She relies on this universal women's experience as the basis for her legal theory. A theory of sexual harassment built around a *universal* women's experience that is distinct for women, which men cannot get access to, which is arrived at through the process of feminist consciousness raising, which men cannot get access to, cannot be the basis for a rational consensus in Habermasian terms. The idea of basing a norm around a *universal* women's experience that necessarily cannot be rationally arrived at from the point of view of every affected participant is problematic in terms of Habermas' notion of discourse ethics, since participant is defined more broadly in Habermas' approach. In his approach men would be required to be participants in discourse regarding the making of sexual harassment law. This conceptualization of participation would be precluded in MacKinnon's theory on epistemological grounds and as a mode of process. Men cannot participate in a process of arriving at a feminist understanding of sexual harassment, hence must be precluded from participating in its formulation, articulation, definition, as they are outside a woman's experience.

MackKinnon's approach to the formulation and implementation of sexual harass-

ment has been monological in nature. The monological nature of MacKinnon's theory stems not from the fact that it comes from MacKinnon or feminists or the legal profession, but that it relies on the notion of a *universal* women's experience, a distinct set of interests, that should in a sense be imposed upon all persons, instead of shared consensually by all persons, and reached by rational consensus. Further, MacKinnon's analysis is monological in terms of assuming one perception of the workplace and social relations. She posits that her theoretical framework correctly represents the workplace and social relations for all women. A Habermasian approach, on the other hand, is dialogical in nature. Communication and participation by all concerned is important in order to reach a rationally motivated consensus and mutual understanding.

A critical concept to the following analysis of MacKinnon's work is the idea of truth. MacKinnon and Habermas have very different conceptions of truth. MacKinnon's theoretical framework is founded on the notion that there is a patriarchal socially constructed reality which is false, and a patriarchal socially constructed consciousness which is false. Therefore there exists a real feminist consciousness, a real experience of oppression, a *real truth* (grounded in women's experience of oppression) that has simply to be uncovered and that can provide the basis for a transformative politics or project. In contrast, Habermas does not suggest that there is a *real truth* out there waiting to be found. Discourse is not a process to lead to truth, but rather it is the process itself which produces its own normative validity.

An approach which claims one truth does not accommodate diversity. MacKinnon prioritizes one form of oppression, claiming all other forms of oppression are somewhat less relevant or important. The significant point to be made in terms of the need for transformation is the recognition that there are a plurality of oppres-

sions that occur in the workplace which cannot be reduced to one single overriding oppression. MacKinnon's analysis is extremely reductionist and therefore does not allow for the necessary attention to other forms of oppression.¹⁵ A Habermasian approach embraces and facilitates diversity. It is a participatory, dialogical approach which allows for a meaningful discourse on any number of forms of oppression.

The last theme to be explored is the public/private dichotomy. MacKinnon submits that traditionally everything that was public was men's terrain, whereas women were confined to the private (family) and that in making it private men effectively maintained dominance and subordinated women. Given women's confinement to the private, MacKinnon argues that for women the private is public and political, and her analysis attempts to explode this dichotomy. Her solution of making the private public can be questioned. It could be argued that private space should be maintained. This is not to suggest it be beyond public scrutiny, but rather that challenges to norms within the private be settled through discourse. Habermas conceptualizes public and private differently. First he conceives modernity as containing a system and a lifeworld each of which concerns itself with different functions. The system pertains to the economy and the state, whereas the lifeworld relates to the social life. Second, modernity contains two distinct public and private separations: in the system the private economy and the public state, and in the lifeworld the public sphere and the private sphere. The private and public spheres in the lifeworld "...are communicatively structured spheres of action...."¹⁶ Habermas does not suggest that the private sphere in the lifeworld is beyond public scrutiny. Rather, he posits scrutiny be communicative, discursive and geared towards reaching a mutual understanding.

¹⁵eg. race, culture, ethnicity, class, etc..

¹⁶Habermas (1987), *Supra.* footnote 12, at p. 319.

A Habermasian approach provides a method which it is felt would result in a change in the way sexual harassment law and policy might look. His theory of communicative action and discourse ethics furnishes a different way of conceiving of social life, communication, participation and law.

Chapter 2

Development of Sexual Harassment

2.1 From 'Private' Behavior to Public Concern

Prior to the 1970s, sexual harassment was not a publically recognized social or legal problem. Most of what is now considered sexually harassing behavior was then labeled as normal, acceptable interpersonal interaction, or a personal problem of women in the workplace. Since then, through the efforts of feminists,¹⁷ sexual harassment has surfaced as a serious issue within the workplace as well as a rapidly growing area of legal intervention. The majority of early research on sexual harassment occurred in the U.S.. In 1975, the Working Women United (an American self-defined feminist organization) and their research branch, Working Women Institute (WWI), began investigation, education and research into the concept of sexual harassment.¹⁸ Other feminist groups and individuals quickly followed. In 1976, the Alliance Against Sexual Coercion (AASC; another American self-defined feminist organization) was founded with a mandate that included research, education and training with regard to sexual harassment.¹⁹ In 1978, Lin Farley produced the first

¹⁷Farley, L., Backhouse, C., MacKinnon, C., Bularzik, M., Gutek, B., to name a few.

¹⁸Weeks, E.L., Boles, J.M., Garbin, A.P. and Blount, J., "The Transformation of Sexual Harassment From a Private Trouble into a Public Issue," *Sociological Inquiry*, Vol. 56, No. 4, Fall, 1986 at p. 435.

¹⁹*Ibid.* at p. 436.

comprehensive work on sexual harassment—*Sexual Shakedown*.²⁰ Also in 1978, Constance Backhouse and Leah Cohen published the first work on sexual harassment in Canada *The Secret Oppression: Sexual Harassment of Working Women*.²¹ This was followed in 1979 by Catharine MacKinnon's book *Sexual Harassment of Working Women*²² which, although identifying sexual harassment as a social problem, is most significant in its contribution to providing a basis for legal action. As Barbara Gutek comments, "In a strong and convincing argument, MacKinnon contends that sexual harassment was primarily a problem for women, that it rarely happened to men, and therefore, that it should be considered as a form of sex discrimination."²³ All of these individuals and organizations were instrumental in naming, defining, publicizing and legitimizing sexual harassment as both a social and legal problem for women (not men).

2.1.1 Naming

The power of naming was pivotal for feminists. To name something lifts it out of obscurity and places it apart for attention.²⁴ Wood argues that the reason sexual harassment was unnamed for so long was because it was experienced primarily by women, who occupy a low or lower position of power and status in society. Those in power—primarily men—did not see sexual harassment as a significant problem. "Sexual harassment's low salience to those with the power to confer name and legitimacy

²⁰Farley, L., *Sexual Shakedown: The Sexual Harassment of Women on the Job*, New York, NY: McGraw Hill Book Co., 1978.

²¹Backhouse, C. and Cohen, L., *The Secret Oppression: Sexual Harassment of Working Women*, Toronto, Ontario: MacMillan Co., 1978.

²²MacKinnon, C.A., *Sexual Harassment of Working Women: A Case of Sex Discrimination*, New Haven, CO: Yale University Press 1979.

²³Gutek, B.A., *Sex and the Workplace*, San Francisco, CA: Jossey-Bass Publishers, 1985 at p. 6.

²⁴Wood, J.T., "Naming and Interpreting Sexual Harassment: A Conceptual Framework for Scholarship," in Kreps, G.L., *Sexual Harassment: Communication Implications*, Creskill, NJ: Hampton Press Inc 1993 at p. 13. Wood argues that the lack of naming implicitly suggests that sexual harassment is unimportant and does not merit attention, not naming renders sexual harassment invisible.

left it unrepresented in the language they generated to represent their experiences of the world. From the perspective of individuals who were not adversely affected by sexual harassment, it was not worth naming, it didn't exist."²⁵

Feminists, upon identifying sexual harassment, made it a priority to name sexual harassment from a feminist perspective. They were concerned that the way sexual harassment was defined or named as a problem should reflect women's experience.²⁶ Further, that its naming call attention to the violence, power differential and damage that women experience. Given the sexualized nature of sexual harassment, feminists were insistent that social and legal reforms acknowledge that men and women perceive sexually related behaviors differently and have distinct understandings of their roles in sexualized situations. As well, feminists insisted that sexual harassment not be perceived from a male standpoint which would identify sexual harassment as flirtation, personality problems, or normal sexual relations. Additionally, feminists were concerned that government and other institutions would take control and transform the legal response to the issue into a bureaucratic, mechanical set of legal procedures. Moreover, there was concern that the legal machine would produce a definition which would reject women's experiences as not constituting sexual harassment. As a result, feminists' efforts to name the problem and to document its individual, institutional, and social consequences, established sexual harassment as a serious social problem affecting all women.

2.1.2 Empirical Evidence of the Scope and Awareness of the Problem

In addition to lobbying for social and legal reforms, feminist researchers were also instrumental in generating interest into research, studies and surveys on the

²⁵*Ibid.* at p. 13.

²⁶Their interpretation of women's experience, eg. MacKinnon, C., Backhouse, C. & Cohen, L., Farley, L., AASC & WWI.

incidence of sexual harassment. Weeks et al. found that at least 10% of magazine and journal articles on sexual harassment were directly linked to the WWI and the AASC.²⁷

The first survey to reveal the high prevalence of sexual harassment for working women was done by Redbook magazine in 1976.²⁸ It indicated that approximately 90% of working women had experienced some form of sexual harassment and provided the empirical evidence for many feminists²⁹ that sexual harassment was a widespread problem experienced primarily by women. There were several methodological problems with this survey and therefore its reliability is seriously questioned. However, it did effectuate public awareness and concern.³⁰ Subsequently a number of magazines, feminist organizations and academics undertook studies and surveys on sexual harassment.³¹ But it was the U.S. Merit Systems Protection Board study in 1980³² that was particularly important in demonstrating the seriousness of the problem. This study sampled 23,964 American federal employees, with a response rate of 84.8% and found that 42% of women and 15% of men had experienced some form of sexual harassment. Of the 42% of women experiencing sexual harassment, 67% experienced a Quid Pro Quo³³ type of sexual harassment.

²⁷Wood (1993), *Supra*, footnote 24, at p. 441.

²⁸"How Do You Handle Sex on the Job: A Redbook Questionnaire," *Redbook Magazine*, Vol. 146, January, 1976:74-75; and Safran, C., "What Men Do to Women on the Job," *Redbook Magazine*, Vol. 156, November, 1976:149, 217-223.

²⁹Farley, L., MacKinnon, C..

³⁰Gruber, J.E., "Methodological Problems and Policy Implications in Sexual Harassment Research," *Population Research and Policy Review*, Vol. 9, No. 3, September, 1990 at p. 235.

³¹Collins, E.G.C. and Blodgett, T.B., "Sexual Harassment...Some See It...Some Won't," *Harvard Business Review*, Vol. 59, March-April, 1981:77-95; Cruik, P., "The Impact of Sexual Harassment on the Job: A Profile of Experiences of 92 Women," New York: Working Women Institute Research Series Report No. 3, Fall 1979; Gutek, B., "Experiences of Sexual Harassment: Results from a Representative Survey," paper presented at the annual meeting of the American Psychological Association, Los Angeles, CA., August 1981; Pryor, J.B. and Day, J.D., "Interpretations of Sexual Harassment: An Attributional Analysis," *Sex Roles*, Vol. 18, No. 7/8, April, 1988:405-417.

³²U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: It is a Problem*, Washington, DC: U.S. Government Printing, 1981.

³³this for that', involving an explicit or implicit demand to provide or accept sexual behavior in

The widest degree of consensus among the general public occurs with Quid Pro Quo types of harassment (whereby an explicit exchange takes place a woman complies sexually or "...forfeits an employment benefit"³⁴). Gutek's study revealed that approximately 90% of respondents (men and women) agreed that Quid Pro Quo sexual relations amounted to sexual harassment and should be prohibited.³⁵ The consensus as one moves toward Condition of Work types of harassment, (whereby sexually harassing behavior "...makes the work environment unbearable"³⁶) however, deteriorates within sex (women) and between sexes.³⁷ Although women are more likely than men to find a particular behavior sexually harassing, not all women agree on what behaviors would constitute sexual harassment.³⁸ Some feminists³⁹ have suggested that women share a collective conception of what constitutes sexual harassment, however studies⁴⁰ do not appear to support this claim.

Studies, surveys and research on sexual harassment continued into the 1980s.⁴¹ Gruber argues that all of these studies/surveys suffered from methodological prob-

return for some benefit or to keep one's job.

³⁴MacKinnon (1979), *Supra*, footnote 22, at p. 32.

³⁵Gutek (1985), *Supra*, footnote 23, at p. 45.

³⁶MacKinnon (1979), *Supra*, footnote 22, at p. 40.

³⁷Gutek (1985), *Supra*, footnote 23, at p. 45.

³⁸*Ibid.* at p. 46.

³⁹For instance, Larkin, J., "Sexual Harassment: From the Personal to the Political," *Atlantis*, Vol. 17, No. 1, Fall/Winter, 1991 at p. 113; MacKinnon, C.A., *Sexual Harassment of Working Women: A Case of Sex Discrimination*, New Haven, CO: Yale University Press, 1979.

⁴⁰Collins, E.G.C. and Blodgett, T.B., "Sexual Harassment...Some See It...Some Won't," *Harvard Business Review*, Vol. 59, March-April, 1981 at p. 78; Pryor, J.B. and Day, J.D., "Interpretations of Sexual Harassment: An Attributional Analysis," *Sex Roles*, Vol. 18, No. 7/8, April, 1988 at p. 406; Gutek, B.A., *Sex and the Workplace*, San Francisco, CA: Jossey-Bass Publishers, 1985 at p. 46. See next section.

⁴¹Human Rights Commission, "Unwanted Sexual Attention and Sexual Harassment: Results of a Survey of Canadians," Ottawa: Human Rights Commission, 1983; Gutek, B.A., *Sex and the Workplace*, San Francisco, CA: Jossey-Bass Publishers, 1985; Wise, S. and Stanley, L., *Georgie Porgie: Sexual Harassment in Everyday Life*, New York: Pandora Press, 1987; Fitzgerald, L.F., "Sexual Harassment: The Definition and Measure of a Construct," In M.A. Paludi (ed) *Ivory Power: Sexual Harassment on Campus*, Albany, NY: State University of New York Press, 1990:21-44; U.S. Merit Protection Board, "Sexual Harassment in Federal Government: An Update," Washington, DC: U.S. Government Printing Office, 1988, to name just a few.

lems⁴² and hence their accuracy can be questioned. However, he goes on to suggest that even when methodological errors are accounted for, there is still a high incidence of sexual harassment approximately 40% of women are sexually harassed.⁴³

These studies provided the empirical evidence that sexual harassment was a widespread problem that predominantly affected women in the workplace. The empirical studies substantiated feminists' theoretical claim that sexual harassment was a serious problem that required a response.

2.1.3 Definitions

As has been seen, feminists have struggled to name and define the issue of sexual harassment. Consequently it is important to examine the varying concepts of what constitutes sexually harassing behavior in the feminist literature.

Farley posits that:

Sexual harassment is best described as unsolicited, nonreciprocal male behavior that asserts a woman's sex role over her function as a worker. It can be all of the following: staring at, commenting upon, or touching a woman's body; requests for acquiescence in sexual behavior; repeated nonreciprocated propositions for dates; demands for sexual intercourse; and rape. These forms of male behavior frequently rely on superior male status in the culture, sheer numbers, or the threat of higher rank at work to exact compliance or levy penalties for refusal.⁴⁴

Farley's definition corresponds closely with Quid Pro Quo harassment which concurs with what many people would understand (today) as an unacceptable form of behavior precisely because of the efforts of such feminists as Farley.

Backhouse and Cohen include the definitions of both the AASC and WWI:

Any sexually oriented practice that endangers a woman's job—that undermines her job performance and threatens her economic livelihood (AASC)...any repeated unwanted sexual comments, looks, suggestions

⁴²Gruber, J.E., "Methodological Problems and Policy Implications in Sexual Harassment Research," *Population Research and Policy Review*, Vol. 9, No. 3, September, 1990; Paul, E.F., "Bared Buttocks and Federal Cases," *Society*, Vol. 28, No. 4, May/June, 1991:4-7. Some methodological problems included: sample selection, randomness, questions asked, interpretation of results.

⁴³Gruber (1990), *Supra*, footnote 30, at p 248.

⁴⁴Farley (1978), *Supra*, footnote 20, at pp.14-15.

or physical contact that you find objectionable or offensive and causes you discomfort on the job (WWI)...[s]exual harassment can manifest itself both physically and psychologically...it can involve verbal innuendo and inappropriate affectionate gestures. [i]t can...escalate to extreme behavior amounting to attempted rape and rape.⁴⁵

Mackinnon submits that:

Sexual harassment may occur as a single encounter or as a series of incidents at work. It may place a sexual condition upon employment opportunities at a clearly defined threshold, such as hiring, retention, or advancement; or it may occur as a pervasive or continuing condition of the work environment. Extending along a continuum of severity and unwantedness, and depending upon the employment circumstances, examples include

verbal sexual suggestions or jokes, constant leering or ogling, brushing against your body "accidentally", a friendly pat, squeeze or pinch or arm against you, catching you alone for a quick kiss, the indecent proposition backed by the threat of losing your job, and forced sexual relations.⁴⁶

Mackinnon's primary argument is a legal one which claims "...sexual harassment of women at work is sex discrimination in employment."⁴⁷ Her influence is in extending and broadening the scope or reach of the definition to encompass Condition of Work type harassment. It is important to note that Mackinnon's conceptualization of sexual harassment comes out of her theory of sexuality, of power, of consciousness raising and her epistemology.⁴⁸

The definition of sexual harassment can be said to operate on a continuum. At one end is Quid Pro Quo which speaks to a certain behavior that is deemed inappropriate involving an explicit or implicit demand to provide or accept sexual behavior in return for some benefit or to keep one's job. At the other end is Condition of Work, whereby the work environment itself is not conducive to a fair and equitable workplace for women. These two extremes of sexual harassment differ significantly. Quid Pro Quo is a *specific behavior* that is inappropriate, unfair and inequitable for *a particular woman*. The definition of harassment is specific and narrow. This type

⁴⁵Backhouse (1981), *Supra*, footnote 21, at p. 38.

⁴⁶Mackinnon (1979), *Supra*, footnote 22, at pp. 1-2.

⁴⁷*Ibid.* at p. 4.

⁴⁸See Chapter 3 for elaboration of Mackinnon's theory.

of behavior generates the largest degree of public consensus on the fact that it does indeed amount to sexual harassment.⁴⁹ Condition of Work, on the other hand, refers to a whole *series of behaviors*, as well as how men and women interact, that is unfair and inequitable to *all women*. In Condition of Work, it is the environment itself that is problematic. Condition of Work represents a broadening of the reach and scope of the definition of sexual harassment. In this context, sexual harassment is systemic in nature. The work environment itself systematically discriminates against women. This type of sexual harassment is consistent with MacKinnon's concerns regarding workplace behavior and interaction that disadvantages women. Condition of Work harassment depends upon women's experience of the workplace environment which MacKinnon claims is radically different from men's, so that what men would perceive as ordinary, non-sexualized, competitive behavior or camaraderie would or might be perceived by women as being sexualized, oppressive, exclusionary and discriminatory. It is precisely this notion of a sphere of sexual harassment that relies on a different understanding of "experience" between women and men that is most likely to be controversial, most likely to and does lack widespread consensus⁵⁰ and is most likely to feel as if it is 'imposed' upon men and women in a way that cannot be accomplished through rational, participatory discourse since it is self-defined and framed around a distinct women's experience.

MacKinnon acknowledges that this type of sexual harassment is less clear but claims it is more pervasive.⁵¹ She contends that in both these types of sexual harassment, "...the sexual demand is often but an extension of a gender-defined work

⁴⁹Gutek (1985), *Supra*, footnote 23, at p. 45 found a high degree of consensus on Quid Pro Quo sexual harassment.

⁵⁰*Ibid.* at pp. 45 found a lack of consensus regarding Condition of Work sexual harassment.

⁵¹MacKinnon (1979), *Supra*, footnote 22, at p. 40.

role. The victim is employed hence treated 'as a woman'.⁵²

A consistent theme within feminism is that sexual harassment revolves around power inequalities between men and women and that it is this difference in power which is key to understanding its dynamics.⁵³ MacKinnon states that sexual harassment

...refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one's social sphere to lever benefits or impose deprivations in another. The major dynamic is best expressed as the reciprocal enforcement of two inequalities. When one is sexual, the other material, the cumulative sanction is particularly potent.⁵⁴

Sexual harassment is demonstrative of the powerlessness of women workers and the cultural norms which define women as sex objects. It endangers women's employment, negatively affects their performance and undermines their dignity as workers. To understand sexual harassment it is necessary, according to feminists and MacKinnon in particular, to understand that it is about sexuality, gender roles, control, and power. Power differences between women and men stem in part from socially constructed sex roles, as opposed to supposedly 'natural' sex instincts in both males and females, that sexualize and locate women in low status positions.

A common theme in feminist writing⁵⁵ on sexual harassment is that the definition should be as open-ended as possible. Crocker questions the appropriateness of a definitive definition of sexual harassment suggesting that:

No definition will be absolutely complete it is extremely difficult to encompass every dimension of a problem we are still learning about. Attempting to address the complexity of the issue by introducing elaborate distinctions merely creates an overly legalistic and mechanistic formula that allows for excuses and technical loopholes. A definition should be

⁵²*Ibid.* at p. 32.

⁵³Farley, L., MacKinnon, C., Backhouse, C..

⁵⁴MacKinnon (1979), *Supra.* footnote 22, at pp. 1-2.

⁵⁵Farley, L., Crocker, P., Gordon, L..

intended as a guide not a set of standards for proscribed behavior.⁵⁶ Many feminists accordingly argue that definitions should challenge preconceived ideas and assumptions, recognize the widest range of behavior which is sexually harassing, as well as acknowledge and take into account the experiences of and impact on women. Definitions of sexual harassment should begin with women's experiences. Gordon advises that the definition of sexual harassment can never be totally complete since there are an infinite number of ways in which men use sex to intimidate and subjugate women.⁵⁷ She suggests that a flexible definition is an asset since sexual harassment cannot simply be eradicated through legal or policy means. Rather eradication requires a multitude of strategies that teach men to quit harassing women, and see their behavior from a woman's perspective; that change power relations between men and women; and that change the world order of male supremacy.⁵⁸ The inclusion of a broad range of behavior in the definition of sexual harassment, Gordon argues, was instrumental in demonstrating how widespread sexual harassment was as a social and legal problem and therefore worthy of an institutional response.⁵⁹

The difficulty with most definitions of sexual harassment is that they include everything from a look to sexual assault. On the one hand, for behavior to be known as inappropriate it is necessary to provide a concise definition, on the other hand, a precise definition may not capture the wide variety of behaviors that potentially could be considered sexually harassing to employees. The difficulty with an open-ended definition of sexual harassment such as MacKinnon's is that it becomes unclear what may or may not constitute sexual harassment.

⁵⁶Crocker, P.L., "An Analysis of University Definitions of Sexual Harassment," *Signs*, Vol. 18, No. 4, Summer, 1983 at p. 697.

⁵⁷Gordon, L., "The Politics of Sexual Harassment," *Radical America*, Vol. 15, No. 4, July/August, 1981 at p. 8

⁵⁸*Ibid.* at p. 10.

⁵⁹*Ibid.* at p. 10

2.1.4 Feminist Strategies

Feminist strategies to combat sexual harassment have included a variety of methods, nevertheless, the primary focus has been on law and policy. The WWI and the AASC, although employing other strategies to help combat sexual harassment, were also efficacious in constructing a network of lawyers interested in pursuing sexual harassment as a legal claim. They provided information and advice to legal professionals on sexual harassment.⁶⁰ As well, the WWI was involved in testifying at government hearings on sexual harassment.⁶¹ MacKinnon has been one of the principle persons involved in the development of sexual harassment both definitionally and legally using the legal system in seeking legitimacy and social awareness. Her approach has provided the theoretical underpinning for much of the discussion of the definition of and strategies for eliminating sexual harassment. Legal cases indicate that the courts looked to feminists for information and conceptualization of sexual harassment,⁶² particularly to Catharine MacKinnon and Constance Backhouse. LEAF, a feminist legal organization, represented Janzen in the Canadian Supreme Court case⁶³ and relied on Catharine MacKinnon's definition and theoretical framework of sexual harassment to argue their case. They also consulted Constance Backhouse as an authority on sexual harassment. LEAF argued that sexual harassment

...fed on men's economic and sexual dominance over women...[i]t both mirrors and reinforces a fundamental imbalance of power between men and women in the workplace and in society, and it was within the context of this power imbalance that the meaning of male and female was socially constructed...men [are] conditioned to find female powerlessness and submission erotic.⁶⁴

⁶⁰Weeks et al. (1986), *Supra.* footnote 18, at p. 438.

⁶¹*Ibid.* at p. 443.

⁶²*Cox v Jagbrutte Inc.* (Ont. 1982), 3 C.H.R.R. D/609 (Cumming); *Janzen and Govereau v Platy Enterprises Ltd* [1989], 10 C.H.R.R. D/6205.

⁶³*Janzen and Govereau v Platy Enterprises Ltd* [1989], 1 S.C.R. 1252, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6205; Razack, S., *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality*, Toronto, Ont.: Second Story Press, 1991 at p. 109.

⁶⁴Razack, S., *Canadian Feminism and the Law: The Women's Legal Education and Action Fund*

LEAF emphasized to the court that in order to consider sexual harassment appropriately it was necessary to abandon the traditional legal-individualistic, abstract balancing approach to rights, since the social construction of gender negatively biases women. Razack asserts that:

...by accepting many of LEAF's authorities (including Catharine MacKinnon and Constance Backhouse) and crediting LEAF directly, the court indicated its understanding of sexual harassment as an experience women have because they are women, and therefore, are members of a group who typically fill the least-compensated, least-powerful, and lowest-status jobs in society.⁶⁵

The Supreme Court of Canada in coming to its landmark decision in *Janzen and Govereau v Platy Enterprises Ltd*⁶⁶ consulted such authorities as Catharine MacKinnon's *Sexual Harassment of Working Women*⁶⁷ and Constance Backhouse and Leah Cohen's *The Secret Oppression: Sexual Harassment of Working Women*⁶⁸ to conceptualize and define sexual harassment.⁶⁹ MacKinnon has been even more influential in the American context. Weeks et al. submit that Catharine MacKinnon has been outstanding in promoting sexual harassment as a problem. Her book has circulated in draft form since 1975, which was a critical year in case law, and provides "...an expert legal analysis and strong argument that sexual harassment constitutes sex discrimination."⁷⁰ Further, they claim that several "...court ruling[s] reflected reasoning which is indicative of the effect her work had on the thinking of readers both within and outside the legal profession."⁷¹ Finally, MacKinnon herself represented Vinson as co-counsel in the landmark U.S. Supreme Court case *Meritor Savings Bank v. Vinson*⁷² which established sexual harassment as sex discrimination. In rendering

and the Pursuit of Equality, Toronto, Ont.: Second Story Press, 1991 at p. 108.

⁶⁵ *Ibid.* at p. 109.

⁶⁶ [1989], 1 S.C.R. 1252, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6205 at p. D/6205.

⁶⁷ MacKinnon (1979), *Supra.* footnote 22.

⁶⁸ Backhouse (1981), *Supra.* footnote 21.

⁶⁹ *Janzen and Govereau v Platy Enterprises Ltd* (1985), *Supra.* footnote 66, at p. D/6225.

⁷⁰ Weeks et al. (1986), *Supra.* footnote 18, at p. 439.

⁷¹ *Ibid.* at p. 439.

⁷² 106 S. Ct. 2399 (1986).

its decision, at times the court virtually took the words out of MacKinnon's mouth regarding sexual harassment.⁷³

2.2 Development of Legal Strategies: MacKinnon's Approach as the Dominant Legal Approach

As has been shown, MacKinnon has been very influential in the development of sexual harassment law, therefore it is quintessential to examine her theory of sexual harassment law and policy. Although her book, *Sexual Harassment of Working Women*,⁷⁴ appeared in its first draft twenty years ago, it is still relevant today as it has provided a basis for legal argument on sexual harassment as sex discrimination.

MacKinnon's theory seeks to understand and define sexual harassment as an equality rights issue. She locates sexual harassment in the milieu of women's work, then undertakes to demonstrate that the structure of the work environment makes women systemically vulnerable to sexual harassment. Sexual harassment, she maintains, on the one hand reinforces and on the other hand expresses women's inferior status in the workforce.⁷⁵ "Practices which express and reinforce the social inequality of women to men are clear cases of sex-based discrimination...."⁷⁶ "Women are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality.. ."⁷⁷ "Sexual harassment is discrimination 'based on sex' within the social meaning of sex, as the concept is socially incarnated in sex roles. Pervasive and 'accepted' as they are, these rigid roles have no place in the allocation of social and economic resources."⁷⁸ Sexual harassment threatens women's employment,

⁷³Minson, J., *Questions of Conduct: Sexual Harassment, Citizenship, Government*, London: MacMillan Press Ltd., 1993 at p. 76.

⁷⁴MacKinnon (1979), *Supra* footnote 22.

⁷⁵*Ibid.* at p. 4.

⁷⁶*Ibid.* at p. 174.

⁷⁷*Ibid.* at p. 174.

⁷⁸*Ibid.* at p. 178.

inhibits job performance, expresses and reinforces inappropriate sex-stereotypes, undercuts potential for work equality and is sexism.⁷⁹

MacKinnon argues that sexual harassment should not be a condition of employment and further that employers should be liable for their employee's behavior, that employers should be held legally responsible for maintaining equality in condition of employment for both male and female workers. Her legal argument places a legal responsibility on the employer to ensure that equity (in terms of the absence of sexual harassment) is achieved in the workplace—that all employees are treated equally, and that permitting sexual harassment in the workplace effectively subjects some employees (women as a class, as well as women as individuals) to unequal treatment. MacKinnon's approach relies on the threat of legal coercion: i.e. the threat of legal sanction against not only individuals but against the employer. No matter what one might think about the effects, MacKinnon does provide a brilliant legal argument and a profoundly effective one.

In investigating sexual harassment as sex discrimination, MacKinnon identifies two different approaches taken by courts: the difference approach and the inequality approach.

The difference approach views the sexes as different from each other but disallows distinctions based on preconceived or inaccurate notions. Sexual harassment is considered sex discrimination in that it "...differentially injures one gender...[when] the treatment of men and women can be compared."⁸⁰ This approach does not prohibit all differential treatment, rather only those which are unfounded, inaccurate or overstated distinctions. The difference approach looks for a perfectly balanced rule.⁸¹

⁷⁹ *Ibid.* at p. 208.

⁸⁰ *Ibid.* at p. 6.

⁸¹ *Ibid.* at p. 127.

"The gender difference is lined up against the sex difference in practice, and women are compared with men, to see if the correspondences warrant application."⁸² This approach regards sex discrimination as beginning with the idea "...that equals should be treated equally,"⁸³ using the formula of "similarly situated" whereby "...persons in relevantly similar circumstances should be treated relevantly similarly."⁸⁴ If it is determined that the sexes cannot be compared, then any discrimination is therefore not perceived as sex-based.

The inequality approach on the other hand, "...understands the sexes to be not simply socially differentiated but socially *unequal*."⁸⁵ In this view, all behavior "...which subordinates women to men...[is] prohibited."⁸⁶ Women's situation is seen as "...a structural problem of enforced inferiority..."⁸⁷ This approach considers sexual harassment as disadvantaging women as a gender. "Inequality is more than discrepancy or disparity."⁸⁸ Here it is not that men and women's roles are different which this approach acknowledges, but that men's role is socially dominant and women's subordinate. The inequality approach understands "...that sex discrimination is a system that defines women as inferior from men, that cumulatively disadvantages women for their differences from men, as well as ignores their similarities."⁸⁹ Legal intervention in the inequality approach is an attempt to protect the less powerful.⁹⁰ The significance of the inequality approach is that it argues there is a systemic power inequality between men and women in patriarchal society

⁸² *Ibid.* at p. 102.

⁸³ *Ibid.* at p. 107.

⁸⁴ *Ibid.* at p. 107.

⁸⁵ *Ibid.* at p. 4.

⁸⁶ *Ibid.* at p. 4.

⁸⁷ *Ibid.* at p. 5.

⁸⁸ *Ibid.* at p. 102.

⁸⁹ *Ibid.* at p. 116.

⁹⁰ *Ibid.* at p. 127.

and in the workplace, and then builds a theory of sexual harassment as a form of sex discrimination around this theme of systemic power inequalities between men and women. The inequality approach challenges the work culture itself as much as any individual acts of harassing behavior.

MacKinnon is critical of the difference approach and argues that its concern for disparity and comparability loses sight of the socially constructed inferiority and status of women. Where men and women can be compared, differential treatment is seen as sex discrimination. The difference approach asks the wrong questions: difference, comparability, disparate treatment, although important, are not the key issues. For MacKinnon, the key issue is the inequality—the second class status of women. She argues that the favorable approach is the inequality approach. This approach recognizes the gender inequality that women experience. It asks the question of whether a practice contributes to the maintenance of gender inequality. The central claim in MacKinnon's work—that sexual harassment amounts to sex discrimination does not depend on whether one accepts the inequality approach or the difference approach. Both approaches lead to the same conclusion at least in this one important respect. However, the difference approach allows for only a narrow definition of sexual harassment whereby one can clearly demonstrate that women at work are treated differently than men because they are women. The determination of different treatments is based, according to MacKinnon, on an objective male standard. Whereas, the inequality approach permits for a broader definition of sexual harassment in order to accommodate that women have a distinct experience from men. The inequality approach underlies MacKinnon's argument for an extensive continuum definition and strategy that requires the broadest understanding of sexual harassment possible. The key here is that which approach one takes, profoundly

effects the definition and scope of sexual harassment law and policy. The implication of the inequality approach's conceptualization of sexual harassment as demonstrative of the systemic power inequality women suffer in patriarchal society is that it permits for a broad legal definition and a broad scope for sexual harassment law and policy.

Important in MacKinnon's estimation, is bringing "...to the law something of the reality of women's lives."⁹¹ It is necessary that the law be shaped by what is *really* happening to women and not a male view of what is happening. "Women's lived through experience, in as whole and truthful a fashion as can be approximated at this point, should begin to provide the starting point and context out of which...[sexual harassment]...is made illegal on their behalf."⁹² By contrast, the difference approach still relies on the assumed male norm of experience as a starting point for comparison. The inequality approach presupposes that women's experience should count because "reality" is experienced differently by men and women. The difference approach doesn't need to examine women's lived experience or lived reality it offers a more "objective" standard for comparison. MacKinnon argues that an "objectivist" standard for comparison which starts from men's lived reality and experience of power has the effect of disqualifying much of women's lived experience of inequality. The inequality approach is self-consciously subjectivist, in the sense of focusing not on a universal conception of reality and experience, but by positing that women's lived experience and apprehension of reality differs from men's.

2.3 Legal Development

It is the feminist pursuit of legal measures that catapulted sexual harassment into a legitimate social problem. Legal development on sexual harassment is in its infancy. Only in the past twenty years has there been a significant change in

⁹¹ *ibid.* at p. xii.

⁹² *ibid.* at p. 26.

the way it is conceptualized both in Canada and the U.S.. Feminist organizations and individuals, particularly MacKinnon, were instrumental in molding the legal development of sexual harassment law and it has been one of feminists' primary strategies in transforming women's employment. Legal cases were thought to be instrumental in generating public and political awareness

Legal approaches to sexual harassment have included criminal law, torts and antidiscrimination law.⁹³ However, MacKinnon argued that it was antidiscrimination law which potentially would be the most sensitive to power relations. "...[A]ntidiscrimination law casts the same act either as one of *economic* coercion, in which the material survival of women in general is threatened, or as one of *intellectual* coercion in which the spiritual survival of women in general is similarly jeopardized."⁹⁴ MacKinnon's work in developing a legal response to sexual harassment as a form of sexual discrimination and therefore challengeable under federal and state human rights laws in the U.S. (and under federal and provincial human rights laws in Canada) has been extremely influential in this regard. MacKinnon's legal theory has received empirical confirmation in the courts in their acceptance of this feminist legal analysis.

2.3.1 U.S. Case Law and its Effects

In order to examine the development of sexual harassment law one must turn first to the United States where sexual harassment as a legal issue began. In a legal context, sexual harassment was conceptualized by MacKinnon⁹⁵ as sex discrimination, and it is in this legal framework that sexual harassment was initially debated. Early legal arguments in the U.S. centered around whether or not sexual harass-

⁹³MacKinnon, C.A., *Sexual Harassment of Working Women: A Case of Sex Discrimination*, New Haven, CO: Yale University Press, 1979 at pp. 158-174; Tong, R., *Women, Sex and the Law*, Totowa, NJ: Rowman & Allanheld, 1984 at p. 77.

⁹⁴Tong, R., *Women, Sex and the Law*, Totowa, NJ: Rowman & Allanheld, 1984 at p. 77.

⁹⁵Her book was circulating in draft form as early as 1975, in which sexual harassment is argued to be sex discrimination.

ment amounted to sex discrimination under Title VII of the Civil Rights Act which prohibited sex discrimination in employment.

At first American courts were unwilling to accept sexual harassment as sex discrimination⁹⁶ claiming this behavior amounted to "personal proclivity" and "isolated incidents." Although the outcome of these cases did not render positive results, they were significant in generating extensive media coverage and thus creating public awareness. The first case to accept sexual harassment as sex discrimination was *Williams v. Sarbe* (1976).⁹⁷ The court "...ruled that sexual harassment amounted to disparate treatment and so was a violation of Title VII."⁹⁸ In 1977 there were three federal Court of Appeal cases that solidified the judicial opinion of sexual harassment in the workplace as a form of sex discrimination.⁹⁹ In *Barnes v. Costle*, the appellate court stated:

It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job.¹⁰⁰

These court decisions established that sexual harassment amounts to sex discrimination under Title VII of the Civil Rights Act; that "...sexual harassment should not be a condition of employment,"¹⁰¹ and that employers can be held liable for employees' behavior. However, it was not until the landmark case *Meritor Savings Bank v.*

⁹⁶*Corne et al. v. Bausch & Lomb Inc.*, 390 F. Supp. 161 (D. Ariz. 1975); *Miller v. Bank of America*, 418 F. Supp. 233 (N. D. Cal. 1976); *Tomkins v. Public Service Electric and Gas Co.*, 422 F. Supp. 53 (D. N. J. 1976).

⁹⁷413 F. Supp. 654 (D. D. C. 1976).

⁹⁸Tarnopolosky, (Justice), W.S. and Pentrey, W.F., *Discrimination and the Law*, Toronto, Ont.: DeBoo/Carswell, 1994 at pp. 8-20.

⁹⁹*Barnes v. Costle*, 561 F. 2d 983 (S. C. Cir. 1977); *Garber v. Saxon Business Products*, 552 F. 2d 1032 (4th Cir. 1977); and *Tomkins v. Public Service Electric and Gas Co.* (Tomkins II), 568 F. 2d 1044 (3rd Cir. 1977).

¹⁰⁰*Barnes v. Costle*, 561 F. 2d 983 (S. C. Cir. 1977) at p. 990. This judgement reflects a difference approach in MacKinnon's terms.

¹⁰¹Aggarwal, A.P., *Sexual Harassment in the Workplace* (2nd Ed), Toronto, Ontario: Butterworths 1992 at p. 26

*Vinson*¹⁰² that the Supreme Court of the United States in a unanimous decision confirmed that sexual harassment amounted to sex discrimination and employers could be held liable for employees' behavior, thereby firmly entrenching sexual harassment as a legal claim. The court in *Meritor v Vinson* in coming to its decision relied on the definition of sexual harassment as discrimination contained in the EEOC guidelines which included hostile environment (Condition of Work). In addition to recognition of the EEOC guidelines, a key decision by the court stated that sexual harassment cases need not necessarily demonstrate that the complainant suffered "tangible economic loss."¹⁰³ As well, although the court stated that the mere presense of a policy prohibiting sexual harassment was not sufficient to remove the employer's liability, they also held that the absence of a policy can be seen as key evidence of employer liability.¹⁰⁴ Employer liability is a very important element of the legal theory, which has far reaching effects. It has probably prompted more policy initiatives by corporate management than anything else.

2.3.2 Canadian Case Law and its Effects

Canada's first sexual harassment case did not occur until 1980 in *Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc.*,¹⁰⁵ however the evolution of Canadian sexual harassment jurisprudence mirrors that of the United States. In *Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc.*, Chair Owen Shime's discussion of whether or not sexual harassment constituted sex discrimination, prohibited under the Human Rights Code, provided the foundation for sexual harassment law in Canada. He incontrovertibly established sexual harassment as sex discrimination:

¹⁰² *Meritor Savings Bank v. Vinson* (1986), *Supra.* footnote 72.

¹⁰³ Tarnopolosky (1994), *Supra.* footnote 98, at pp. 8-23.

¹⁰⁴ *Meritor Savings Bank v. Vinson* (1986), *Supra.* footnote 72, at p. 2408.

¹⁰⁵ (Ont. 1980), 1 C.H.R.R. D/155 (Shime).

Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve or maintain her existing benefits. The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work place and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against.¹⁰⁶

Although the Bell case firmly established sexual harassment within Canadian human rights law, the definition and scope of sexual harassment was to be debated by later courts. What range of behavior and conduct that should be prohibited has generated considerable argument and debate in subsequent cases.

Canadian jurisprudence like the American has defined two types of sexual harassment: (1) Quid Pro Quo; and (2) Poisoned Environment (Condition of Work; equivalent to U.S. Hostile Environment). Both of these types fall under sexual harassment as sex discrimination as set out in the Human Rights Codes.¹⁰⁷ Most Canadian cases involve Quid Pro Quo type sexual harassment. Debate surrounding Quid Pro Quo is generally limited to credibility regarding the complaint rather than whether this type of conduct is prohibited or not. It is this type of sexual harassment that generates the widest consensus on definition and prohibition. Quid Pro Quo harassment is said to clearly demonstrate an abuse of power or authority and has personal consequences to the complainant.

Poisoned Environment harassment, on the other hand, is more subtle and less easily defined, but can be equally inappropriate conduct. Case law¹⁰⁸ has indicated that it is more difficult to prove conduct is offensive when it does not involve a sexual

¹⁰⁶*Ibid.* at p. D/155.

¹⁰⁷Ontario Human Rights Code section 7(2)(3) R.S.O. 1990 C.H. 19; Canadian Human Rights Act, section 14(2), R.S.C. 1985 C.H. 6; Canada Labour Code section 247.1 R.S.C. 1985 C.L. 2.

¹⁰⁸*Aragona v. Elegant Lamp Co. and A. Fillipitto* (Ont. 1982), 3 C.H.R.R. D/1109 (Ratushny); *Cuff v. Gypsy Restaurant* (Ont. 1987), 8 C.H.R.R. D/3972 (Bayefsky); *Daigle v. Hunter* (N.B. 1989), 10 C.H.R.R. D/5670 (Ruben).

advance. It is this type of behavior and conduct that has produced the most dispute on sexual harassment, where consensus breaks down, and is the source of the majority of debate in case law. The Bell case, although it does not speak of poisoned environment specifically, introduces the idea by indicating that:

...gender based insults and taunting which may reasonably be perceived to create a negative psychological and emotional work environment....¹⁰⁹

Poisoned work environment was discussed in *Aragona v. Elegant Lamp Co. and*

*A. Fillipitto*¹¹⁰ in which Chair Rutushny stated:

The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman.¹¹¹

There have been several legal issues of significance in determining sexual harassment: complainant's responsibility, objective standard, tangible loss and employer liability. In the Aragona case,¹¹² the board addressed the issue of whether the complainant had a responsibility to express disapproval or resist harassment to establish unwelcomeness prior to filing a complaint and looked to the American case *Bundy v. Jackson*¹¹³ in discussing the difficulty in requiring the complainant to resist. In *Bundy v. Jackson*, the the court comments as follows:

It may even be pointless to require the employees to prove that she "resisted" the harassment at all. So long as the employer never literally forces sexual relations on the employee "resistance" may be a meaningless alternative for her. If the employer demands no response to his verbal or physical gestures other than goodnatured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them. She might be able to contrive proof of rejection by objecting to the employer's advances in some visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable. It hardly helps that the remote prospect of legal relief under *Barnes* remains available if she objects so powerfully

¹⁰⁹ *Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc.* (1980), *Supra.* footnote 105, at p. D/156.

¹¹⁰ (Ont. 1982), 3 C.H.R.R. D/1109 (Ratushny).

¹¹¹ *Ibid.* at p. D/1109.

¹¹² *Ibid.* at p. D/1109.

¹¹³ 641 F. 2d 934 (D.C. Cir. 1981).

that she provokes the employer into firing her.¹¹⁴

However the Chair in the Aragona case suggested a need for an "objective standard" regarding unwelcomeness. A prior complaint regarding offensive behavior is not always required, however Chair Rutushny suggests it is important to ascertain whether the harasser (or a reasonable person in a similar position) should have known that the behavior was unwelcome. Therefore, a prior complaint can form one part of the "objective standard" which sexual harassment law has embraced.

An "objective standard" was first discussed in the Bell case¹¹⁵ which introduced this requirement. Chair Shime held "...that harassment must be assessed by an objective standard; the prohibited conduct must 'reasonably' be perceived to create a negative psychological and emotional work environment."¹¹⁶ However, this analysis raises the question-whose's standard, the complainant (usually a woman) or the respondent (usually a man). The U.S. courts have considered the reasonable woman standard¹¹⁷ as opposed to reasonable person. The reasonable woman standard relies on the claim that women and men perceive and experience certain behaviors differently. Canada as yet has not adopted the reasonable woman standard but rather has maintained the reasonable person standard, although this standard has been challenged¹¹⁸ based on the fact that a reasonable person standard is inappropriate and often based on stereotypical male ideas and is unfair to the victim.

In *Kotyk and Allary v. Chuba*¹¹⁹ the Tribunal suggested that:

¹¹⁴Aggarwal (1992), *Supra.* footnote 101, at p. 29.

¹¹⁵*Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc.* (1980), *Supra.* footnote 105, at p. D/155.

¹¹⁶*Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc.* (1980), *Supra.* footnote 105, at p. D/156.

¹¹⁷*Ellison v Brady*, CA 9, 1991, 54 FEP Cases 1346.

¹¹⁸Re Ottawa Board of Education and Ottawa Board of Education Employees Union (1989), 5 LAC (4th) 171 (Bendel); Gallivan K., "Sexual Harassment After *Janzen v Platz*: The Transformative Possibilities," *University of Toronto faculty of Law Review* Vol. 49, at p. 27.

¹¹⁹(1983), 4 C.H.R.R. D/1416 (Ashley).

The test of whether the advances are unsolicited or unwelcome is objective in the sense that it depends upon the reasonable and usual limits of social interaction in the circumstances of the case.¹²⁰

Tarnopolosky advanced that "[s]everal factors are relevant in evaluating the limits of 'reasonable' social interaction, including the nature of the conduct at issue, the workplace environment, the pattern or type of prior personal interaction between the parties, and whether an objection or complaint has been made."¹²¹ Normal social interaction and sexual harassment are distinguished in *Robichaud v. Brennan*:

...the pertinent distinctive characteristic of the sexual encounters which must be considered to be prohibited by...the Act are, first that they be unsolicited by the complainant, and unwelcome to the complainant and expressly or implicitly known to be unwelcome by the respondent. (These are the factors which remove the situation from the normal social interchange, flirtation or even intimate sexual conduct which Parliament cannot have intended to have denied to supervisors and the people they supervise in the workplace.)¹²²

Canada has adopted a similar position to the U.S. with regard to tangible loss. Both *Cox*¹²³ and *Kotyk*¹²⁴ established the principle of tangible loss, whereby the boards held that tangible employment consequences need not be shown.

Finally, Canadian law has also established the principle of employer liability. Employer liability for supervisory employees' Quid Pro Quo harassment was established in the *Bell* case,¹²⁵ however there was legal debate on Poisoned Environment (Condition of Work) harassment and employer liability. The debate centered on whether an employer was responsible to provide a sexual harassment-free work environment where sexual harassment was the result of systemic gender discrimination. Further, whose behavior would an employer be liable for (i.e. agents, non-supervisory em-

¹²⁰ *Ibid.* at p. D/1430.

¹²¹ Tarnopolosky (1994), *Supra.* footnote 98, at pp. 8-32.1.

¹²² (1983), 3 C.H.R.R. D/977 (Abbott) at pp. D/981-82.

¹²³ *Cox v Jagbitte Inc.* (Ont. 1982), 3 C.H.R.R. D/609 (Cumming)

¹²⁴ *Kotyk v Canadian Employment and Immigration Commission and Chuba* (Can. 1983), 4 C.H.R.R. D/1416 (Ashley).

¹²⁵ *Bell and Korczak v. Ladac and The Flaming Steer Steak House Tavern Inc.* (1980), *Supra.* footnote 105.

ployees, customers etc.). In *Robichaud v Canada*¹²⁶ the Supreme Court of Canada speaking only to employer liability placed the "...onus of creating a healthy and unpoisoned workplace devoid of sexual harassment on the employer."¹²⁷ Further, the Supreme Court held that employers have a statutory obligation to provide a safe and healthy work environment. Justice La Forest in writing for the court concludes "...that the statute [Canadian Human Rights Act] contemplates the imposition of liability on employers for all acts of their employees."¹²⁸ According to Aggarwal, the implication of the Supreme Court's decision regarding employer liability is that:

...employers are responsible for the due care and protection of employees' human rights in the workplace; employers are liable for the discriminatory conduct of and sexual harassment by, their agents, supervisory personnel; sexual harassment by a supervisor is automatically imputed to the employer when such harassment results in a tangible job-related disadvantage to the employee; explicit company policy forbidding sexual harassment and the presence of procedures for reporting misconduct may or may not be sufficient to offset liability; employers will be pressured to take a more active role in maintaining a 'harassment-free' work environment;...employers' intentions to have effective sexual harassment policies are insufficient, in order to avoid liability. The policies must be functional and must work as well in practice as they do in theory.¹²⁹

Given the employer's responsibility to provide a sexual harassment free work environment, the open-ended definition of poisoned environment sexual harassment and the lack of necessity of demonstrating tangible loss, the door is potentially open for third party claims of sexual harassment. Even if a behavior is not directed at the particular person and persons involved do not consider the language and/or behavior sexual harassment, it can still constitute sexual harassment because even if the language and/or behavior is unwelcome or unacceptable to only one employee it could create a poisoned environment.

¹²⁶(1987) 8 C.H.R.R. D/4326 (SCC).

¹²⁷Business Council of British Columbia, *Policy Guidelines on Sexual Harassment in the Workplace*, Vancouver, B.C.: Business Council of British Columbia, 1992 at p. 10.

¹²⁸*Robichaud v Canada* (1987), *Supra.* footnote 126, at p. D/4333.

¹²⁹Aggarwal, A.P., *Sexual Harassment: A Guide for Understanding and Prevention*, Toronto, Ontario: Butterworths, 1992 at p. 91.

It was not until 1989 that the Supreme Court of Canada (SCC) ruled on the definition and scope of sexual harassment. In a unanimous decision the SCC held that sexual harassment is sex discrimination in *Janzen and Govereau v Platy Enterprises Ltd.*¹³⁰ Chief Justice Dickson, writing for the Court regarding sex discrimination, held that:

...discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of or employment opportunities available to, employees on the basis of a characteristic related to gender.¹³¹

He referred to academic, primarily feminist, definitions¹³² to derive the meaning of sexual harassment. He states:

Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.¹³³

In further defining sexual harassment, Dickson C.J.C. stated:

Emerging from these various legislative proscriptions is the notion that sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behavior.¹³⁴

He confirms that both Quid Pro Quo and Poisoned Environment harassment are prohibited. However, he does not find the distinction between these types of sexual

harassment particularly helpful.¹³⁵ Rather, he states:

¹³⁰ *Janzen and Govereau v Platy Enterprises Ltd* (1985), *Supra.* footnote 60.

¹³¹ *Ibid.* at p. D/6224.

¹³² MacKinnon, C., Backhouse, C., and *Janzen and Govereau v Platy Enterprises Ltd*, [1989], 1 S.C.R. 1252, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6205 at p. D/6224.

¹³³ *Janzen and Govereau v Platy Enterprises Ltd* (1985), *Supra.* footnote 66, at p. D/6225.

¹³⁴ *Ibid.* at p. D/6226.

¹³⁵ *Ibid.* at p. D/6226.

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas, supra*, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.¹³⁶

Finally, in addressing the question of what type of conduct constitutes sexual harassment, Dickson C.J.C. states:

The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional environment.

Sexual harassment is any sexually oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity. Harassment behavior may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include sexual innuendos, and propositions for dates or sexual favours.

Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behavior amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.¹³⁷

2.3.3 Statutory Provisions

Until the 1980s there was no specific statutory ban on sexual harassment in Canada, although there were provisions within Human Rights statutes to prohibit sex discrimination. The 1980s saw an interweaving of statutory provisions and case

¹³⁶ *Ibid.* at p. D/6227.

¹³⁷ *Ibid.* at pp. D/6222 and D/6224.

law. At times, statutes on sexual harassment came first; at other times case law demonstrated a need for statutory provisions on sexual harassment. Ontario was the first province to specifically ban sexual harassment in their Human Rights Code by amendment in 1981. Section 7 (2) and (3) of the Ontario Human Rights Code, R.S.O. 1990, c. H.19, state:

7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

7(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Further, in Section 10(1), harassment is defined as follows:

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.¹³⁸

Other provinces have since included statutory provision for sexual harassment: Quebec, Newfoundland and Manitoba.¹³⁹ Although each province has different statutory provisions, the effect of the Janzen decision is that across Canada sexual harassment is deemed to constitute sex discrimination and consequently is prohibited under human rights law, therefore for all intents and purposes the law is basically the same across provinces, regardless of whether any prohibition of sexual harassment is included in Federal and Provincial Human Rights codes.

Canada also provides protection from sexual harassment under the Human Rights Act, R.S.C. 1985, C.H. 6, where sexual harassment is prohibited in section 14(1):

It is a discriminatory practice,

. . . .

¹³⁸Bowland, A., Sakatsu, T.C. and O'Reilly, J.W., *The Annotated Human Rights Code 1993*, Toronto, Ont.: Carswell, 1992 at p. 54.

¹³⁹Aggarwal (1992). *Supra*, footnote 101, at p. 50.

(c) in matters related to employment, to harass an individual on a prohibited ground of discrimination.

14(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

As well, the Canada Labour Code, R.S.C. 1985, C.L-2, prohibits sexual harassment.

Sexual harassment is defined in Section 247.1:

In this Division, "sexual harassment" means any conduct, comment, gesture or contact of a sexual nature

(a) that is likely to cause offence or humiliation to any employee; or

(b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

The Canada Labour Code places the onus on employers to provide a sexual harassment free work environment. Further, the Code directs employers to furnish a policy on sexual harassment and to make employees aware of said policy.

2.4 Employer Imposed Sexual Harassment Policies

A primary strategy in fighting sexual harassment has been the call for employer liability with regard to sexually harassing behavior. Policy development stems from three impetuses: feminists, legal and state directives. Feminist theorists such as MacKinnon and Backhouse have maintained that employers should be held legally responsible for the behavior of their employees and have a legal responsibility to help prevent sexual harassment. Additionally, both case law and statutory provision have established that employers have a responsibility and liability to provide a sexual harassment-free work environment. It is likely that it is the potential liability that has encouraged employers to develop, communicate and enforce a company policy.

Policies take two forms: legislative guidelines and employment policies. U.S. feminist organizations such as AASC and WWI advise that guidelines and policies should acknowledge sexual harassment as sex discrimination, that definitions of sexual harassment should include the widest range of behavior, and that there should be acknowledgment that sexual harassment is an issue of power.

Since Canada has in large part followed the American jurisprudence on sexual harassment, it is important to first examine the U.S. policy development. The first guideline was implemented in 1980 when the U.S. Equal Employment Opportunities Commission (EEOC) drafted guidelines on sexual harassment(see Appendix 1 for a copy of the EEOC guidelines). The EEOC guidelines were a reflection of research on sexual harassment, by both feminists and non-feminists alike, and recent judicial rulings. These policy guidelines were most likely "...the single most important event in the legitimation process..."¹⁴⁰ of sexual harassment. These guidelines identified: sexual harassment as sex discrimination, the types of sexual harassment which would constitute inappropriate behavior, employer liability and the necessity of employers drafting policies to deal with sexual harassment. They were used as the blueprint in judicial rulings on sexual harassment in future court cases.¹⁴¹ It was not until 1983 that the Canadian Human Rights Commission issued a comprehensive policy statement (see Appendix 2 for a copy of the Canadian Human Rights Commission Policy Statement) on sexual harassment. Though similar in content to the U.S. EEOC guidelines, the Canadian Human Rights Commission Policy Statement is not as extensive nor does it have the same force (Courts in both the U.S. and Canada have used the EEOC guidelines as templates for determining jurisprudence. Further, although the Canadian Human Rights Commission often acts as a guide for provincial legislation, each province has the authority to draft its own labour legislation.).

These two guidelines provided the impetus for employers to draft company policies. It is section (e) of the EEOC guidelines and part [d] of the Canadian Human Rights Commission policy that recommended or encouraged that employers develop policies prohibiting sexual harassment as separate from anti-discrimination prohibi-

¹⁴⁰Weeks et al. (1986). *Supra*. footnote 13, at p. 444.

¹⁴¹*Ibid* at pp. 444.

tions and make employees aware of said policies. Both the EEOC and the Human Rights Commission will provide assistance for drafting these policies. Employers, in coming to understand the seriousness of sexual harassment, given the disruption it causes to productivity and employee relations as well as potential legal liability, saw the necessity of such policies. Wagner has pointed out that "[i]n an increasing litigious society and in an era of ever increasing employee rights and employer responsibility, sexual harassment allegations are particularly hazardous."¹⁴²

Canadian policies generally include: a statement regarding sexual harassment, grievance procedures, investigation procedures, disciplinary action, and training and education. It is important that the policy be known and understood by all employees. The belief is that a communicated policy and prompt corrective action when an incident occurs will minimize the incidence, and impact of sexual harassment.

Although policies are in place to deal with incidents of sexual harassment and these policies may assist in making people aware of the problem, it is argued that they do little to challenge the structural inequality that facilitates sexual harassment.

2.5 The Limits of Law Reform

What seems to be lacking in all of the early strategies employed by feminists and lawmakers alike is any real discourse within gender or between gender. It is taken as given that an experience of sexual harassment is an uncontested event that all women interpret and understand similarly. There seems to be an underlying assumption by MacKinnon, that radical feminism has correctly captured "women's experience" of sexual harassment.¹⁴³ As Meyer et al. points out:

Only after people become aware that something they are doing is offensive

¹⁴²Wagner, E.J., *Sexual Harassment in the Workplace: How to Prevent, Investigate and Resolve Problems in Your Organization*, New York, NY: AMACOM, 1992 at p. 1.

¹⁴³The assumption in MacKinnon's work on truth and knowledge, is not in all feminist writing i.e. Bell Hooks. I do not wish to suggest that all feminists share the same thought on all issues.

to others can they begin to take responsibility for stopping the behavior. Either personal insight or compatible communication will make this happen. The government and judicial involvement in prohibiting sexual harassment is a tremendous impetus to aid the harassee, but we should not depend upon it. The government cannot force a moral tenor, in the final analysis, it can only support individual initiative.¹⁴⁴

It is not suggested that simply conveying to someone that a behavior is offensive will correct that individuals' behavior. Rather, what is suggested is that only through communication, dialogue and discourse can men and women begin to understand one another. Do we want feminists (any stream), legislators and judges deciding for us how we do or do not want to interact interpersonally? Sexual harassment law and policy appears to demonstrate that our most intimate private lives/relationships are privy to construction by outside interests.

The law has progressed swiftly in the area of sexual harassment and in some contexts this is desirable, but not entirely. Law cases are unwieldy tools for molding human behavior: "...they are expensive; eat up a lot of time and usually exacerbate whatever tensions already exist; they often have unforeseen consequences; they tend to enrich the lawyers far more than they satisfy the parties."¹⁴⁵ It is essential that we, as a society, consider the consequences of a more intrusive involvement of the law into our most personal and social relationships. It is necessary that we use caution when developing rules, regulations and laws that prohibit or discourage interpersonal relationships. Traditional law and policy should not be the most significant approach to solving the problem of sexual harassment. What is required is an avenue that facilitates discourse within and between gender in order to begin to change behavior that is potentially offensive. It is only through understanding and communication that people can begin to understand and/or appreciate each others' positions.

¹⁴⁴Meyer, M.C., Berchtold, I.M., Oestreich, J.L. and Collins, F.J., *Sexual Harassment*, New York, NY: Petrocelli Books, 1981 at p. 175.

¹⁴⁵Lindemann, B. and Kadue, D.D., *Sexual Harassment in Employment Law*, Washington, DC: Bureau of National Affairs Inc., 1992 at pp. vi-vii.

Law and policy are powerful educational tools as well as an important means to assert and protect rights; but legal solutions/policy do not ultimately give women greater power. In the final analysis, law and policy cannot change the way men and women relate. The introduction of law and policy may prohibit certain behavior, however the behavior can/may just change form and substance.

It is not argued that feminists do not recognize many of the limitations of law and policy, or that they have not invested in other strategies to combat sexual harassment, however, law and policy have emerged as the most significant strategies. What is argued is that certain influential feminists such as MacKinnon have a certain degree of faith in the law and its power to effectively change women's status in the workplace. Further, MacKinnon has constructed sexual harassment law and policy based on the claim that women's experience (and radical feminism) leads to "truer" knowledge to understanding sexual harassment. Again, the question surfaces, do we really want or need feminists, legislators and judges defining for employees the way in which we can or cannot conduct our own interpersonal relationships? The argument is not that there should be no rules and regulations, but rather that employees participate in decision-making that profoundly effects their most intimate relationships friends and partners.

It is contended that legal equality rights discourse in the workplace the juridification of interpersonal relationships in the workplace, potentially has some negative consequences. The concern is that law encroaches further into the interpersonal lives of employees, directing the way in which people interact. The danger is that lawyers, judges, bureaucrats and legal theorists such as MacKinnon are setting the parameters of employees' relationships with little or no input from employees themselves.¹⁴⁶

¹⁴⁶The juridification theme will be more fully elaborated upon in Chapter 4.

What we see in the legal development of sexual harassment is an expanding field of law, that has expanded in terms of Quid Pro Quo along a continuum to Condition of Work harassment, which has had significant effects due to the notion of employer responsibility, that in turn prompted employers to impose policies.

It is also argued that the definition of sexual harassment is a contested domain which involves significant normative conflicts. There are conflicting and/or different definitions and conceptions of what behaviors should be considered sexual harassment within the sexes and between the sexes. Visualizing sexual harassment on a continuum with Quid Pro Quo at one end and garnering a high degree of consensus that it amounts to sexual harassment, and Condition of Work at the other end, which lacks a fundamental consensus that this behavior amounts to sexual harassment, assists in illustrating what is occurring within the sexual harassment debate.¹⁴⁷ Despite the apparent legal consensus that sexual harassment extends to include Condition of Work, there is in fact considerable dissension over this aspect of the definition of sexual harassment. To lump together Quid Pro Quo and Condition of Work in a single conception of sexual harassment, as is done in the Janzen case¹⁴⁸ conceals and obscures what is in fact an area of *contested norms*.

It is not suggested that the law on sexual harassment or the subsequent gains made with regard to sexual harassment should be abandoned. Rather, what is suggested is that we open up space for discourse ethics where dialogue can take place, with a wider participation, on issues that profoundly affect our social relations.

¹⁴⁷See section 2.1.3 for evidence of consensus or lack thereof. As well, see Canadian cases in section 2.3.2.

¹⁴⁸*Janzen and Govereau v Platy Enterprises Ltd* (1985). *Supra*. footnote 66.

Chapter 3

MacKinnon: Feminism and Sexual Harassment

3.1 Feminism: Contextualizing the Issue

The purpose of this chapter is to provide a critical analysis of MacKinnon's theory of sexual harassment and the resulting juridification of interpersonal relations within the workplace. It is argued that one of the dominant models which has been extremely powerful within the debate on sexual harassment is based on Catharine MacKinnon's radical feminist theory, hence incorporating her particular assumptions concerning gender and power relations. There are aspects of MacKinnon's theoretical model that are believed to have certain problematic effects. There are concerns regarding the way in which sexual harassment law and policy is currently developing which has lead to questions about this dominant model and resulted in the conclusion that it may not be the only or necessarily the most appropriate model for resolving the issue of sexual harassment, and therefore power and gender relations in the workplace. As a starting point, this chapter will examine this feminist discourse and then raise doubts about the model's effectiveness which will assist in an attempt to formulate and justify an alternative approach.

3.2 MacKinnon's Feminism and Sexual Harassment Theory

3.2.1 Sexual Harassment

MacKinnon identifies sexual harassment as pervasive in American society and argues that sexual harassment exists due to both internalized and structural forms of male power. Moreover, she posits that men's control over women is institutionalized, and that male dominance of women is legitimized by society. For MacKinnon, "[s]exual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power."¹⁴⁹ Since women as a group occupy a structurally inferior position both in employment and sex-role, they are especially vulnerable.¹⁵⁰ She reasons "...that when men sexually harass women it expresses male control over sexual access to us. It doesn't mean they all want to fuck us, they just want to hurt us, dominate us and control us, and that is fucking us."¹⁵¹

In MacKinnon's evaluation, the key factor underpinning sexual harassment is the requirement of women to market sexuality to men who hold economic, social and political power, and therefore, are in a position to enforce their proclivities.¹⁵² Sexual harassment takes away a woman's decision of whom she has intimate relations with, but furthermore it denies her the opportunity to work without being exposed to sexist behavior. In short, sexual harassment threatens women's employment opportunity, is sexual exploitation and undermines women's equality. Hence sexual harassment is a form of sex discrimination. It "...perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom

¹⁴⁹MacKinnon (1979). *Supra.* footnote 22, at p. 1: A more detailed definition by MacKinnon was given in Chapter 2, section 2.1.4.

¹⁵⁰*Ibid.* at p. 2.

¹⁵¹MacKinnon, C.A., *Feminism Unmodified: Discourses on Life and Law*, Cambridge, MA: Harvard University Press, 1987 at p. 92.

¹⁵²MacKinnon (1979), *Supra.* footnote 22, at p. 21.

of the labor market."¹⁵³ Sexual harassment institutionalizes the requirement that women "...exchange sexual services for material survival...."¹⁵⁴ MacKinnon asserts that sexual harassment "...is a clear social manifestation of male privilege incarnated in the male sex role that supports coercive sexuality reinforced by male-power over the job."¹⁵⁵

The workplace, according to MacKinnon, is divided by gender in three particular ways that disadvantage women: one, horizontal segregation where "...most women perform the job they do because of their gender, with the element of sexuality pervasively implicit;"¹⁵⁶ two, vertical stratification-where "...women tend to be in low ranking positions, dependent upon the approval and good will of male superordinates for hiring, retention, and advancement;"¹⁵⁷ and three, income inequality which "...is an index to the foregoing two dimensions."¹⁵⁸ The feminization of particular jobs, MacKinnon argues, includes the "...sexualization of the woman worker as a part of the job"¹⁵⁹ and it is this which "...makes sexual harassment systemically inevitable for the masses of women who must take the only jobs society opens to them."¹⁶⁰ She contends that men consume women's sexuality in the workplace and women must accommodate this consumption as part of their work.¹⁶¹

3.2.2 *Theory of Sexuality*

MacKinnon has developed a theory of sexuality that begins with the premise that society and social relations are constructed by men. Underlying her theory of

¹⁵³ *Ibid.* at p. 174.

¹⁵⁴ *Ibid.* at p. 174.

¹⁵⁵ *Ibid.* at p. 192.

¹⁵⁶ *Ibid.* at p. 9.

¹⁵⁷ *Ibid.* at p. 9.

¹⁵⁸ *Ibid.* at p. 9.

¹⁵⁹ *Ibid.* at p. 18.

¹⁶⁰ *Ibid.* at p. 18.

¹⁶¹ *Ibid.* at p. 22.

sexuality is a theory of patriarchy. She argues that male supremacy exists and is sexual.¹⁶² She is critical of "...both femininity and masculinity as serving the interests of men, as furthering male power, and instrumental to male dominance."¹⁶³ Even when all the formal barriers are removed, she maintains that there remains systemic barriers which are much more subtle and much more difficult to get at. Therefore, she claims we need to develop a more far reaching and encompassing theory and legal strategy in order to deal with this discrimination. MacKinnon posits the root source of all forms of oppression is men's control over women's sexuality, all other forms of oppression are subordinate to it.¹⁶⁴ Sexuality is "...the primary social sphere of male power."¹⁶⁵ It is important, she maintains, to link an analysis of gender with sexuality. Sexuality is perceived "...as the interactive dynamic of gender as an inequality."¹⁶⁶ MacKinnon believes: that sexuality is socially constructed by men and is universal, the social process being gender, which is a matter of dominance not difference; the structure of sexuality is predominantly heterosexuality; sexuality's nuclear form is the family; and, men and women are the sex roles which form the two social personas.¹⁶⁷ "Sexuality is that social process which creates, organizes, expresses and directs desire, creating the social beings we know as women and men, as their relations create society."¹⁶⁸ MacKinnon's analysis submits that "...social relations between the sexes is organized so that men may dominate and women must submit and this relation is sexual,"¹⁶⁹ and further men sexualize inequality. Gender

¹⁶²MacKinnon (1987). *Supra.* footnote 151, at p. 14.

¹⁶³*Ibid.* at pp. 123.

¹⁶⁴*Ibid.* at p. 2.

¹⁶⁵MacKinnon, C.A., "Feminism, Marxism, Method, and the State: An Agenda for Theory," *Signs*, Vol. 7, No. 3, 1982, at p. 529.

¹⁶⁶MacKinnon (1987), *Supra.* footnote 151, at p. 6.

¹⁶⁷*Ibid.* at p. 49.

¹⁶⁸MacKinnon (1982), *Supra.* footnote 165, at p. 516.

¹⁶⁹MacKinnon (1987), *Supra.* footnote 151, at p. 3.

is considered a system of power of which women have little.¹⁷⁰ "Sexuality...is a form of power...[and]...gender, as socially constructed embodies it...."¹⁷¹ Her theory in its most basic form states, "[t]he organized expropriation of the sexuality of some for the use of others defines sex, women."¹⁷² "The substantive principle governing the authentic politics of women's personal lives is pervasive powerlessness to men, expressed and reconstituted daily as sexuality."¹⁷³ She asserts that the crux of sexual inequality is misogyny.¹⁷⁴ Furthermore, she argues that sex and violence are not mutually exclusive but rather are interconnected.¹⁷⁵

According to MacKinnon, gender inequality is a fundamental social conflict which needs to be resolved.¹⁷⁶ Gender, although a distinct inequality in and of itself, also contributes to other inequalities such as class and race while at the same time race and class are embedded in gender.¹⁷⁷ MacKinnon claims that "...[w]omen get their class status through their sexual relations with men of a particular class; perhaps their racial status..."¹⁷⁸ as well. She argues that gender is not a difference but rather an eroticized hierarchy. The issue is not gender difference but rather the difference gender makes. It is an inequality of power¹⁷⁹ and a system of power, "...specifically of male supremacy and female subordination."¹⁸⁰ In MacKinnon's view, "...feminism is a theory of how the eroticization of dominance and submission creates gender, creates woman and man in the social form in which we know them."¹⁸¹

¹⁷⁰ *Ibid.* at p. 14.

¹⁷¹ MacKinnon (1982), *Supra.* footnote 165, at p. 533.

¹⁷² MacKinnon (1987), *Supra.* footnote 151, at p. 49.

¹⁷³ MacKinnon (1982), *Supra.* footnote 165, at p. 535.

¹⁷⁴ MacKinnon (1987), *Supra.* footnote 151, at p. 5.

¹⁷⁵ *Ibid.* at p. 86.

¹⁷⁶ *Ibid.* at p. 5.

¹⁷⁷ *Ibid.* at p. 2.

¹⁷⁸ *Ibid.* at p. 2.

¹⁷⁹ *Ibid.* at p. 8.

¹⁸⁰ *Ibid.* at p. 40.

¹⁸¹ *Ibid.* at p. 50.

Fundamental to an analysis of sexual harassment is the recognition of sexuality as the "...source, form and sphere of social inequality."¹⁸² "The relationship of sexuality to gender is the critical link in the argument that sexual harassment is sex discrimination."¹⁸³ Gender is not simply a biological difference between men and women but rather is substantially influenced by social and cultural factors and is assigned and learned.¹⁸⁴ "Gender itself is largely defined in terms of sexuality in that heterosexuality is closely bound up with the social conceptions of maleness and femaleness.... [S]exuality is a major medium through which gender identity and gender status are socially expressed and experienced."¹⁸⁵ Gender, in this analysis, is largely defined in terms of sexuality.¹⁸⁶ As with gender, sexuality is socially constructed, assigned and learned. Sexual harassment on the job sexualizes a woman's work role, "...her sexuality is a condition of her subsistence, its delivery part of the definition of her productive activity."¹⁸⁷ "Women's place at work and in sexual relations can be seen as socially constructed, not naturally given; public and structural, not private and individual; separate and subordinate and not equal."¹⁸⁸ MacKinnon emphatically insists that sexual harassment has "...everything to do with sexuality."¹⁸⁹ She maintains, therefore, that sexuality should not be set apart from gender but rather gender should be considered in the context of sexuality.

3.2.3 Power

Central to MacKinnon's theoretical framework is her linking of a theory of power

¹⁸² MacKinnon (1979), *Supra.* footnote 22, at p. 59.

¹⁸³ *Ibid.* at p. 151.

¹⁸⁴ *Ibid.* at p. 153.

¹⁸⁵ *Ibid.* at p. 182.

¹⁸⁶ *Ibid.* at p. 189.

¹⁸⁷ *Ibid.* at p. 216.

¹⁸⁸ *Ibid.* at p. 220.

¹⁸⁹ *Ibid.* at p. 221.

to her theory of sexuality.¹⁹⁰ Her theory of power is centered around dominance.¹⁹¹ "The feminist theory of power is that sexuality is gendered as gender is sexualized."¹⁹² Power is maintained through coercive control of sexuality, where women submit to dominance for fear of the threat of violence by men. Power is external for women in the sense that women do not have it and any power they do attain is given to them by men. She claims female power is a contradiction in terms, a misnomer.¹⁹³ Power is held and controlled by men, for men.¹⁹⁴ MacKinnon's analysis constructs power in dichotomous terms, powerful-men and powerless-women. Women learn submissiveness and are trained to be weak whereas men are trained and learn to be strong.¹⁹⁵ This conception of power identifies women as victims. MacKinnon claims it is politics male politics, which constructs society in such a way that the male supremacy point of view determines the status of the sexes.¹⁹⁶ The politics of women's personal lives is their pervasive powerlessness reconstituted as sexuality.¹⁹⁷ Power is organized in a particular way such that politics (the state and its institutions) institutionalizes male power and dominance.¹⁹⁸

The key component in sexual harassment according to MacKinnon is power economic, political and sexual—men have it and women do not. She feels it is important in an analysis of sexual harassment not to lose sight that power and sexuality are intrinsically linked.¹⁹⁹ Likewise, it is necessary in an analysis of sexual harassment to

¹⁹⁰ MacKinnon (1987), *Supra.* footnote 151, at pp. 49-62.

¹⁹¹ *Ibid.* at p. 40.

¹⁹² *Ibid.* at p. 50.

¹⁹³ *Ibid.* at pp. 53.

¹⁹⁴ *Ibid.* at p. 51.

¹⁹⁵ *Ibid.* at p. 120.

¹⁹⁶ *Ibid.* at p. 53.

¹⁹⁷ MacKinnon, C.A., *Toward a Feminist Theory of the State*, Cambridge, MA: Harvard University Press, 1989, at p. 120.

¹⁹⁸ MacKinnon, C.A., "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence," *Signs*, Vol. 8, No. 4, 1983, at p. 644.

¹⁹⁹ MacKinnon (1987), *Supra.* footnote 151, at p. 89.

recognize that first and foremost gendered sexual harassment is "...done by men to women regardless of relative position on the formal hierarchy."²⁰⁰ "Gender is a power division and sexuality is one sphere of its expression. One thing wrong with sexual harassment...is that it eroticizes women's subordination. It acts out and deepens the powerlessness of women as a gender, *as women*."²⁰¹ "...[S]exual expression shaped by sex roles prescribes appropriate male and female conduct, defines normalcy, designs sexual rituals, and allocates power in the interest of men and to the detriment of women."²⁰²

Mackinnon argues that women are socialized to be passive and subordinate.²⁰³ Women, she claims, acquiesce to sexual harassment because they are intimidated and are socialized to passivity.²⁰⁴ Further, she states:

...the sexual harassment of working women presents a closed system of social predation in which powerlessness builds powerlessness....Working women are defined and survive by defining themselves as sexually accessible and economically exploitable. Because they are economically vulnerable, they are sexually exposed; because they are sexually accessible, they are always economically at risk.²⁰⁵

3.2.4 *Private/Public Distinction*

Within her theory of power Mackinnon explores the dichotomy of public/private. She claims that women do not experience the private since they have no power to ensure privacy for themselves. Mackinnon submits, the personal is political. The private is the public and it is political for women. She asserts "...there is no private, either normatively or empirically."²⁰⁶ According to Mackinnon, the "...right to privacy is a right of men 'to be let alone' to oppress women one at a time."²⁰⁷ "It is

²⁰⁰ *Ibid.* at p. 107.

²⁰¹ Mackinnon (1979), *Supra.* footnote 22, at p. 221.

²⁰² *Ibid.* at p. 157.

²⁰³ *Ibid.* at pp. 44, 156.

²⁰⁴ *Ibid.* at v. 48.

²⁰⁵ *Ibid.* at p. 55.

²⁰⁶ Mackinnon (1987). *Supra.* footnote 151, at p. 100.

²⁰⁷ *Ibid.* at p. 102.

a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it. It keeps some men out of the bedrooms of other men."²⁰⁸ According to MacKinnon, the personal is epistemologically political, moreover, feminist epistemology is politics. The personal as political would effectively collapse any distinction between personal and political, the public and the private, between civil society and state, between lifeworld and system. The law would then be allowed to enter unchecked into all areas of personal lives. This is considered desirable by MacKinnon because the personal lives of women have been defined in MacKinnon's theory as the site of their oppression and domination. It is the absence of law in these areas of women's personal lives which provide the *modus operandi* of women's oppression.

In MacKinnon's theory of patriarchy, the law, as an expression of the public sphere, is barred entry to the private sphere, which allows men to oppress women in intimate, private contexts, without fear of public, legal control. The public/private divide in patriarchy is central to an understanding of women's oppression under a system of patriarchy because it precludes the possibility of legal protection for women against men's intimate violence, whether in the form of domestic violence, or sexual harassment at work. In relation to sexual harassment, the workplace is seen as part of the private sphere of the economy in patriarchal, legal and political theory, and therefore outside the realm of legal regulation. Hence, it is important to collapse the public/private distinction and allow the presence of law in these areas of women's personal lives which will provide a means for their liberation from oppression. The whole point of MacKinnon's challenge to the public/private distinction is to *require* the juridification of intimate (hitherto 'private') sexual and social relations.

²⁰⁸ *Ibid.* at p. 102.

Sexual harassment as sex discrimination, MacKinnon suggests, challenges what has been previously delegated to the private and the personal, and places it under the purview of the public.²⁰⁹ She maintains it is essential to challenge the notion of sexual harassment as behavior which is personal, natural, or private since these labels remove "...events from the social or political arena, hence from scrutiny, criticism and regulation by legal intervention."²¹⁰ When a behavior is labeled personal and private it is protected and she argues "...is nothing other than men's traditional prerogative of keeping sexual incursions on women beyond scrutiny or change." Private relations are demonstrative of "...the structure of dominance and submission that characterizes the entire socioeconomic system."²¹¹

3.2.5 *Dominance (Inequality)/Difference Approach*

MacKinnon's theory of sexuality advocates what she terms a dominance (inequality) approach as opposed to what she terms a difference approach. The dominance approach focuses on gender as a question of power, and equality as a question of distribution of power.²¹² Whereas the difference approach focuses on questions of sameness and difference, in which equality is a question of equivalence.²¹³ She is highly critical of the difference approach claiming that its adoption is a cooption of the male point-of-view, whereas the dominance approach is "feminist".²¹⁴ The dominance approach describes "...the systematic relegation of an entire group of people to a condition of inferiority..."²¹⁵ and MacKinnon argues this relegation is a political construct of male supremacy/domination. A dominance approach shifts from

²⁰⁹ MacKinnon (1979), *Supra*, footnote 22, at p. 58.

²¹⁰ *Ibid.* at p. 83.

²¹¹ *Ibid.* at p. 90.

²¹² MacKinnon (1987), *Supra*, footnote 151, at p. 40.

²¹³ *Ibid.* at pp. 32.

²¹⁴ *Ibid.* at pp. 43.

²¹⁵ *Ibid.* at pp. 41.

gender as difference to gender as dominance. Gender becomes a question of power "...specifically of male supremacy and female subordination."²¹⁶ "...[G]ender changes from a distinction that is presumptively valid to a detriment that is presumptively suspect."²¹⁷ She proposes that in the difference approach sex discrimination often takes the form of a question of private morality whereas in the dominance approach it is a question of public (power) politics. MacKinnon's dominance (inequality) approach is connected with her theory of sexuality, of power, of consciousness raising and her epistemology. Likewise, her critique of the difference approach comes out of these positions. Her dominance (inequality) approach has had significant effect on her development of feminist strategy and definition of sexual harassment, as well as on the legal development and definition and the application of this new field of law.

3.2.6 Epistemology

MacKinnon argues that law, state and conventional science are based on a male epistemology, a male point of view which is falsely posited as universal.²¹⁸ "The male perspective is systemic and hegemonic."²¹⁹ She is critical of the stance of men being the "knower". "...[F]eminist theory of knowledge begins with the theory of the point of view of all women on social life. It takes as its point of departure the criticism that the male point of view on social life has constructed both social life and knowledge about it."²²⁰ MacKinnon posits that a "...theory of knowledge is inextricable from the feminist critique of male power because the male point of view has forced itself upon the world, and does force itself upon the world, as its way of knowing."²²¹

²¹⁶*Ibid.* at pp. 40.

²¹⁷*Ibid.* at pp. 44.

²¹⁸MacKinnon (1987), *Supra.* footnote 151, at p. 50.

²¹⁹MacKinnon (1983), *Supra.* footnote 198, at p. 636

²²⁰MacKinnon (1987), *Supra.* footnote 151, at p. 50.

²²¹*Ibid.* at p. 50.

What is required is an epistemology by women for women.²²² MacKinnon suggests that women's knowledge is different from men's. Presently, knowledge is defined by and for men from an objectivist standpoint which situates them outside the real experience whereas women *do* experience the reality of dominance/coercive sexuality, therefore their knowledge more closely approximates reality/truth.²²³

MacKinnon claims there is a true shared women's reality, a common experience/reality for *all* women.²²⁴ "...[F]eminist theory probes hidden meanings in ordinariness and proceeds as if the truth of women's condition is accessible to women's collective inquiry."²²⁵ Feminist epistemology, for MacKinnon, is the pursuit of the essence of women, women's reality as women's experience—for women to discover together what being a woman *is*.²²⁶ "The pursuit of the truth of women's reality is the process of consciousness; the life situation of consciousness, its determination articulated in the minutiae of everyday existence, is what feminist consciousness seeks to be conscious of."²²⁷ She does not try to develop an epistemological stance that would accommodate both male and female experiences or world views but rather posits an oppositional woman-centered epistemology,²²⁸ the epistemology of the oppressed.

MacKinnon makes crucial claims in her discussion of epistemology. One especially critical claim is that a male point of view claims to be objectivist and universal, despite differences in class, race, culture, etc..²²⁹ Further, a central transformative claim is that feminist epistemology—a woman's point of view—a woman's experience—is shared by all women, regardless of differences in class, race, culture, history, ethnic-

²²² *Ibid.* at p. 59.

²²³ *Ibid.* at pp. 55-58.

²²⁴ *Ibid.* at p. 54.

²²⁵ MacKinnon (1989), *Supra.* footnote 197, at p. 39.

²²⁶ MacKinnon (1982), *Supra.* footnote 165, at p. 535.

²²⁷ MacKinnon (1989), *Supra.* footnote 197, at p. 39.

²²⁸ MacKinnon (1987), *Supra.* footnote 151, at pp. 57-58.

²²⁹ *Ibid.* at p. 52.

ity, etc..²³⁰ A central part of both of these critiques by MacKinnon is her challenge to any claims to a form of knowledge that purports to be 'objective', 'neutral', or 'universal'. Such claims are presented as a universal way of knowing, accessible to both men and women. However, as MacKinnon argues, such claims reflect a male epistemology disguised as universally accessible to both men and women.²³¹ The corollary of this critique of male epistemology is her celebration of women's epistemology, a woman's way of knowing, based on women's shared collective experience of oppression, which is by definition universal for all women, but not universal for both men and women. MacKinnon suggests that feminist theory begins with an epistemology based on a woman's point of view, that is different than the traditional model of knowledge which is based on a male point of view, and is inextricable from a critique of male power. Implicit in her inequality (dominance) approach is an epistemology where import is given to reality as experienced by the oppressed rather than reality as experienced by the oppressors. Her feminist epistemology is presented oppositionally to her view of the dominant male epistemology or perspective inscribed in law, state, etc. As well, MacKinnon claims that "[r]adical feminism is feminism...after this, feminism unmodified."²³² She maintains that there is a true feminism,²³³ and is critical of others whom claim to be feminists. She goes so far as to say that "...women who defend...[liberal equality]...are, in effect, procuring women for men."²³⁴ Furthermore, she holds that liberal neutrality amounts to substantive misogyny.²³⁵ She states that she takes it upon herself to define feminism,²³⁶ equating

²³⁰ MacKinnon (1982). *Supra*. footnote 165, at pp. 535-536.

²³¹ Part of MacKinnon's critique of the *difference* approach which maintains that an equivalent or equal standard should be applicable to men and women in the workplace, comes from her epistemological stance which advance that women's experience different, unequal from men's.

²³² MacKinnon (1982), *Supra*. footnote 165. at p. 639.

²³³ *Ibid.* at p. 640.

²³⁴ MacKinnon (1987), *Supra*. footnote 151, at p. 14

²³⁵ *Ibid.* at pp. 15.

²³⁶ *Ibid.* at pp. 48.

her view with feminism.²³⁷ Consciousness raising—a women's perspective/experience, becomes separatism as method.

3.2.7 Feminist Method: Consciousness Raising

According to MacKinnon, consciousness raising is necessary because women have been socially constructed as female by men. Women's powerlessness is identified through consciousness raising. Consciousness raising facilitates the need to throw off the shackles of this social construction that women have internalized.

For MacKinnon, consciousness raising is the feminist method and is conceived as feminist politics. Consciousness raising as a feminist method follows from the transformative claim in MacKinnon's epistemology—i.e. the claim to a feminist epistemology based on women's shared reality, which is women's shared experience of oppression. Consciousness raising is a method for accessing that shared reality and therefore of accessing and constructing an alternative feminist epistemology to challenge the dominance of the 'male' objectivist epistemology. MacKinnon also claims (as many would agree) that knowledge and power are interconnected. Male 'objectivist' epistemology reinforces patriarchal assumptions about and claims to sexuality and power, and is in turn grounded in these patriarchal assumptions. Consciousness raising as feminist method, explicitly links feminist (women-centered) knowledge and feminist (women-centered) challenges to patriarchal power. So consciousness raising is *both* method *and* politics in MacKinnon's theory. "Consciousness raising not only comes to know different things as politics, it necessarily comes to know them in a different way. Women's experience of politics, of life as sex objects, gives rise to its own method of appropriating that reality: feminist method."²³⁸

²³⁷*Ibid.* at pp. 49.

²³⁸MacKinnon (1982), *Supra.* footnote 165, at p. 535.

Women's experience--women's point of view, is feminism, and is a claim to truth and reality.²³⁹ She claims that all women share a male socially constructed identity and this social construction is grounded in a male control of female sexuality. She suggests, there is a real women's experience which can be constructed by women for women. Consciousness raising allows women to identify the collective reality of women's condition from within instead of from outside. This internal reality is a way of knowing.²⁴⁰ The core of women's social transformation is women socially constructing themselves (freeing themselves from their socially constructed identities) based on their shared experience and reality. Consciousness raising is getting to the *real* women's identity, experience and reality which would be different from the reality men have constructed for them. "Consciousness raising is a major technique of analysis, structure of organization, method of practice and theory of social change of the women's movement."²⁴¹ It is a process whereby women's experience demonstrates how women are socially constructed by men and then uses that analysis as a strategy for deconstructing that false reality. In consciousness raising, women recognize that they have learned male and female roles, and further to that, they learn that all aspects of the world, and therefore themselves, are socially constructed by men for men. Through consciousness raising, men's position of power and women's powerlessness become clear.²⁴² MacKinnon claims the feminist method is consciousness raising which she sees as "...the collective critical reconstruction of the meaning of women's social experience, as women live through it."²⁴³

Consciousness raising through socialized knowing transforms to a shared reality,²⁴⁴

²³⁹ *Ibid* at pp. 536.

²⁴⁰ MacKinnon (1989). *Supra*. footnote 197, at p. 95.

²⁴¹ MacKinnon (1982), *Supra*. footnote 165, at p. 535.

²⁴² MacKinnon (1989). *Supra*. footnote 197, at p. 92.

²⁴³ MacKinnon (1982), *Supra*. footnote 165, at p. 543.

²⁴⁴ MacKinnon (1989). *Supra*. footnote 197, at p. 101.

which is both transformative and perceptive. On the one hand, it is a form of political practice, on the other hand, it reveals that gender relations are a male socially constructed, collective fact. Furthermore, consciousness raising identifies the private/personal as political for women.

According to MacKinnon, in order to unmask the scope of sexual harassment, consciousness raising is necessary. It is through consciousness raising as method that MacKinnon is able to expose the role of sexuality in women's work, and the role of power in the workplace that disadvantages women. Consciousness raising reveals the social construction of women, by men, in an unequal powerless position. It is this social construction which places women in an especially vulnerable position in the workplace where sexual harassment is the manifestation of male power and female powerlessness.

3.2.8 A Feminist Role for Law

In MacKinnon's framework, the state is the apparatus of male supremacy/dominance. She states:

The law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relations to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying or de jure prohibiting its excesses when necessary to its normalization. Substantively, the way the male point of view frames an experience is the way it is framed by state policy.²⁴⁵

In response, MacKinnon calls for a radical feminist analysis of law which attempts to incorporate a woman's point of view, a woman's experience, into law.

It is MacKinnon's contention that law has the potential to assist women in severing the link that they experience between "...material survival and sexual exploitation."²⁴⁶ The law is seen as a tool to "...support and legitimize women's economic

²⁴⁵ MacKinnon (1983), *Supra.* footnote 198, at p. 644.

²⁴⁶ MacKinnon (1979), *Supra.* footnote 22, at p. 7.

equality and sexual determination...."²⁴⁷ She views sexual harassment law as "...a practical attempt to stop a form of exploitation."²⁴⁸ In exploding the distinction between public and private, MacKinnon attempts to create space for the law in an area it previously left primarily untouched. She sees the law as a transformative tool through which "...the legal concept of sexual harassment reenters the society to participate in shaping the social definitions of what may be resisted or complained about...."²⁴⁹ Sexual harassment law is feminist jurisprudence the possibility of social change through law.²⁵⁰ She expostulates that the law is necessary to legitimize injury,²⁵¹ and claims that sexual harassment theory/law is the first time that women have defined their own injuries in law. Furthermore, "...the [sexual harassment] law is working surprisingly well for women by any standards, particularly when compared with the rest of sex discrimination law."²⁵² Although she does recognize that the law has not always, or most often not, assisted women, she remains committed to using the law to transform women's equality.

3.3 Concerns With MacKinnon's Theory

The intention of the following comments is not to challenge the notion of sexual harassment per se, nor feminism altogether, nor to trivialize the significance of the issue of sexual harassment and perhaps the necessity of specificity of sexual harassment. However, it is suggested that the development and practice of sexual harassment law and policy has been problematic in part due to the adoption of certain aspects of MacKinnon's theoretical framework. The following is a brief look at some of the concerns regarding MacKinnon's theory.

²⁴⁷*Ibid.* at pp. 7.

²⁴⁸MacKinnon (1987), *Supra.* footnote 151, at p. 103.

²⁴⁹MacKinnon (1979), *Supra.* footnote 22, at p. 57.

²⁵⁰MacKinnon (1987), *Supra.* footnote 151, at p. 10.

²⁵¹*Ibid.* at pp. 104.

²⁵²*Ibid.* at pp. 105.

Since MacKinnon's theory of sexuality provides the basis for her analysis of sexual harassment, many of the assumptions made and how they potentially affect social change are troublesome. MacKinnon's assessment of women's sexuality as constructed *only* by and for men is problematic. Drucilla Cornell gives an insightful critique of MacKinnon's reading of sexuality. She argues that an analysis of women's sexuality as constituted by and for men is "...contrary to women's freedom from the chains of an imposed femininity, a femininity which constitutes 'our' sex and that can only justify women's domination."²⁵³ She suggests that MacKinnon's stance "...reflects the very 'sexual shame' of women's 'sex' that keeps the feminine from being valued...."²⁵⁴ "MacKinnon's reduction of feminine sexuality to being a 'fuckee' endorses this fantasy as 'truth' and thereby promotes the prohibition against the exploration of women's sexuality and 'sex' as we live it and not as men fantasize about it."²⁵⁵

MacKinnon considers sexuality to be the root source of oppression. Her discussion of oppression hierarchicalizes gender oppression and marginalizes other forms of oppression. Her analysis is extremely reductionist in that all oppression flows from sexual oppression—men sexually oppressing women and, therefore, does not allow for the necessary attention to other forms of oppression. According to MacKinnon's theory, sexuality is a form of oppression privileged over all other forms of oppression. It follows from this that sex discrimination is privileged over all other forms of discrimination, therefore, sexual harassment as sex discrimination precludes equal treatment of other forms of discrimination. It is important to accommodate a plurality of oppressions in order to capture the varying experiences of oppression. Bell

²⁵³Cornell, D., "Sexual Differences, the Feminine and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State" *Yale Law Journal*, Vol. 100, No. 7, May, 1991, at p. 2249.

²⁵⁴*Ibid.* at pp. 2250.

²⁵⁵*Ibid.* at pp. 2250.

Hooks has challenged the notion that sexuality is the root source of oppression and that the elimination of sexist oppression will lead to the eradication of all forms of domination. She submits that this theoretical stance has enabled western privileged, white women to suggest that racism and class exploitation are merely offspring of patriarchy and sexuality.²⁵⁶ The key factor, according to Hooks, is the practice of domination. She acknowledges that sexist oppression is important "...not because it is the basis of all other oppressions, but because it is the practice of domination most people experience, whether their role be that of discriminator or discriminated against, exploiter or exploited."²⁵⁷ She submits that all forms of oppression are linked and the elimination of one oppression will not eradicate other forms.²⁵⁸ Hooks claims that "[w]hite women who dominate feminist discourse, who for the most part make and articulate feminist theory, have little or no understanding of white supremacy as a racial politic, of the psychological impact of class, of their political status within a racist, sexist, capitalist state"²⁵⁹ Hooks argues that the tenet 'all women are oppressed', with its implication that women share a common lot, does not account for the diversity of women's experience of oppression. Not all women experience oppression to the same degree or in the same manner.²⁶⁰ Hooks asserts that:

It was a mark of race and class privilege, as well as the expression of freedom from many constraints sexism places on working class women, that middle class white women were able to make their interests the primary focus of the feminist movement and employ a rhetoric of commonality that made their condition synonymous with 'oppression'.²⁶¹

Mackinnon's claims of *a* women's experience that can be isolated to *a* truth, *an* oppression, independently of other oppressions is criticized as essentialism. Es-

²⁵⁶ Hooks, B., *Talking Back: Thinking Feminist, Think Black*, Boston, MA: South End Press, 1989 at p. 19.

²⁵⁷ *Ibid.* at pp. 35.

²⁵⁸ *Ibid.* at pp. 35.

²⁵⁹ *Ibid.* at pp. 4.

²⁶⁰ *Ibid.* at pp. 57.

²⁶¹ *Ibid.* at pp. 6.

essentialism is "[t]he notion that there is a monolithic 'women experience' that can be described independent of other facets of experience like race, class and sexual orientation...."²⁶² Angela Harris submits that women's experience in MacKinnon's work is talked about in monolithic terms in which gender is the factor which determines women's oppression. She argues that this approach marginalizes and silences those who suffer oppression due to other factors such as race, class etc.. Further, she contends this essentialism amounts to racism even if it is subconscious.²⁶³ Harris asserts that "[i]n her search for what is essential womanhood...MacKinnon rediscovers white womanhood and introduces it as universal truth."²⁶⁴ Parashar proposes that it is possible to conceptualize women in terms of multiple consciousness which would include not only sex but class, ethnicity, race, religion and various other factors.²⁶⁵ Being white, upper middle class, educated, MacKinnon's dismissal of other oppressions, such as race, ethnicity, religion, etc. is questionable. More specifically, as Parashar has pointed out, legal feminism (within which MacKinnon is included) reflects the concerns (i.e. sexual objectification and sexual harassment) of white middle-upper class women and "...can hardly be the first concerns of women who have no opportunities for economic or psychological independence. Likewise, sexual harassment has little relevance for women who cannot even hope for steady wage and employment."²⁶⁶

Another problem with MacKinnon's work is her analysis of power. She assumes power is external to women, and located only with men. In this interpretation,

²⁶²Harris, A., "Race and Essentialism in Feminist Legal Theory," in Bartlett, K. and Kennedy, R. (ed), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Colorado: Westview Press Inc., 1991, at p. 240.

²⁶³*Ibid.* at pp. 240.

²⁶⁴*Ibid.* at pp. 242.

²⁶⁵Parashar, A., "Essentialism or Pluralism: The Future of Legal Feminism," *Canadian Journal of Women and the Law*, Vol. 6, No. 2, 1993 at p. 343.

²⁶⁶*Ibid.* at pp. 342.

power ultimately comes from outside women, not from inside. This conception of power leaves very little room for personal empowerment. Power is solely constructed in oppositional terms: powerful-men and powerless women. Power perceived in this manner raises serious questions. It is unreasonable to suggest power is simply an external, as opposed to an internal, phenomenon, or that it is as dichotomous as MacKinnon contends. Power is not simply something one is born with, based on gender, or simply bestowed or given to another. It can be argued that power can also be found within individuals. Further, it is questionable that power is all encompassing and attributed only to men. This is not challenging the notion that men generally have considerably more power than women; rather it is challenging MacKinnon's assertion that just because one is a man, he has more power than any woman.

MacKinnon, when speaking of women, uses a language of victimization, powerlessness, subordination and passivity. A construction of power that portrays women as powerless conceptualizes women only as victims, and this is problematic. The language of victimology limits the possibility for empowerment. Drucilla Cornell would concur and argues that MacKinnon does not develop a successful feminist theory of the state "...because she is unable to affirm feminine sexual difference as other than victimization."²⁶⁷ She contends that MacKinnon's reductionist view of women as victims cannot develop useful reform programs but further "...cannot account for the very feminist point of view that she argues must be incorporated...."²⁶⁸ Consciousness raising as a method of transformation must "...involve more than an exposure of the 'truth' of our victimization."²⁶⁹ It is suggested that all women are

²⁶⁷Cornell (1991), *Supra.* footnote 253, at p. 2248.

²⁶⁸*Ibid.* at pp. 2249.

²⁶⁹*Ibid.* at pp. 2250.

not only or simply victims. A victimization interpretation has several consequences for a transformative project. MacKinnon statically constructs women in the workplace in a subordinate role. She claims feminism seeks to empower women but she always speaks of women as powerless. Questions arise from this: How does one go from being victim to becoming an active agent? How can one move beyond this subordination?

Additionally, the portrayal of women as victims, passive, subordinate, powerless obscures the reality that women can participate in domination and power. MacKinnon's analysis depicts men as powerful, the enemy, the problem, and women as powerless, the victim, and implicitly the solution. This interpretation views men as bad and women as good. Women are not better than men nor men better than women. We all share, although to different degrees, in a society of domination. As Bell Hooks has asserted, feminism "...should not obscure the reality that women can and do participate in politics of domination, as perpetrators as well as victims—that we dominate, that we are dominated."²⁷⁰ She contends that were women to rule, "...society would not be organized that differently...."²⁷¹ Regarding power, Hooks suggests that "[w]omen, even the most oppressed among us, do exercise some power."²⁷² She reminds us that the women organizing and participating in the feminist movement were/are in no way passive, unassertive, unable to make decisions, although they suggest that these are typical female traits.²⁷³

The private has been the site of oppression as well as an important locus of political struggle for women. However, MacKinnon's analysis that the private must

²⁷⁰ Hooks (1989), *Supra*, footnote 256, at p. 20.

²⁷¹ Hooks, B., *Feminist Theory: From Margin to Center*, Boston, MA: South End Press, 1984, at p. 86.

²⁷² *Ibid.* at pp. 90.

²⁷³ *Ibid.* at pp. 91.

be exploded into the public—public being political—the state and its institutions and subject to law's sovereignty and surveillance is problematic.²⁷⁴ In collapsing any distinction between personal and political, MacKinnon opens women's personal lives to the unchecked dominance of the state and law. There is an alternative to exploding the private in the manner MacKinnon suggests. The private need not be beyond scrutiny and change. Rather, this scrutiny and change need not require only state intervention through law and its other institutions. What is envisioned is a protection of private space from state and traditional formal legal intervention but not beyond public purview and debate.

Feminist epistemology and consciousness raising play an essential role in MacKinnon's theoretical framework and transformative project. Within MacKinnon's discussion of epistemology and consciousness raising is the assumption that all women share a collective truth about themselves and the way they experience life. Consciousness raising, according to MacKinnon, illuminates women's reality, self-concept and experience, and at the same time women learn what their reality is through consciousness raising, eg. male domination, sexualized hierarchy and powerlessness. This analysis raises some serious questions: Whose reality? Whose self-concept? Whose experience?

According to MacKinnon, consciousness raising as a method identified the *truth* that men (male power) concealed. It identified that female sexuality was socially constructed by men for their own interests. However, as Smart inquires:

Nowhere in her argument does it appear that masculinity might also be constructed, or that male sexuality as it is manifested is anything other than male sexuality in a state of nature. Male sexuality then is not cultural, it is natural and trans-historical. Moreover, it can remain undistorted whilst distorting female sexuality.²⁷⁵

²⁷⁴Minson (1993), *Supra.* footnote 73, at p. 60.

²⁷⁵Smart, C., *Feminism and the Power of Law*, London: Routledge, 1989, at p. 77.

The theme of truth also appears in her theory of sexuality, where she claims it captures the truth "Radical feminism is feminism...after this, feminism unmodified."²⁷⁶ The claim of truth is suspect but a universal truth is particularly problematic. Is there one truth 'out there' or rather a whole series of truths? As Smart points out:

It sets up a specific feminist theory as superior to other versions, not on the basis of a set of political values but on the basis that radical feminism is the Truth and its truth is established through the validity of its method and epistemology.²⁷⁷

Women's experience, uncovered by consciousness raising (feminist method) provides the truth. Smart correctly argues that it is "...necessary to resist the certainties, the dogma, the program of action, the hierarchy of truth explicit in her work."²⁷⁸ MacKinnon has created a belief system. However, what happens when someone does not accept the religion? It is argued that MacKinnon does not speak for all women. It is her claim that only feminism unmodified can produce truth and knowledge, but one may contend that there are other *truths* and *knowledges* which are just as valid. MacKinnon's theory privileges radical feminism as truth, capturing women's experience—sexuality as their oppression. Cornell has argued that MacKinnon's works are not just descriptive but are narrations that give meaning to reality.²⁷⁹ Cornell asserts "...that no reality can perfectly totalize itself because reality, including the reality of male domination, is constituted in and through language in which institutionalized meanings can never be fully protected from slippage and reinterpretation."²⁸⁰ Kreps explains that theory is substantially influenced by interpretation and that in place of a 'universal' truth is a number of truths.²⁸¹

²⁷⁶MacKinnon (1989), *Supra.* footnote 197, at p. 117.

²⁷⁷Smart (1989), *Supra.* footnote 275, at p. 71.

²⁷⁸*Ibid.* at pp. 72.

²⁷⁹Cornell (1991), *Supra.* footnote 253, at p. 2262.

²⁸⁰*Ibid.* at pp. 2264.

²⁸¹Kreps, G.L., *Sexual Harassment: Communication Implications*, Creskill, NJ: Hampton Press Inc., 1993, at p. 20.

Smart questions MacKinnon's method of consciousness raising a method that disqualifies women who do not conform, or accept her version of events.²⁸² MacKinnon's theory constructs a women's truth, a women's knowledge and a women's experience of sexual harassment. However, it does not accommodate that women might experience sexual harassment differently. MacKinnon claims to capture the truth of women's experience but it is not representative of my experience (as subordinate, powerless and a victim of men). An a priori constructed women's experience de-privileges other experiences. MacKinnon's feminist theory challenges the universalist claims of male epistemology, male law, male science, male state etc. and then substitutes a new *universalism* based on women's experience, feminist epistemology, in its place. MacKinnon implicitly claims that women's truth, women's reality, women's knowledge, is *not* subject to interpretation, much less plural interpretations, but is *universally* true for all women. This claim to a universal feminist consciousness, a universal feminist epistemology, a universal feminist experience of oppression, a universal feminist "truth" are problematic in the extreme.

According to MacKinnon, consciousness raising as a method occurs in large part in consciousness raising groups. It is women's experience from these groups from which radical feminism claims to spring. MacKinnon states that the women in these groups came from a diversity of women, and that these women represented the experiences of women everywhere.²⁸³ It is questionable whether these women really were representative of all women. It is suggested that the women in these groups were not a random selection representative of all women but rather a self-selected group. Resultingly, there is a real possibility that many other women's experiences have been missed. Bell Hooks has challenged the representativeness and experiences that

²⁸²Smart (1989), *Supra.* footnote 275, at p. 80.

²⁸³MacKinnon (1989), *Supra.* footnote 197, at p. 84.

have come out of consciousness raising groups, stating that they were a reflection of class and racial bias which often silenced non-white participants.²⁸⁴ Also supporting the potential exclusiveness of women's experience in MacKinnon's work is other research on communication which has indicated that knowledge and experience is indeed situated and thus cannot be understood unless analyzed in light of its unique location.²⁸⁵

Underpinning MacKinnon's analysis of sexual harassment seems to be the assumption that sexual harassment occurs whether individual women recognize it is happening to them or not. This disregards and devalues women's own experiences in determining whether certain behaviors are problematic or discriminatory. I think this component is essential. If a woman in a particular environment does not find a behavior harassing, should she not be the one to decide whether or not it is sexual harassment?

The problem with sexual harassment law as it has developed and has been theorized by MacKinnon is that it includes a wide range of behavior over which there is a broad consensus at one end (*Quid Pro Quo*) but not at the other end (*Condition of Work*). An extensive over-arching legal definition obscures the fact that a conflict over normative validity in certain areas of sexual harassment law exists. To impose coercive legal regulation in such an area of normative conflict leads to pathological responses and is likely to do little to achieve a more satisfactory normative consensus.

I argue that MacKinnon's articulation of a particular women's experience is monological. The monological character of her theory is not that it derives from MacKinnon, or feminists, or legal professionals, but rather that it relies on a monological conception of women's experience which is not arrived at through participation or

²⁸⁴ Hooks (1984), *Supra*, footnote 271, at p. 11.

²⁸⁵ Kreps (1993), *Supra*, footnote 281, at p. 18.

discourse, and which is generated out of a *presumed* shared women's experience. MacKinnon theorizes a women's experience that is true for all women and uses that to build a theory of knowledge, power and law. This constructed women's experience is actually central to a specific understanding and definition of sexual harassment. The central critique of MacKinnon's theory questions the construction of a women's experience as a basis for a legal definition of sexual harassment, as a basis for a theory of knowledge and power. She claims a universal truth for all women, claiming that there is one experience shared similarly by all women, and this presupposes a non-discursive method for articulating that experience which certainly cannot be accessed by men who are outside that shared experience, and is also potentially inaccessible to some women who do not share this presumed women's experience. MacKinnon's theory is monological in the sense that it claims an *a priori* shared women's experience, an *a priori* constructed truth, that is imported into the definition of sexual harassment and the legal norm.

Her legal analysis relies on a *universal* women's experience which may not be capable of being the basis for a norm that can be reached by rational consensus by all participants. It is the articulation of a 'universal' women's experience within the legal definition of sexual harassment, within its theoretical underpinnings, and application of the legal approach which has been an essential platform in MacKinnon's theory of sexual harassment, which is prohibited in terms of Habermas' discourse ethics. Important within the conditions of discourse ethics is that at the very minimum, through a process of discourse in an ideal speech situation, participants can at least understand the speaker. So if women's experience is organized such that a participant cannot thereby understand, as in MacKinnon's analysis where men are outside a women's experience, then there is no way that all participants can come

to a rational consensus. MacKinnon's approach focuses on a women's experience as a basis of knowledge and truth, whereas Habermas' approach focuses on rational discourse as a basis of knowledge and truth. Rational discourse allows any affected person to participate in discourse, whereas MacKinnon's approach is based on a shared women's experience which presupposes women having privileged access to participate. Habermas' theory acknowledges that participants in discourse can have different experiences and those experiences form bases of the discourse in order to reach a rational consensus. This presupposes that one person can articulate experience and another person can attempt to put themselves into that position, whereby they have some understanding and at least realize that it would be important to build that experience into the issue at stake. Habermas' approach contrasts with a notion of experience that essentializes experience.²⁸⁶ MacKinnon's essentialized notion of experience purports to elevate experience above the level of rational discourse; removing it, putting it on a higher plain and deriving everything from that, therefore ensuring that by definition it cannot be a process for a consensually arrived at norm. The higher constructed norm cannot meet the requirement of a rationally motivated consensus.

Participation of all in discourse, in my estimation, ensures the best possible chance of social transformation. To exclude a large segment of the population from a discourse, lends itself to defeat, especially if that population presently holds the dominant role in society. MacKinnon's framework creates an us/them dichotomy which is counter-productive to any real substantive social transformation. MacKinnon claims

²⁸⁶ Critique of essentialism can be found in Harris, A., "Race and Essentialism in Feminist Legal Theory," in Bartlett, K. and Kennedy, R. (ed), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Colorado: Westview Press Inc., 1991; and in Parashar, A., "Essentialism or Pluralism: The Future of Legal Feminism," *Canadian Journal of Women and the Law*, Vol. 6, No. 2, 1993: 328-348.

that the exclusion of men from consciousness raising was necessary in order to encourage women to communicate more freely without the intimidation of men hanging over them—it made speech possible.²⁸⁷ Hooks identifies that an anti-male stance is not a sound basis for action since this sentiment intensifies sexism and adds to the antagonism which already exists between women and men.²⁸⁸ She maintains that men can have a place in the feminist movement and the struggle against sexism.²⁸⁹ Further, she advances that “[u]ntil men share equal responsibility for struggling to end sexism, [the] feminist movement will reflect the very sexist contradiction we wish to eradicate.”²⁹⁰ Change can only occur if men are equally involved whereby they are “...compelled to assume responsibility for transforming their consciousness and the consciousness of society as a whole.”²⁹¹

In regard to sexual harassment, MacKinnon appears to have a considerable amount of faith in the law to assist women in transforming their work environment. There is an apparent contradiction in her work, on the one hand she claims the law is inadequate²⁹² and reflects a male epistemology; and on the other hand her book, *Sexual Harassment of Working Women*²⁹³ focuses on the use of law to help transform women's work. She discusses women's reluctance to file sexual harassment suits due to the negative response they receive (i.e. not being believed) and the humiliating role as witness/victim women experience in court. Yet on the other hand, she advocates the use of legal proceedings as the most promising method of dealing with sexual harassment. The assumption in MacKinnon's analysis of law, that law which

²⁸⁷MacKinnon (1989), *Supra*. footnote 197, at p. 86.

²⁸⁸Hooks (1989), *Supra*. footnote 256, at p. 70.

²⁸⁹*Ibid.* at pp. 80.

²⁹⁰*Ibid.* at pp. 81.

²⁹¹*Ibid.* at pp. 81.

²⁹²MacKinnon (1987), *Supra*. footnote 151, at p. 2.

²⁹³MacKinnon (1979), *Supra* footnote 22.

is masculinist on the one hand can address feminist concerns/epistemology on the other hand, begs the question where does law come from? It is suggested that simply reorienting law that embodies a male epistemology, a male point of view, would be sufficient to eliminate male domination. If male domination remained within the state and economy, providing law for women by women would be ineffective since cooption by the dominant group is inevitable. It seems that MacKinnon's faith in the ability of law to significantly change women's role in society is somewhat optimistic. In her study of law and women, the law seems to have abandoned women to the wants and needs of male supremacy at every turn. She claims that the law embodies a male epistemology and is used to maintain male supremacy and control of women. This contention leaves little space for women to use law to effectively change their subordinate position. Also, the construction of women as victims leaves little room for women to use law effectively. Carol Smart has argued that the "...law is so deaf to the core concerns of feminism that feminists should be extremely cautious of how and whether they resort to law."²⁹⁴ Still, it is significant to note, as MacKinnon argues, that law can play a legitimizing role. This is certainly demonstrated in sexual harassment law where feminists have been successful in using the law to legitimize their complaint about certain behaviors. But it is also important to note that their concerns are translated into a legal language and discourse and that this has certain consequences, some of which are problematic.

There are three main interconnected concerns involving MacKinnon's invocation of the law and sexual harassment. The first is whether or not the law can change behavior. As noted before, it seems unlikely that the law can or will do very much to change the relationship between men and women because ultimately change in

²⁹⁴Smart (1989), *Supra.* footnote 275, at p. 2.

behavior must come from people themselves. We can regulate certain behavior as illegal and that may partially eliminate some behavior, but in the final analysis it may not change how individuals feel or think about an issue, although it is acknowledged that the law can have a legitimizing effect. As well, it is doubtful that the law alone will substantially change women's inequality. The law can on paper claim equality and in some cases compensate for inequality, however, being treated as equal requires changes in attitudes, beliefs and all behaviors (subtle or overt), that treat others as unequal. What is necessary is change in the way people think and behave and that requires some initiative to ensure that it occurs before the problem not after it. Further laws regulating behavior potentially do little to change the underlying problem but rather transform the behavior to a more subtle form. For example, in the case of sexual harassment, we can provide laws that limit behavior (in the category of Condition of Work) towards women with the intention of making a better work environment for women. However, men may change the overt behavior (i.e. joking) which is prohibited, to a more subtle behavior (i.e. silence) whereby women's work environment is still 'hostile'. The position taken in this thesis differs fundamentally from MacKinnon. It challenges the notion that one can regulate Condition of Work simply through law.²⁹⁵ MacKinnon claims that law can legitimize women's aims, and transform women's workplace. Even though the law has legitimized sexual harassment as inappropriate behavior, it falls short of MacKinnon's claims. Carol Smart challenges this assumption, suggesting that it is unlikely, given the history of law reform which reveals the failure of the law to legitimate women's claims.²⁹⁶

A second concern regarding sexual harassment law is whether the law really reflects the needs and concerns of employees. Is the use of law the option that would

²⁹⁵This point will be elaborated on in the following sections.

²⁹⁶Smart (1989), *Supra.* footnote 275, at p. 81.

have been chosen freely? Further, is this adversarial method the most appealing option for women to articulate to men the behaviors they find offensive? It is not clear that confrontation is the best method to change the way people think and behave.

Third, this project is not to challenge MacKinnon's legal argument with respect to sexual harassment—that sexual harassment amounts to sex discrimination, as an appropriate legal avenue. Rather the focus is whether the law in its traditional form²⁹⁷ should be used so pervasively? Smart also raises fundamental doubts about leaving "...untouched the idea that law should occupy a special place in ordering everyday life."²⁹⁸ She suggests that we should "...resist the move toward more law and the creeping hegemony of the legal order."²⁹⁹ MacKinnon does not adequately explore or address the dangers of using the law to structure interpersonal relationships (juridification), and the negative consequences this may have for women. It is important that there is consideration of the potential damages for women in utilizing the law. As both Habermas and Smart have argued, the growth of law in the form of rights has come at a cost of greater surveillance, conformity and new regulations.³⁰⁰ Furthermore, Smart points out, "...that we cannot predict the outcome of any individual law reform" but one certainty is that once law is enacted it is out of feminists hands into the hands of individuals and agencies with quite different agendas, values, and politics.³⁰¹ MacKinnon on the other hand, wants more legal surveillance of gender relations and of sexuality. Habermas' conception of dejuridification provides

²⁹⁷ Formal court adversarial system.

²⁹⁸ Smart (1989), *Supra.* footnote 275, at p. 5.

²⁹⁹ *Ibid.* at pp. 5.

³⁰⁰ Habermas, J., *The Theory of Communicative Action Vol. 2, Lifeworld and System: A Critique of Functionalist Reason*, trans. Thomas McCarthy, Boston, MA: Beacon Press, 1987, at pp. 356-364; Smart, C., *Feminism and the Power of Law*, London: Routledge, 1989, at pp. 161-162.

³⁰¹ Smart (1989), *Supra.* footnote 275, at p. 164.

an insightful approach to conceptualizing the role of law in a different way. Dejuridification is not *no law whatsoever*, but rather incorporation of a different conception of law.

The way MacKinnon tends to view law, law is viewed in a coercive, dominant way. Law is seen as mandatory. There is the assumption in her work that law can regulate behavior. She assigns to law the role of active agent of social change. Law is seen as a tool of social transformation, whereby the law acts upon the world, regulates values, behavior and conduct. The law is not dependent upon the consent of the public but rather an agent to change public behavior, values, structures, etc.. In MacKinnon's analysis of law, law is contingent on the coercive backing of the state. Her use of law evokes the state's power through law on women's behalf. Law is conceptualized as universal, top-down. Although MacKinnon is in no way a legal positivist within the tradition of John Austin, an analogy can be drawn in a reading of MacKinnon's analysis of law, to say she operates from a universal starting point applied downward from that which, in a certain way, parallels Austin's command theory of law. Minson argues that MacKinnon's

...vision of radical social transformation...leads her to place an exaggerated trust in the commanding status of law and concomitantly, in the consciousness-raising impact of legal publicity. It is as if, once the law can be remade so as to embody a feminist structural understanding of what gives rise to sexual harassment; to approximate women's experience of the injury it imposes; and to foreshadow a radical alternative set of relations between the sexes, then its traditional majesty could be invoked in order to provide an Archimedean point of transformation.³⁰²

He asserts it is unlikely that sexual harassment law can sustain significance if it is conceived in terms of "...legal sovereignty over sexes conduct."³⁰³ "...[S]ex-discrimination law is neither capable of dramatically changing society either by commanding obedience or by changing hearts...."³⁰⁴

³⁰²Minson (1993), *Supra*. footnote 73, at p. 87.

³⁰³*Ibid.* at pp. 87.

³⁰⁴*Ibid.* at pp. 87.

This study attempts to view law in a different way. It is not a question of law versus no law but rather, that there can be different modes and conceptualizations of law. Perhaps only problem solving using law backed by the power of the state is undesirable.

MacKinnon's definition of sexual harassment is also problematic. She provides an open-ended definition, calling for the broadest understanding of sexual harassment possible. Her radical feminist epistemology and her conception of power, truth and law as feminist agents of change *preclude* any concern for a process of discourse to address areas where there are contested norms (eg. at the Condition of Work end of the continuum), since her theory assumes an absolute conflict (zero-sum) between mainstream (male-stream) experience and understanding of law and power, and radical feminist experience and understanding of law and power. Any area of contested norms therefore represents a normative battlefield, and a battle which it is imperative to win. One can conceptualize sexual harassment on a continuum with Quid Pro Quo at one end, with public consensus that this amounts to sexual harassment exists, and Condition of Work at the other end, where there is a lack of such public consensus. It is in this lack of consensus as one moves toward the Condition of Work end of the continuum that problems arise. Hence the challenge raised about the use of law does not emanate from Quid Pro Quo type harassment but alternatively from Condition of Work. The behaviors prohibited under this type of sexual harassment are often very subtle and can be viewed differently within gender and between gender. Where a lack of consensus exists on what constitutes prohibited behavior, should feminists and legal professionals be allowed to decide for employees how they are to structure their interpersonal relationships?

Habermas' analysis of law allows one to explore another mode/conceptualization

of law. He does not suggest there should be no law, just that law affecting the lifeworld (social relations) should operate as an external constitution which would allow space for discourse, communication and participation. Habermas' approach underlines the need for participatory discourse precisely in areas of contested norms. Habermas' theory does not imply in the case of sexual harassment, we need no law whatsoever, because that would presuppose deregulation and therefore leaves the issue of power and gender unresolved. Instead law might include some minimal norms, around which there is a certain amount of consensus, with more scope for participation in putting in place further norms. Discussing law in this open ended manner provides the opportunity to look at law in different modes rather than rely on a coercive conception of law backed by state power to transform interpersonal relationships.

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Chapter 4

Habermas: Dilemmas of Law

4.1 Habermas and Communicative Action: Contextualizing the Issue

Since this thesis relies on a Habermasian framework to examine the legal issue of sexual harassment, it is necessary to interrogate Habermas' *Theory of Communicative Action*.³⁰⁵ In what follows is a framework for sexual harassment law and policy in the workplace based on Habermas' theory of communicative action and discourse ethics. This approach to sexual harassment conceptualizes truth and knowledge differently, identifies the pathologies of a reliance on law, encourages participation of all persons potentially affected, incorporating the varied perspectives/paradigms people hold, and provides for a conception of private space that is not beyond public debate. There is not the expectation that a theory can completely explain the world, derive truth, or provide answers. A theory, can however, provide a point of departure from which one can begin to analyze questions and/or problems and it is in this context that this thesis relies on Habermas' theory. This chapter will briefly examine a few key components of his approach to communicative action.

Habermas' theory represents a paradigm shift from theory based on purposive rationality/action to communicative rationality/action. As well, Habermas moves

³⁰⁵Habermas, J., *The Theory of Communicative Action Vol. 1, Reason and the Rationalization of Society*, trans. Thomas McCarthy, Boston, MA: Beacon Press, 1984.

away from a philosophy of consciousness toward one of communication, whereby the focus changes from subject/object to intersubjectivity. This paradigm shift is significant in reference to this project because it provides space for issues to be resolved in a more communicative, participatory fashion.

Habermas develops a dual concept of society–lifeworld and system.³⁰⁶ This construct provides, for the purposes of this thesis, a parsimonious model of society. Here Habermas lays out his view of differentiation outlining the way in which modern society develops into system and lifeworld. His subsequent analysis of the paradox and pathologies of modernity is articulated through the development of the concept of colonization of the lifeworld. Within Habermas' thesis are several significant observations relevant to a discussion of sexual harassment law and policy. The first is his view on rationality and communication. Specifically, he identifies reification (which refers to the process whereby the rational foundations of communicative action in the lifeworld are undermined by the functional imperatives of system reproduction.³⁰⁷) and discusses how as the sacred disappears and coordination of action takes place via language, a paradox occurs in that there is a greater necessity for non-linguistic steering media of action (money and power) which produce purposive–instrumental rather than rational action. Habermas maintains that it is necessary to preserve communicative rationality and action in the lifeworld. The second particularly relevant observation is juridification which identifies the paradoxes and pathologies of a reliance on law to regulate social interaction. Habermas maintains that it is necessary to de-juridify lifeworld relations. Within his discussion of juridification, he distinguishes two types of law: law as medium and law as an institution. Law as

³⁰⁶Lifeworld refers to the social life, system refers to the state and economy.

³⁰⁷Brand, A., *The Force of Reason: An Introduction to Habermas' Theory of Communicative Action*, Sydney, Australia: Allen and Unwin, 1990, at p. 54.

an institution is most relevant to this project, since Habermas designates law as an institution that is freedom securing, empowering, and involving a regulative function which entails procuring a role for public participation in law, and yet would accomplish this without increasing the penetration of administrations.

The third strength of Habermas' theory for this thesis focuses on his articulation of the public sphere,³⁰⁸ where he identifies the diminished role of citizen in the public sphere and how this is in fact pathological. Habermas claims a revitalization of the public sphere is an important step toward illuminating the pathologies of modernity.

Habermas perceives several emancipatory resolutions to the pathologies and paradoxes of modernity. The emancipatory potential in Habermas' theory is consistent with his discussion of the paradoxes and pathologies of modernity, since, as he emphasizes, these processes are not inevitable. The first, is decolonization of the lifeworld which encompasses three areas of change: "...first, the removal of system integration mechanisms from symbolic reproduction spheres; second, the replacement of (some) normatively secured contexts by communicatively achieved ones; and third, the development of new democratic institutions capable of asserting lifeworld control over state and...economic systems."³⁰⁹

4.2 Situating Communicative Action

Habermas' framework of the theory of communicative action begins with communication. He departs from Weber and his fellow Frankfurt School predecessors³¹⁰ who depicted modernity in terms of purposive-instrumental rationality and action,³¹¹

³⁰⁸Public sphere is defined by Habermas as one of the institutional orders of the lifeworld. The public sphere is "...found in the 'cultural industry', press and, later mass media." (Brand (1990) *Supra.* footnote 307, at p. 58.) The public sphere is linked to the state via the medium of power, channeled through the roles of citizen and client.

³⁰⁹Fraser, N., "What's Critical About Critical Theory?: The Case of Habermas and Gender," *New German Critique*, Vol. 35, Spring/Summer, 1985, at p. 121.

³¹⁰Horkheimer, Adorno, Maruse.

³¹¹Habermas defines purposive-instrumental rationality action that is goal oriented, focused on

which left as Weber states, modernity in an "iron-cage".³¹² Habermas conceptualizes modernity in a substantially different light. He portrays modernity's development as containing not only purposive instrumental but also communicative rationality. Communicative rationality action is defined as oriented towards mutual understanding, focuses facts, truthfulness, sincerity, rightness; it is discursive. Habermas argues that his predecessor's account of rationality is too narrow, and offers that a reconceptualization of rationality including communicative rationality provides a better model of modernity and potentially escapes the "iron-cage". His theory of communicative action is an attempt to reconstitute critical theory avoiding its weaknesses while still incorporating Weber into Western Marxism. He suggests modernity's present development was neither inevitable nor pre-ordained, and therein lies the most significant contribution of Habermas' theory-it provides for possibilities for dynamic change. His is a critical, social, evolutionary theory of modernity which conceives social history in terms of lifeworld and system. Habermas attempts this reorientation of social theory by shifting its framework from a subject-oriented paradigm based on purposive rationality to a paradigm of intersubjectivity based on communicative rationality. Modernity signifies the differentiation of the social systems of economy and state from the lifeworld. He postulates that the differentiation of system and lifeworld delineates a shift away from coordination of action which is communicative and discursive to purposive-instrumental and non-discursive. It is within his thesis of differentiation that Habermas distinguishes his notion of *colonization of the life world*. His colonization thesis identifies the pathologies and paradoxes

success and efficiency, and is strategic regarding action.

³¹²"Iron-cage" refers to Weber's thesis regarding the increasing rationalization of society in the course of modernity whereby the instrumental rationality of the system captures an expanding role in the socialization of individuals. This rationalization in modernity results, according to Weber's thesis, in a paradox. On the one hand an increase in autonomy and on the other hand a loss of freedom.

of modernity: reification, juridification, diminished public sphere, and disintegration of communicative processes. He posits that these pathologies are not inevitable and suggests methods of countering them: de-colonizing the lifeworld; de juridification; revitalizing the public sphere; and institutionalizing practical discourse.

4.3 A Summary of Habermas' Theory of Communicative Action

4.3.1 Lifeworld/System

Habermas provides a dualistic model of modernity conceptualizing society as lifeworld and system. In the process of social evolution, modernity signifies the uncoupling of the system-economy and state from the lifeworld. In other words, the system becomes differentiated from the lifeworld. Material reproductive functions within the state and economy which are systemically integrated become differentiated from symbolic reproductive functions within the socially integrated lifeworld.

The system is comprised of the institutional orders of economy (private) and state (public), and is steered by the logic/media of money and power, respectively. The coordination of action is system integration which is achieved through the steering media of money and power. System integration "...is a matter of the functional intertwining of action consequences,"³¹³ whereby action is determined by self-interest, efficiency, etc..³¹⁴ The system is mediated instrumentally, systemically regulated, and formally organized. Law in the system parallels its mediation, it functions instrumentally, is formally organized and is goal oriented. Habermas maintains that the system is driven by functional, purposive-instrumental rationality. The system perspective is external—from that of the observer and therefore is not intersubjective. The system is motivated purely by strategic/instrumental action oriented to results

³¹³Brand (1990) *Supra.* footnote 307, at p. 38.

³¹⁴Fraser (1985), *Supra.* footnote 309, at p. 102.

with claims of efficiency. It does not rely on the medium of language but employs coercive, anti-communicative media—that of money and power. The reproduction of the system is material reproduction which comprises social labor.

The lifeworld, on the other hand, is comprised of the institutional orders of the public sphere (i.e. political participation) and the private sphere (i.e. family) and is steered by the logic/medium of communicative rationality. The coordination of action is social integration which is achieved through language where explicit and implicit intersubjective consensus about norms and values are reached through linguistic speech and interpretation (normatively-secured).³¹⁵ The lifeworld is mediated communicatively, symbolically regulated and socially organized. The function of law in the lifeworld is symbolic reproduction. It is driven by communicative rationality. The lifeworld perspective is internal—from that of the subject and hence intersubjective. The lifeworld is defined as the "...world of everyday life...",³¹⁶ the "...ordinary world of lived experiences...."³¹⁷

The lifeworld is made up of three structural components: culture, which refers to "...the stock of knowledge which provides those who seek shared understanding about something, with interpretations;"³¹⁸ society, which refers to "...the legitimate orders through which participants [in communication] regulate their membership in social groups and thereby secure solidarity;"³¹⁹ and personality, which refers to the "...competences that make a subject capable of speaking and acting, that puts him in a position to take part in processes of reaching understanding and thereby to

³¹⁵ *Ibid.* at pp. 102.

³¹⁶ Murphy, W.T., "The Habermas Effect: Critical Theory and Academic Law" *Current Legal Problems*, Vol. 42, 1989, at p. 139.

³¹⁷ Rasmussen, D.M., "Communication Theory and the Critique of the Law: Habermas and Unger On the Law," *Praxis International*, Vol. 18, No. 2, July, 1988, at p. 158.

³¹⁸ Brand (1990), *Supra.* footnote 307, at p. 35.

³¹⁹ Habermas (1987), *Supra.* footnote 12, at p. 138.

Table 1

Structural Components		Symbolic Reproduction		Dimensions of Evaluation		Disturbances
Culture	→	Cultural Reproduction	→	Rationality of Knowledge	→	Loss of Meaning
Society	→	Social Integration	→	Solidarity of Members	→	Anomie
Personality	→	Socialization	→	Personal Responsibility	→	Psychopathologies

assert his own identity."³²⁰ These structural components are essential for mutual understanding (see Table 1).

Habermas also identifies formal worlds: the objective world; the social world; and the subjective world. These formal world concepts "...constitute a reference system for that about which mutual understanding is possible: speakers and hearers come to an understanding from out of their common lifeworld about something in the objective, social or subjective worlds."³²¹ Corresponding to the structural components are processes of reproduction (symbolic reproduction) consisting of: (i) cultural reproduction, which "...ensures that newly arising situations are connected up with existing conditions in the world, in the semantic dimension: it secures a *continuity* of tradition and *coherence* of knowledge...measured by the *rationality* of knowledge..."³²² --Disturbances in cultural reproduction result in a "loss of meaning": (ii) social integration, which "...ensures that newly arising situations are connected up with existing conditions in the world in the dimension of social space: it takes care of *coordinating action* by way of legitimately regulated interpersonal relations...measured by *solidar-*

³²⁰*Ibid.* at pp. 138; Personality's inclusion of communicative competence relates to discourse ethics. It is this structural component that makes discourse possible.

³²¹*Ibid.* at pp. 126.

³²²*Ibid.* at pp. 140.

ity among members...."³²³ Disturbances in social integration manifest themselves in "anomie" (normlessness); and (iii) socialization, which "...ensures that newly arising situations are connected up with existing conditions in the world in the dimension of historical time: it secures for succeeding generations the acquisition of *generalized competence for action*...interactive capabilities...measured by the *responsibility of persons*."³²⁴ - Disturbances in socialization are manifested in psychopathologies (see Table 1).

Habermas postulates that action is divided into three categories: (i) strategic action oriented to success which involves social action oriented to subjects; (ii) instrumental action, again oriented to success; however this action is nonsocial and oriented to objects (these two modes of action most often appear in the system); and (iii) communicative action oriented to reaching a shared understanding, which involves social action oriented to subjects and is in the domain of the lifeworld. Communicative action "...is that form of social interaction in which the plans of action of different actors are coordinated through an exchange of communicative acts, that is, through a use of language (or corresponding nonverbal expressions) oriented towards reaching understanding."³²⁵ Communicative action is rational action in that it is grounded in reason and this grounding takes place through argumentation. A central criterion of communicative rationality is intersubjective rationality, whereby reaching an agreement is done without force or coercion but rather is based on the better argument.³²⁶

³²³ *Ibid.* at pp. 140.

³²⁴ *Ibid.* at pp. 141.

³²⁵ Thompson, J.B. and Held, D. (ed), *Habermas: Critical Debates*, London, England: MacMillan Press Ltd, 1982, at p. 234; Further discussion of types of action, speech acts, orientation, dimensions, validity claims, discourse and knowledge will be discussed in Chapter 5. See Table 2.

³²⁶ Travers, A., *The Invisible Women: A Feminist Critique of Habermas's Theory of Communicative Action*, M.A. Thesis, University of British Columbia, 1990, at p. 15.

4.3.2 Communicative Action

Habermas' theory introduces two key concepts: communicative action and discourse ethics.³²⁷ Communicative action, for Habermas, is the progressive outcome of the rationalization of modernity.³²⁸ According to Habermas, social evolution is primarily the process of rationalization of the lifeworld.³²⁹ His new paradigm of rationality is discursive.³³⁰ Communicative rationality, which is based on the forces of the better argument, implies the use of speech.³³¹ Language is the vehicle for communicative action.³³² In the process of social evolution, social integration becomes more and more a matter of communicative action through language. As well, communicative rationality widens over time uncovering linguistic possibilities, and it is this process Habermas labels rationalization.³³³ He claims that within language there is a thrust to achieve a shared understanding that is rationally motivated.³³⁴ In the process of rationalization, the lifeworld gets more and more differentiated.

For Habermas, the development of systematic complexity ultimately depends on the structural differentiation of the lifeworld. As the structural components of the lifeworld become more differentiated, the more interaction becomes dependent upon a rationally motivated shared understanding that is based on the authority of the better argument.³³⁵ The structural differentiation of the lifeworld occurs with the evolutionary development of moral consciousness that is embodied in legal institu-

³²⁷Detailed discussion of discourse ethics will be delayed until Chapter 5. But briefly, it refers to both the basic principles in order for discourse to occur and the philosophical justification of having discourse as means of pursuing conflicted validity claims.

³²⁸Goodnight, T.G., "Habermas, The Public Sphere and Controversy," *International Journal of Public Opinion*, Vol. 4, No. 3, 1992, at p. 248.

³²⁹Brand (1990), *Supra*. footnote 307, at p. 36.

³³⁰Benhabib, S. *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory*, New York: Columbia University Press, 1986, at p. 262.

³³¹Brand (1990), *Supra*. footnote 307, at p. ix.

³³²*Ibid.* at pp. ix.

³³³*Ibid.* at pp. ix.

³³⁴*Ibid.* at pp. xi.

³³⁵*Ibid.* at pp. 36.

tions. The structural differentiation in the lifeworld serves as a crystallization point for new mechanisms of systematic differentiation which releases the rationality potential of communicative action. This process, Habermas suggests, undermines the normative steering of social interaction. Here interaction threatens to become coordinated in two ways; by means of communication or by means of the steering media of power and money. This results in an uncoupling of system and lifeworld which entails the differentiation of state and economy which is characteristic of modernity.

4.3.3 Colonization of the Lifeworld

A significant element of Habermas' theory is his thesis of "colonization of the lifeworld", which provides an analysis of several pathologies and paradoxes of modernity. The term colonization of the lifeworld demonstrates "...how areas of social life can be subjected to new forms of domination and control under the rubrics of an instrumental rather than a communicative rationality."³³⁶ Habermas identifies two interconnected processes of rationalization, that of the system and the lifeworld. Initially, the rationalization of the system is dependent upon the lifeworld. However, at the stage of the welfare state, system rationalization penetrates into the lifeworld in a destructive fashion; this is what Habermas calls colonization. "When stripped of their ideological veils, the imperatives of autonomous subsystems make their way into the lifeworld from the outside—like colonial masters coming into tribal society—and force a process of assimilation upon it."³³⁷ Habermas argues that colonization of the lifeworld is "...not necessarily inherent in historical development...but...a pathological development against which resistance is possible."³³⁸

Habermas identifies several different ways in which colonization of the lifeworld

³³⁶Rasmussen (1988), *Supra.* footnote 317, at p. 159.

³³⁷Habermas (1987), *Supra.* footnote 12, at p. 355.

³³⁸Brand (1990), *Supra.* footnote 307, at p. 53.

occurs. However, for the purposes of this thesis the summary will be limited to the means of colonization that are relevant to my discussion of sexual harassment: reification, juridification and the private and public sphere.

Reification is "...the process in which the rational foundations of communicative action in the lifeworld are, ultimately, undermined by the functional conditions of system reproduction in modern societies."³³⁹ The lifeworld is invaded by economy and state via the media of money and power destroying "...communicative processes in areas where these remain necessary, namely those of...[symbolic reproduction]."³⁴⁰ Habermas posits that new social movements emerge at the conjuncture of the system and lifeworld and contest reification.

4.3.4 Juridification

Juridification is the increase in formal, positive written law which includes both the expansion of law and the increase in density of law. Habermas distinguishes four waves of juridification in the evolution of modernity. The first is the rise of the bourgeois state. In this period, the law guarantees liberty, equity before the law, and property of private persons. The law authorizes a monopoly on coercive force to the sovereign state, as well as, sole legal authority. It is in this period that the system and the lifeworld become distinguished and differentiated. The second thrust is the bourgeois constitutional state. Here administrative authority is constitutionally regulated; private individual citizens are given civil rights; the rule of law is established; and the constitution provides guarantees of life, liberty and property of private persons. It is in the bourgeois constitutional state that Habermas claims that an acknowledgement of the entitlement to protect the citizen's modern lifeworld is made. The third thrust is the democratic constitutional state. Here,

³³⁹ *Ibid.* at pp. 54.

³⁴⁰ *Ibid.* at pp. 54.

the constitutional state is democratized. Citizens now have the right to political participation. Significantly, the law is bound to parliament. The last thrust is that of the welfare state. Although each of the thrusts of juridification is seen as "freedom guaranteeing", it is in the fourth thrust that "freedom guaranteeing" becomes ambiguous. Habermas suggests that the negative aspects of juridification in this stage go beyond simple side effects, but are in part the result of the juridification itself. He states, "[i]t is now the very means of guaranteeing freedom that endangers the freedom of the beneficiaries."³⁴¹ "...[T]he new subsystems of economy and state 'extracted what they need' from the 'unspecific reservoir' of the lifeworld. This sets the pattern for subsequent modes of juridification. Even though new freedoms are granted,...juridification erodes lifeworld structures to which it assumes a parasitic position."³⁴² Previously, law provided rights and protection for citizens. However now law not only provides rights and protection but also provides for bureaucratic and administrative concerns. In the past where law provided a right, it now provides a right and the rules and regulations limiting and administering that right. It is in this discussion that Habermas identifies the paradox of juridification. On the one hand, these rights in the form of benefits provide positive assistance, on the other hand, they promote disintegration of life relations.

4.3.5 Law as a Medium/Law as an Institution

Related to juridification is Habermas' discussion of law. He distinguishes two types of law, which mirror his distinction between lifeworld and system;³⁴³ law as a medium (system), and law as an institution (lifeworld). Law as an institution is defined as "...legal norms that can not be sufficiently legitimized through a positivistic

³⁴¹Habermas (1987), *Supra.* footnote 12, at p. 362.

³⁴²Rasmussen (1988), *Supra.* footnote 317, at p. 159.

³⁴³Murphy (1989), *Supra.* footnote 316, at p. 138.

reference to procedure."³⁴⁴ He suggests that, "[a]s soon as the validity of these norms is questioned in everyday practice the reference to their legality no longer suffices,"³⁴⁵ and they require substantive justification based on the fact that "...they belong to the legitimate orders of the lifeworld."³⁴⁶ Law as an institution "...belongs to the societal component of the lifeworld."³⁴⁷ The function of law as an institution is that of symbolic reproduction rather than instrumental/goal oriented. These laws would include both criminal and constitutional law. Law as a medium is law which is combined with the media of power and money, and operates as a steering media itself. Habermas suggests that law as medium does not require justification, because its substance only requires legitimation through "formally correct procedures."³⁴⁸ This would include commercial, business and administrative law.

Habermas' exploration of how the law operates in relation to both the system and lifeworld identifies how law is involved in the colonization of the lifeworld. He posits, "...legal institutions that guarantee social compensation become effective only through social welfare law used as a medium."³⁴⁹ By using law as a medium to regulate behavior, communicative action is undermined, weakened and in some cases destroyed. By reducing citizens to clients and consumers, law as a medium subverts their autonomy in ordering their own lifeworld. Law as a medium which is associated with the system (i.e. operating through a form of purposive instrumental rationality) penetrates into or colonizes the lifeworld, this involves a colonization (and disturbance) of the intersubjective sphere of rationality and communication by a form of action based on purposive-instrumental rationality.

³⁴⁴*Ibid.* at pp. 365.

³⁴⁵*Ibid.* at pp. 365.

³⁴⁶*Ibid.* at pp. 365.

³⁴⁷*Ibid.* at pp. 365.

³⁴⁸*Ibid.* at pp. 365.

³⁴⁹*Ibid.* at pp. 367.

In order to tap the emancipatory potential of modernity, Habermas calls for de-juridification to reopen space for communicatively structured dispute resolutions. It is his hint of law as 'institution' as an 'external constitution' which is of primary importance. Law as 'institution' for Habermas is a "...societal component of the lifeworld;...embedded in a broader political, cultural and social context;...in a continuum with moral norms; and are superimposed on communicatively structured areas of action. They give to informally constituted domains of action a binding form backed by state sanction."³⁵⁰ Law as 'institution' is the only legal regulation which is compatible with an anonymous institutional life of the lifeworld.³⁵¹

Habermas posits that "...the juridification of communicatively structured areas of action should not go beyond the enforcement of principles of the rule of law, beyond the legal institutionalization of the external constitution..."³⁵² which would be the "...procedures for settling conflicts that are appropriate to the structures of action oriented by mutual understanding-discursive processes of will formation and consensus-oriented procedures of negotiation and decision making."³⁵³ As an 'institution', law's function is to secure and formalize the normative achievements of the new world. It would appear that law as 'institution' is freedom-securing, empowering, involves a regulative function which entails procuring a role for civil society in law, and would accomplish this without increasing the penetration of administrations.

For Habermas, the form of law as 'institution' facilitates communicative processes by "...guaranteeing the 'external constitution' of the communicatively structured social sphere."³⁵⁴ In Habermas' analysis:

³⁵⁰Habermas (1987), *Supra.* footnote 12, at p. 366.

³⁵¹Cohen, J. & Arato, A., *Civil Society and Political Theory*, Cambridge, Massachusetts: MIT Press, 1992, at p. 462

³⁵²Habermas (1987), *Supra.* footnote 12, at p. 370.

³⁵³*Ibid.* at pp. 371.

³⁵⁴Teubner, G. (ed) *Dilemmas of Law in the Welfare State*, New York: DeGruyter, 1986, at p. 8.

As medium, law...is an independent socio-technological decisional process which replaces the communicative structures that exist within the lifeworld of social subsystems, and so allocates goods according to its own criteria....[whereas], [a]s an 'institution' law functions merely as an 'external constitution' for the spheres of socialization, social intergration and cultural reproduction.³⁵⁵

Law as an 'institution' facilitates rather than endangers the self regulatory processes of communication and learning.³⁵⁶ Only when law is restricted to an "...external constitution' of the 'lifeworld' spheres, can it serve as an 'institution' facilitating rather than disintegrating 'consensus oriented procedures of conflict regulation'."³⁵⁷ Only as law as 'institution'/'external constitution' can it defend against bureaucratic processes. "An 'external constitution' thus facilitates internal reflection...balancing environmental demands of performance...against...proper social functions."³⁵⁸

4.3.6 Public Sphere/Private Sphere

Habermas postulates that in modernity there are two distinct public and private separations: in the system, the private economy and the public state; and in the lifeworld, the private sphere and the public sphere. These public-private separations are coordinated with each other. The process of differentiation which separated the system from the lifeworld distinguished the lifeworld with the institutional orders of the private sphere and the public sphere. However, the colonization of the lifeworld by the system profoundly effected these spheres as they are susceptible to the influences of the interchange relations they have with the subsystems (economy and state). "The economic system exchanges wages against labour power and goods and services against consumer demands. The...[bureaucratic, administrative] state exchanges organizational achievements against taxes and political decisions against

³⁵⁵Teubner, G., "Substantive and Reflexive Elements of Modern Law,," *Law and Society Review* (1983) 17, at p. 270.

³⁵⁶*Ibid.* at pp. 270.

³⁵⁷Teubner (1986), *Supra.* footnote 354, at p. 314.

³⁵⁸*Ibid.* at pp. 315.

mass loyalty."³⁵⁹ These exchanges demonstrate monetarization of economy and the bureaucratization of the state. The private sphere of the lifeworld is linked to the economy via the medium of money, channeled through the roles of worker and consumer. The public sphere is linked to the state via the medium of power, channeled through the roles of citizen and client. Colonization results as the system, through monetarization of relations and bureaucratization of services, distorts lifeworld roles. In the private sphere the role of consumer is inflated—persons become reduced to consumers. In the public sphere, the role of citizen becomes impoverished and the role of client increases—citizens become reduced to clients.

Habermas proposes a revitalization of the public sphere which is realized in new social movements, who engage in a politics of resistance and emancipation. He contends that the revitalization of the public sphere would encompass the normative obligation of social discussion and debate.³⁶⁰ Habermas argues that the key feature of the public sphere is its emancipatory potential located in the intersubjectivity of the communicative process. The revitalization of the public sphere would result in the formation of a public body for the purpose of communicative interaction whereby participation would be unrestricted.

4.4 Communicative Action in the Context of Sexual Harassment

Habermas' *Theory of Communicative Action* is pivotal to the theoretical framework of this thesis. It provides a way in which to analyze sexual harassment that addresses many of the concerns respecting present sexual harassment law and policy. His colonization thesis identifies the pathologies and paradoxes of system domination over lifeworld relations which is in my opinion, demonstrative of what is occurring with the development of sexual harassment law and policy that were raised earlier.

³⁵⁹Brand (1990), *Supra*. footnote 307, at p. 58.

³⁶⁰Goodnight (1992). *Supra*. footnote 328, at p. 252.

Habermas' theory of communicative action is particularly appealing as he produces a social evolutionary theory of modernity which identifies, acknowledges and provides the possibilities to overcome the pathologies and paradoxes of modernity. Habermas' social evolutionary, dualistic model of modernity offers fruitful insight for this thesis, particularly due to the concepts of juridification, colonization and his theory's emancipatory potential.

Habermas' analysis of law allows one to articulate more clearly the problems with present sexual harassment legal development. Where law attempts to regulate and intervene in an area over which there is a significant contest of norm, then this is likely to result in a pathological response.

The argument in this chapter is that Habermas' analysis of the construction of lifeworld relations (which includes the social, interpersonal relationships) as being communicatively structured, involving the participation of all potentially affected and involving discourse when norms are in conflict, provides an appropriate framework for situating the discussion of sexual harassment. The incidence of sexual harassment, although occurring in the workplace, is both a system and lifeworld event (see Figure 1). While it is a system event in that it is work related, it is also an event that falls within the lifeworld in that it is socially related. Since it falls within this domain of the lifeworld, sexual harassment should be handled by communicative action rather than purposive-instrumental action.

Sexual harassment affects interpersonal relations that belong in the domain of the lifeworld. Habermas locates the workplace in the subsystem economy, but there is an interaction that occurs at the workplace which is social in nature and therefore, belongs in the lifeworld. Many of our friends, acquaintances, and partners are met and maintained in the work environment. These social relations should be controlled

Figure 1

by lifeworld logic/media-communicative rationality.

It is proposed that the rational foundation of communicative action in the lifeworld, in relation to sexual harassment, is being undermined by state penetration via the power of law. Habermas' concept of juridification identifies the manner in which state penetration via the power of law as a medium destroys the communicative process. Although juridification creates sets of rights and benefits, it also creates new dependencies and destroys solidarities, capacities for self-help, and communicative resolutions. For example, welfare state policy which provides monetary benefits in the form of legal entitlements certainly represents a degree of freedom; unfortunately, the juridification of these legal entitlements extracts a substantial cost to both the individual and the lifeworld. Juridification in these instances restructures interventions into the lifeworld through bureaucratic implementation and monetary redemption. For the individual, juridification's costs and pathologies have been in

the bureaucratic implementation, monetary compensation and the therapeutic assistance, themselves. The paradox here is that the more the welfare state attempts to assist the individual, the further it exacerbates the problems for the individual. The contradiction of the welfare state continues to be reproduced just on a higher level. With regard to the lifeworld, juridification of legal entitlement inhibits social solidarity and the community's readiness to provide subsidiary assistance. Legal measures supplant communicative action and violate communicative structures rendering communities in the lifeworld powerless to find solutions. The if-then structure of legal entitlement does not allow for an appropriate or preventive reaction to the causes from either the individual or the lifeworld.

Habermas proposes that juridification has a double character. On the one hand, it provides law (both as a medium and as an institution), facilitates interaction between the system and the lifeworld and protects the lifeworld from state penetration. However, on the other hand, the atomization, control, normalization, bureaucratic, disciplining and surveillance characteristics of law as a medium penetrate the lifeworld with negative consequences and at a cost of further colonization.

In the context of sexual harassment, in choosing the law as medium for dispute resolution other methods are negated. Formal law (as a medium) takes an event that profoundly affects an individual and converts that event into a legal problem that is then "resolved" by an adversarial process. The event loses its personal context and becomes translated into a set of legal components. The person sexually harassed becomes in the formal court process *only* a victim, and they no longer have control over subsequent events. The adversarial nature of the legal system produces an us/them dichotomy.³⁶¹ As sexual harassment becomes defined as an exclusively *legal* issue (law

³⁶¹I acknowledge that upon occasion one who is only a victim in the court process can find empowerment and can be transformed from a victim to an articulate advocate.

as medium), any potential for public discussion on a contested issue is eliminated. The state legal system decides via its own rationality and functional requirements as to what process and remedy would be appropriate in relation to sexual harassment, undermining the communicative process. Significant in Habermas' analysis of law in relation to the lifeworld-system is that law functions differently in each of these spheres. It is in the lifeworld that law's potential to regulate social issues such as sexual harassment is highlighted. De-juridifying sexual harassment could return the issue to debate—to be decided by those who are most affected—employees.

As well, Habermas' hint of law as 'institution' set up as an 'external constitution' promises another productive way of resolving the legal crisis in the welfare state. He provides the best way of thinking about democratizing and creating the institutional groundwork for resolving issues surrounding law. Law as 'institution'/'external constitution' could furnish the basis for lifeworld inspired initiatives with regard to law, due to its ability, when coupled with discourse ethics, to produce a bridge between the lifeworld and the state. Law as an institution offers a method of circumnavigating some of the paradoxical problems of the welfare state. It locates law in the lifeworld but does not leave the lifeworld open to all the problems of power and inequality. Law as 'institution' set up as an 'external constitution' provides not only the boundaries between the lifeworld and the system but a framework within the lifeworld which enables citizens to work within the legal structure to resolve problems. Law as an institution/external constitution would be especially relevant for Condition of Work³⁶² type of sexual harassment. The idea is not to abolish law altogether, nor to abolish the concept of Condition of Work, but rather that the law when applied to Condition of Work be operationalized and meet different criteria.

³⁶²Hostile Environment, Poison Environment.

The diminished role of the public sphere speaks to the issue of sexual harassment, in that the institutional core of the public sphere is the communicative network of a public made up of rationally debating citizens,³⁶³ and in the context of sexual harassment this has disappeared, leaving an area of public concern decided by the state without discursive input from the public. The role of the discursive citizen has been replaced with that of the client. The state in an attempt to compensate for inequalities has transformed the public sphere into a group of clients who must meet bureaucratic conditions to secure benefits. In Canada, the Canadian Human Rights Commission, Provincial Human Rights Commissions and Tribunals and in the U.S., the EEOC, make regulations regarding who qualifies for injury (as an injured victim/claimant) regarding sexual harassment. Public debate on sexual harassment has been molded by law, the state provides avenues for compensation for those injured provided they meet the bureaucratic, administrative criteria. In order to show sexual harassment, one must be able to establish proof that would satisfy legal criteria. Revitalizing the public sphere, in relation to sexual harassment, would provide the public body necessary to engage in debate over contested norms. It would maintain private space that would not be beyond public debate. A revitalized public sphere provides the agency necessary for transformation to occur: a private space where people can decide how their interpersonal social lives will be structured.

³⁶³Goodnight (1992), *Supra*. footnote 328, at p. 244.

Chapter 5

Discourse Ethics

5.1 Contextualizing the Issue

The previous chapter discussed the problem of juridification, colonization of the lifeworld and the need for a revitalized public sphere in relation to sexual harassment. This chapter will introduce a different focus of critique—the monological character of present sexual harassment law and policy.

It has been argued that the process of law reform regarding sexual harassment has been by and large monological in the sense of MacKinnon's insistence on the inequality approach which relies on a monological conception of women's experience and participation.³⁶⁴ Sexual harassment undoubtedly is a serious social problem. However, the process of law reform and the outcomes of the present legal system's mode of dealing with sexual harassment are highly problematic. This is demonstrated by the degree of normative conflict regarding Condition of Work type of sexual harassment. It is at this end of the continuum of deemed inappropriate behavior that public consensus on whether the behavior amounts to sexual harassment breaks down. In response, this chapter will suggest another method of defining and responding to sexual harassment—discourse,³⁶⁵ which is based on Habermas' discourse

³⁶⁴See Chapter 2, subsection 2.1.5; Chapter 3, section 3.3.

³⁶⁵The term discourse is used in the same context as Habermas. It is characterized by a

ethics. It is postulated that discourse would provide a more participatory, egalitarian method of determining law and policy on contested norms.

Habermas' discourse ethics is one strategy which can potentially alleviate some of the pathologies³⁶⁶ produced by present sexual harassment laws. Discourse ethics' appeal resides in its participatory, interactive, empowering, equalizing and autonomous components. Discourse would allow those most affected to participate in deciding for themselves on the structure and/or validity of the definition and scope or limits of sexual harassment law. It offers a participatory process to decide on issues of justice such as sexual harassment.

The enterprise of developing a model of discourse along the lines of Habermas' discourse ethics leads one to explore its fundamental tenets and assumptions. This necessitates posing certain questions, such as: Is Habermas' conception of discourse ethics an appropriate model, however idealized, for collective decision making on issues of justice?; and Can Habermas' philosophical ethics tell us anything about how to operationalize discourse in the real world, and if so how?. In order to answer these questions and to understand arguments concerning the development of a model of discourse, an examination must first be made of Habermas' discourse ethics in order to identify what is meant by this concept. This chapter summarizes discourse ethics, identifying the key aspects which make discourse so appealing, and as well, examining some of its deficiencies.

5.2 Situating Discourse Ethics

Discourse ethics is one small part of the wealth of work Jurgen Habermas has produced. His work is situated within the tradition of critical theory.³⁶⁷ As a leading domination-free communication and unconstrained argumentation.

³⁶⁶Which were discussed in Chapter 4.

³⁶⁷"Critical theory refers to a series of ideas which emerged in Germany in the 1920's and 1930's.

social scientist Habermas' most significant contribution to date has been his Theory of Communicative Action³⁶⁸ and it is this theory that provides the basis of his formulation of discourse ethics. His critical analysis of the pathological aspects which arise in modernity provides the springboard for Habermas' consideration of discourse ethics. Discourse ethics provides a mode or process for addressing situations of normative conflict in the lifeworld. It is consistent with communicative rationality. It provides a means for countering the pathologies of the colonization of the lifeworld and juridification.³⁶⁹ Discourse ethics is part of the emancipatory potential of Habermas' Theory of Communicative Action—a way of restoring the communicative integrity and rationality to the lifeworld. Finally, discourse ethics provides an outline of a theory of justice which is participatory rather than monological and hence offers an improvement over MacKinnon's theory of sexual harassment.

5.3 A Summary of Habermas' Discourse Ethics

What is discourse ethics? It is in some respects both complex and simple. On the one hand, discourse ethics could be said to include Habermas' philosophical discussions regarding the grounding of discourse ethics; the philosophical, social, and critical reasoning justifying discourse ethics; the definition and discussion of the concepts of morality, law, rationality, communication and justice; and the principles, rules and conditions discourse must meet. In this respect the concept of discourse ethics is extremely complex and often very difficult to understand. On the other hand, discourse ethics could also be said to be quite simply the basic principles in order for discourse to occur. For the purpose of this thesis, what is of particular

The critical theorists were concerned, among other things, to interpret the course of twentieth century history....While rejecting Marxism-Leninism, the critical theorist nevertheless found Marx's thought a powerful tool for the analysis of historical events." (Thompson, J.B. and Held, D. (ed), *Habermas: Critical Debates*, London: MacMillan Press Ltd, 1982 at p. 2).

³⁶⁸Habermas (1984), *Supra*. footnote 305.

³⁶⁹These themes were discussed in Chapter 4

appeal is the procedural component of discourse ethics, since ultimately the interest is in developing a model of discourse.

5.3.1 Features

Discourse ethics is a moral theory of argumentation, and as such it is primarily concerned with questions of justice. Habermas undertakes to demonstrate that discourse ethics "...is grounded in the 'fundamental norms of rational speech' ".³⁷⁰ His theory of discourse ethics includes rules of process and unconstrained dialogue which determine the formal properties of argumentation he calls "discourses". Often his ethic is seen as a proceduralist ethic in the Kantian tradition³⁷¹ in that discourse ethics attempts to show that normative validity requiring rational consensus³⁷² can only be achieved procedurally--by defining the principles, rules, strategies and modes of argumentation. Thus discourse ethics is seen as a procedure of moral argumentation. Habermas' discourse ethics is a reconstruction of the implicit rules which apply to rational dialogue. Discourse ethics articulates the rules and communicative presuppositions which allow for participants in practical discourse to come to a rational consensus on the validity of a norm. Discourses in the context of communicative action are specialized modes of argumentation. "They derive their particular normative force from the fact that individuals are willing to settle a controversial and conflictory matter without recourse to force, violence, false compromise or silent acquiescence."³⁷³ A discourse theory of ethics, according to Habermas, demands "...that we go beyond theoretical speculations concerning justice and enter into real processes of argumentation under sufficiently propitious conditions."³⁷⁴

³⁷⁰ Benhabib (1986), *Supra.* footnote 330, at p. 287.

³⁷¹ Immanuel Kant, *Philosophical Ethics*.

³⁷² The use of rationality is an essential component of Habermas' theory. This term will be discussed later in this section.

³⁷³ Benhabib (1986), *Supra.* footnote 330, at p. 319.

³⁷⁴ Habermas, J., *Justification and Application: Remarks on Discourse Ethics*, trans. Ciaran

Habermas identifies argumentation as "...speech that 'thematizes' contested validity claims, explicitly supporting or criticizing them."³⁷⁵ Language can solicit four kinds of validity claims which under the ideal speech situation (ISS) can be justified through argumentation. These claims include: efficiency; truth (fact); truthfulness, sincerity, authenticity; and rightness. They relate to the three dimensions; cognitive, expressive and moral. As well, validity claims correspond to various types of action and speech acts: teleological-strategic/instrumental; conversation-assertive/constative; dramaturgical-emotional/aesthetic; and normatively regulated-regulative/moral.³⁷⁶ Discourse also complements these claims and actions in a corresponding fashion, including: empirical; theoretical; aesthetic/therapeutic; and practical. Action is oriented in one of two ways: towards success; or to reaching understanding. Teleological action comprises speech acts which are strategic/instrumental, it is action orient to results/success, the validity claim is efficiency, and the discourse is empirical. This action is rarely subjected to argumentation. Whereas, conversation, dramaturgical, and normatively regulated action, are actions oriented towards mutual understanding and are the subject of argumentation (see Table 2). It is the normatively regulated action which is the focus of discourse ethics.

5.3.2 Practical Discourse

Practical discourse is the process of reaching an understanding by discursive means, and thereby answering normative questions. It is a procedure of argumentation which "...insures that all concerned in principle take part, freely and equally,

Cronin, Cambridge, Massachusetts: MIT Press, 1993, at p. XVIII.

³⁷⁵Alexander, J., "Habermas and Critical Theory: Beyond the Marxian Dilemma?" in Honneth, A. and Joas, H., *Communicative Action: Essays on Jurgen Habermas's The Theory of Communicative Action*, translate by Jeremy Gaines and Doris Jones, Cambridge, England: Polity Press, 1991, at p. 54.

³⁷⁶Normatively regulated validity claim... refers to claims of rightness in the social world. They fall within the moral dimension and are oriented to mutual understanding. See Table 2.

Table 2
Types of Action

Features	Teleological: Strategic/Instrumental	Conversation	Dramaturgical	Normatively Regulated
Speech Acts	strategic (subject;social) instrumental (object;non-social)	assertive/ constative	emotional/ aesthetic	regulative moral
Orientation	result/success	mutual understanding	mutual understanding	mutual understanding
Dimension	cognitive	cognitive	expressive	moral
Validity Claim	efficiency	truth (fact)	truthfulness, sincerity, authenticity	rightness
World Relation	objective	objective	subjective	social
Discourse	empirical	theoretical	aesthetic/ therapeutic	practical
Knowledge	technologies/ strategies	theories	art	legal/ moral

in a cooperative search for truth, where nothing coerces anyone except the force of the better argument.”³⁷⁷ Habermas sees practical discourse as an “...exacting form of argumentative decision making”.³⁷⁸ He suggests that norms must be assessed by way of practical discourse. Norms and the validity of normative institutional arrangements rests on the engagement of practical discourse. Practical discourse’s objective is a “rationally motivated consensus” regarding norms. It “...presupposes and draws upon the normative structures of social interaction....”³⁷⁹ Practical discourse can be seen as a communicative process whereby participants engage in “ideal role-taking”.³⁸⁰ It provides a process where participants can attempt to see the other

³⁷⁷Habermas, J., *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen, Cambridge, Massachusetts: MIT Press, 1990, at p. 198.

³⁷⁸*Ibid.* at pp. 198.

³⁷⁹*Ibid.* at pp. XI.

³⁸⁰A term borrowed from G.H. Mead’s communication theory, ideal role taking participant required to put oneself in the position of all affected.

participants' argument. Habermas claims that the interests of individuals are protected without destroying the social bonds which unite the collective.

Discourse denotes a

...break with the normal context of interaction. Ideally it requires a 'virtualization of the constraints of action'—a putting out of play of all motives except that of a willingness to come to a rationally grounded agreement—and a 'virtualization of validity claims'—a willingness to suspend judgement as to the existence of certain states of affairs (they may or may not be the case) or as to the rightness of certain norms (they may or may not be justified).... Discourse is that 'peculiarly unreal' form of communication in which the participants subject themselves to the 'unforced force of the better argument' with the aim of coming to an agreement about the validity or invalidity of problematic claims.... The agreement is regarded as valid not merely 'for us' (the actual participants) but as 'objectively' valid, valid for all rational subjects (as potential participants). In this sense discourse is... 'the condition for the unconditioned'.³⁸¹

Discourse in this sense is idealized.

Habermas defines discourse as an event "...where all are equal to decide upon a common course of action in a free and unconstrained debate." It is "... 'free from domination'...and 'unconstrained dialogue'...."³⁸² Discourse is oriented toward reaching mutual understanding, based on the unforced force of the better argument, where "...the meaning of the problematic validity claim conceptually forces participants to suppose that a rationally motivated agreement could in principle be achieved, whereby the phrase 'in principle' expresses the idealizing proviso: if only the argument could be conducted openly enough and continued long enough."³⁸³ In order to restore the disrupted consensus, discourse ethics "...calls for a transition to a higher level of discourse where factual and normative claims are subjected to critical scrutiny in a process of argumentation freed from the imperatives of action."³⁸⁴

³⁸¹ McCarthy, T., *The Critical Theory of Jürgen Habermas*, Cambridge MA: MIT Press, 1978, at pp. 291-2.

³⁸² Benhabib (1986), *Supra*. footnote 330, at pp. 275, 282.

³⁸³ Habermas (1984), *Supra*. footnote 305, at p. 42.

³⁸⁴ Habermas (1993), *Supra*. footnote 374, at p. xv.

5.3.3 Principles: (U) and (D)

Habermas' discourse ethics is built around two essential core principles. The first is a reconstruction of the Kantian categorical imperative³⁸⁵ the principle of universalization (U). Habermas shifts the emphasis from producing a general law which all agree upon, to producing a universal norm. Quite simply, (U) is:

*All affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone's interests (and these consequences are preferred to those of known alternative possibilities for regulation).*³⁸⁶

This principle is seen as the essential avenue to bridge the gap between different individuals' and groups' particular wills ensuring that those norms accepted express the general will. It is the ability of practical discourse to express the general will that creates impartiality. Impartiality is attained through (U) in that it requires each participant to adopt the perspectives of all others, thereby balancing the interests of all (ideal role taking). (U) is meant to compel a "universal exchange of roles". Habermas conceives this principle to exclude any norm as invalid if it could not meet with the agreement of all who are potentially affected by it. He claims that moral norms must be an expression of universal laws. Habermas states:

...a norm cannot be considered the expression of interest of all who might be affected simply because it seems acceptable to some of them under the condition that it be applied in a nondiscriminatory fashion....[V]alid norms must deserve recognition by all concerned. It is not sufficient, therefore, for one person to test whether he can will the adoption of a contested norm after considering the consequences and side-effects that would occur if all persons followed that norm or whether every other person in an identical position could will the adoption of such a norm. In both cases the process of judging is relative to the vantage point and perspective of some and not all concerned.³⁸⁷

³⁸⁵ "The categorical imperative can be understood as a principle that requires the universalizability of *modes of action* and *maxims*, or of the *interests* furthered by them (that is those embodied in the norms of action)." (Habermas, J., *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen, Cambridge, Massachusetts: MIT Press, 1990, at p. 63).

³⁸⁶ Habermas (1990), *Supra*. footnote 385, at p. 65.

³⁸⁷ *Ibid.* at pp. 65.

Habermas submits that (U) as a rule of argumentation ensures that agreement in the equal interest of everyone is possible through practical discourse. (U) is formulated such that a monological application is impossible. It calls for an argumentation from *all* those affected and necessitates a plurality of participants. The only way in which norms can be seen to reflect the general will is if all those affected through a practical discourse validate the norm. This view of (U) contains a cooperative notion of argumentation. The principle of universalization functions as a general rule of argumentation which enables participants in discourse to generate rational consensus when conflict arises. Norms cannot be deduced through (U), it can only act as a test of the validity of the norm. *Actual* discourse is essential, norms cannot be determined purposively or instrumentally.

The second principle of Habermas' discourse ethics is the basic principle of discourse ethics (D) itself. The principle of discourse ethics (D) states:

Only those norms can claim to be valid that meet (or could meet) with approval of all affected in their capacity as participants in a practical discourse.³⁸⁸

This is distinct from (U) in that (D) refers to the normative validity and the conditions it must meet whereas (U) refers to the universal acceptance of (D). (D) presupposes that we are able to justify the choice of a norm.³⁸⁹ Habermas claims discourse ethics stands or falls on two assumptions: (1) "...normative claims to validity have cognitive meaning and can be treated *like* claims to truth, and...[(2)]...the justification of norms and commands requires that a real discourse be carried out and thus cannot occur in a strictly monological form."³⁹⁰ There are two dimensions to the basic framework of discourse ethics: one specifies the conditions of coming to

³⁸⁸*Ibid.* at pp. 66.

³⁸⁹I take this to mean that we can justify the choice of challenging a norm, i.e. that we can show that there is not a consensus regarding this norm.

³⁹⁰Habermas (1990), *Supra.* footnote 385, at p. 68.

a rationally motivated agreement and the second specifies the formal content of the agreement. The principle of discourse ethics is not in and of itself a moral principle, but rather it is the central principle for a procedure of moral argumentation—discourse ethics.

In order to fully understand discourse ethics, a brief discussion of Habermas' philosophical justification of (U) is necessary. Habermas grounds the principle of universalization in "transcendental-pragmatics" and its key element, the "performative contradiction". Thus, to understand his argument one must first grasp the notion of a performative contradiction. Put simply, a performative contradiction occurs when the act of making the statement contradicts the assertion the statement makes. For example, the statement, "I do not exist." is a performative contradiction. Habermas' transcendental-pragmatic argument then goes as follows. To demonstrate that (U) which serves as a rule of argumentation, "...is implied by the presuppositions of argument in general,"³⁹¹ Habermas first identifies three levels of presuppositions of argumentation³⁹² and attempts to prove that the principle of universalization is implied by these "...rules whose validity anybody who ventures into argumentation altogether must presuppose."³⁹³ An argument against the principle of universalization positions one in a 'performative contradiction'—"...a contradiction between what one asserts and the fact that one asserts altogether."³⁹⁴

There is a wealth of literature criticizing Habermas' principle of universalization (U), consensus and the priority of right over good.³⁹⁵ Recognition is given to the

³⁹¹ *Ibid.* at pp. 86.

³⁹² These presuppositions will be discussed in detail in the sequel within the discussion of the ideal speech situation.

³⁹³ Andersen, H., "Morality in Three Social Theories: Parsons, Analytical Marxism and Habermas," *Acta Sociologica*, Vol. 33, No. 4, 1990, at p. 334.

³⁹⁴ *Ibid.* at pp. 334.

³⁹⁵ see Rehg, W., *Insight and Solidarity, The Discourse Ethics of Jurgen Habermas*, Berkeley, CA: University of California Press, 1994; Thompson, J.B. and Held, D. (ed), *Habermas: Critical Debates*,

importance of these discussions in a philosophical moral context, however the focus of this thesis is not to critique these arguments but rather to explore the possibilities discourse ethics offers.

Since it is the justification of (U) that has garnered the lions share of criticism of discourse ethics,³⁹⁶ it is necessary to make a few brief comments.³⁹⁷ It would seem that Habermas' principle of universalizability is somewhat redundant. The principle of universalizability "...adds little but consequentialist confusion to the basic premise of discourse ethics (D)."³⁹⁸ (D) together with the presuppositions of argumentation appear to be sufficient to act as a universalizability test. In justifying (U) Habermas contains his conclusion in the premise. The justification does not prove existence.³⁹⁹ Habermas claims that discourse ethics meets with universalizability. However, nothing in his justification of (U) demonstrates that discourse ethics is not the prejudices of an adult, white, well-educated, Western male today.

5.3.4 Rules of Argumentation

In Habermas' early work on discourse ethics, he identified the ideal speech situa-

London, England: MacMillan Press Ltd, 1982; Rescher, N., *Pluralism: Against the Demand for Consensus*, Oxford, England: Clarendon Press, 1993; Benhabib, S., *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, New York, NY: Routledge, Chapman and Hal Inc., 1992.

³⁹⁶see Benhabib, S. *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory*, New York: Columbia University Press, 1986, which provides an excellent overview of criticisms of (U); as well Heller, A., "The Discourse Ethics of Habermas: Critique and Appraisal," *Thesis Eleven*, No. 10-11, 1984: 5-17; Wellmer, A., *Etnik und Dialog. Elemente des moralischen Urteils bei Kant und in der Diskursethik*, Frankfurt: Suhrkamp, 1986; and, Hoffe, O., "Kantian Skepticism Towards the Transcendental Ethics of Communication" in *The Communicative Ethics Controversy* by Seyla Benhabib and Fred Dallmyr, Cambridge Massachusetts: MIT Press, 1990; and Cohen, J. & Arato, A., *Civil Society and Political Theory*, Cambridge, MA: MIT Press, 1992.

³⁹⁷Although (U) may be one of the central concepts of discourse ethics, its criticism, I feel has little or no bearing on an ability to develop a model of discourse.

³⁹⁸Benhabib, S. and Dallmyr, F., *The Communicative Ethics Controversy*, Cambridge, MA: MIT Press, 1990, at p. 344.

³⁹⁹e.g. Premise: 1 is the largest number. Proof: Suppose x = the largest positive number. Then $x^2 \geq x$, since this holds for any number. But, since x is the largest number, x^2 cannot be larger than x . Thus $x^2 = x$. However, the only two numbers which satisfy this equation are 0 and 1. Since 1 is larger than 0, 1 must be the largest number. The fault in this proof is that a largest number does not exist.

tion as forming the presuppositional rules of argumentation necessary for a practical discourse. He has since abandoned this formulation.⁴⁰⁰ However, he insists that something of a like nature is still required. There is still a necessity to specify the formal properties of discursive argumentation in order that a rationally motivated consensus can be reached. In an effort to articulate the similar ideas surrounding the ideal speech situation, Habermas' analysis identifies three levels of presuppositions of argumentation.

In order to illustrate the presuppositions at each level, Habermas draws from Alexy's⁴⁰¹ catalogue of presuppositions of argumentation. The first level is the "logical-semantic" level. An example of what form these might take is:

- 1.1 No speaker may contradict himself;
- 1.2 Every speaker who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all other aspects;
- 1.3 Different speakers may not use the same expression with different meanings.⁴⁰²

At this level, Habermas submits, these rules have no ethical content.⁴⁰³ These rules reflect the idea of consistency. The second level of presupposition is the "procedural" level. An example of what form these might take is:

- 2.1 Every speaker may assert only what he really believes;
- 2.2 A person who disputes a presupposition or norm not under discussion must provide reason for wanting to do so.⁴⁰⁴

At this level Habermas states there is some ethical import. The presuppositions reflect on relations of mutual recognition. At this level of import is the concept of sincerity and accountability. The third level of presuppositions of argumentation is

⁴⁰⁰Habermas (1990), *Supra.* footnote 385, at p. 72; Cohen and Arato (1992), *Supra.* footnote 351, at p. 364.

⁴⁰¹Robert Alexy, *Theorie der juristischen Argumentation: Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt: Suhrkamp, 1978.

⁴⁰²Habermas (1990), *Supra.* footnote 385, at p. 87.

⁴⁰³I am not convinced—the process of 1.3, where one must use the same terms and meanings, requires argumentation to get to different words. Concepts may have different values attached, eg. religion, 'discourse', love etc..

⁴⁰⁴Habermas (1990), *Supra.* footnote 385, at p. 88.

the "process" level.⁴⁰⁵ An example of what form these might take is:

- 3.1 Every subject with the competence to speak and act is allowed to take part in a discourse;
- 3.2 a) Everyone is allowed to question any assertion whatever;
- b) Everyone is allowed to introduce any assertion whatever into the discourse;
- c) Everyone is allowed to express his attitudes, desires;
- 3.3 No speaker may be prevented by internal or external coercion from exercising his rights as laid down in 3.1 and 3.2.⁴⁰⁶

At this level, the presuppositional rules of argumentation have an ethical content.

The rules here are the central presuppositions of argumentation for discourse ethics.

It is at this level that the symmetry condition—rules of discourse, and the reciprocity condition—the set of relations in communication, are established. Reciprocity refers to the inclusion of participants in an egalitarian fashion. Symmetry refers to the speech acts and the rules to protect the egalitarian nature of the disclosure. Habermas argues that the pragmatic presuppositions at the process level are inescapable and essential assumptions. Participation as exceptionless is established in 3.1,⁴⁰⁷ whereas 3.2 guarantees the symmetry condition establishing the equality of chances to speak, and 3.3 secures the condition of reciprocity whereby participants' rights, specified under 3.2, are respected.

5.3.5 Normative Validity

An important aspect of Habermas' discourse ethics is normative validity. It is significant to understand what Habermas means by this term, as well as its overall importance to the concept of discourse ethics. In discourse ethics, there are two different types of claims: claims to truth and claims to rightness. A speaker can make claims to truth and claims to rightness, however norms are limited to claims of rightness. At both levels (speaker and norm) truth and rightness claims are essentially

⁴⁰⁵It is at this level that the rules of presupposition of argumentation reflect what Habermas previously termed the ideal speech situation. Habermas maintains that his earlier analysis is essentially correct, however it requires elaboration, revision and clarification.

⁴⁰⁶Habermas (1990), *Supra*. footnote 385, at p. 89.

⁴⁰⁷Competence is a precondition of 3.1, therefore exceptionless seems contradictory.

discursive matters according to Habermas. At the speaker level, speakers redeem their claims of rightness or claims of truth discursively through providing reason or reasoning. At the normative level, claims to validity are discursively redeemed in a practical discourse. Speech acts are intrinsically linked to normative validity claims. Habermas suggests that rightness claims can be treated in a like manner to truth claims. Like truth claims, rightness claims must be based on soundness of reason, thereby having cognitive significance. Speech act validity claims and normative validity claims are thus interconnected.

Habermas states that a social norm is considered valid only if it meets or could meet with the approval of all persons possibly affected whereby a rationally motivated consensus is the result. A norm is not assumed to be valid from the outset. It is only through a practical discourse which meets with the principle of discourse ethics (D) and all the presuppositions of argumentation that a norm can claim validity. Normative validity cannot be decided deductively nor by fact finding and therefore cannot be validated in a form of monological argument. Habermas suggests that valid norms claim to express an interest common to all and therefore he submits that they must be capable in *principle* of meeting with the rationally motivated consensus of all affected. The responsibility for testing normative validity is with all those affected. A norm cannot truly be considered legitimate if it lacks the consensus which stems from the practical discourse. Habermas argues that valid norms are norms that reflect attributes of fairness and impartiality which are attributes expressed in (U).

5.3.6 *Rationally Motivated Consensus*

Another key component within discourse ethics is the requirement of a *rationally motivated consensus*. According to Habermas, the aim of discourse is to produce a rationally motivated consensus where there are controversial/contested claims of

normative validity. The key aspect of rationally motivated consensus is the process of rationality. Habermas distinguishes between a rational consensus and an empirical consensus, asserting that only a rational consensus can legitimate a normative claim. A rationally motivated consensus puts to the test an empirical consensus. A rationally motivated consensus can only take place in an actual practical discourse, whereby all participants potentially affected cooperatively engage in discursive discourse. Only then can the validity of a norm be determined, since it is only under these conditions that all can, together, be convinced about something. A rationally motivated consensus is contingent on several aspects, some of which are: a discursive discourse, whereby the presuppositions of argumentation are carried through; the participants' inalienable right to say yes or no; and the participants' ability to overcome their egocentric viewpoint.

5.3.7 Other Key Components

There are several components of discourse ethics that merit further consideration and clarification.⁴⁰⁸ The first component of discourse ethics for discussion is the issue of justice versus the good life. Habermas makes a distinction between questions of justice and questions of good life, which is connected to his distinction between ethical and moral discourses.⁴⁰⁹ For Habermas, questions of justice or right claims are of the moral domain and it is questions of justice which must be the focus of discourse ethics. Claims of normative validity are claims around norms related

⁴⁰⁸Although not all of the following selection list is significant in the context of attempting to develop a model of discourse, its contents are important enough to a theory of discourse ethics to warrant further clarification.

⁴⁰⁹Normative validity claims for Habermas can only be questions of justice. Habermas suggests that discourse ethics can provide a general philosophical theory of justice that aims to "...reconstruct the moral point of view as the perspective from which competing normative claims can be fairly and impartially adjudicated." (Habermas, J., *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen, Cambridge, Massachusetts: MIT Press, 1990, at p. viii.)

to justice. Whereas, questions of good life belong in another domain the ethical. He does not preclude a discourse on evaluative questions of good life; instead, this discourse would occur in a different context and form.

The second component to discuss is tied to the normative validity and rationally motivated consensus—that is interests and needs.⁴¹⁰ Normative validity only occurs when it corresponds to the “general” interest. Basically this means the universalizability of interests. General interest provides the test for normative validity uncovering the non-generalizable interests. Put more simply, norms must express the general interest—that is they must satisfy (U). General interest can only be derived from the actual discourse of the participants whereby the needs interpretation and interest of everyone is heard. The requirement of actual discourse permits the ascertainment of whether there is a common interest that can form the basis of a norm. It is, in this respect, that interest is tied to a rationally motivated consensus. Consensus can only be achieved then, if participants are able to agree on the authentic interpretation of each one’s needs (interests) which requires a condition of reciprocity. “The critical conceptual space created by applying discursive rules is supposed to allow for dialogue in which participants have at least the *possibility* of reaching more truthful interpretations of their own particular needs...”,⁴¹¹ as well as those which are general, and thereby are capable of consensus.

The third component which requires clarification is the concept of compromise. Originally, Habermas rejected compromise as being sufficient to validate a norm. He saw compromise as a failure of discourse ethics. Habermas has since re-evaluated his

⁴¹⁰For discussions of needs interpretation, see Warnke, G., *Justice and Interpretation*, Cambridge, Massachusetts: Polity Press, 1992; and Fraser, N., *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory*, Minneapolis: University of Minnesota Press, 1989.

⁴¹¹White, S.K., *The Recent Work of Jurgen Habermas: Reason, Justice and Morality*, Cambridge, Massachusetts: Cambridge University Press, 1988, at p. 71.

position on compromise, conceding that upon occasion it is a necessary evil. Compromise is seen as being subordinate and a second best alternative. Compromise, Habermas grants, can be used when discourse fails to produce a common interest.⁴¹² When compromise is necessary, there is the requirement that it be considered fair, and this necessitates a practical discourse. The unprejudiced application of laws produces just decisions only if these laws have been tested through discursive justification. The basic guidelines for compromise also must themselves be discursively justified in a practical discourse. Only then can a compromise be considered legitimate. As with a rationally motivated consensus, morally justified procedures for compromise would require the agreement of everyone concerned, as free and equal participants in an actual practical discourse.

The fourth component attempts to address the gap between the principles of discourse ethics and real contexts of action. Habermas has posited a distinction between discourses of justification and discourses of application. In a discourse of justification, norm validity is established through a practical discourse based on a principle of universalizability.⁴¹³ Habermas advocates the necessity of another discourse—discourse of application. Discourse of application would require a new discursive procedure based on a new principle—a principle of appropriateness. He claims this would address “...the question of whether a norm should be observed in a particular situation...”⁴¹⁴ given all the pertinent features. “Only the principles of universalizability and appropriateness *together* do complete justice to the notion of impartiality underlying discourse ethics.”⁴¹⁵

The fifth component is institutionalization. Habermas acknowledges that in or-

⁴¹²Habermas (1990), *Supra*. footnote 385, at p. 72.

⁴¹³This is practical discourse as elaborated upon to this point.

⁴¹⁴Habermas (1993), *Supra*. footnote 374, at p. XXIV.

⁴¹⁵*Ibid.* at pp. XXIV.

der for discourse ethics to operate, this would necessitate a complementary theory of social institutions which would facilitate the possibility and variety of practical discourse at all the different levels.⁴¹⁶ Discourse ethics itself "...is not a theory of institutions although it has institutional implications."⁴¹⁷ "In a society organized along radical democratic lines,...[a] 'whole web of overlapping forms of communication' would have to be effectively institutionalized."⁴¹⁸ Discourse ethics itself cannot ensure the conditions necessary for practical discourse to occur. What is necessary according to Habermas is the crucial institutions to facilitate discursive decision making.

Since discourse ethics does not exist in any real sense in Canadian legal practice, it is necessary to explore methods of implementing discourse ethics ideas into institutions. Presently most institutions serve to exclude and silence, when what is required is inclusion and participation. Critics have suggested that inclusion and participation would paralyze institutional life. However, this raises the question of what is the essential function of an institution(s).⁴¹⁹ Habermas advances that "...institutional measures are needed to sufficiently neutralize empirical limitations and avoidable internal and external interference so that the idealized conditions always already presupposed by participants in argumentation can at least be adequately approximated."⁴²⁰

5.3.8 Participation

In discourse ethics participants are considered to be *all* those potentially affected

⁴¹⁶Habermas (1990), *Supra.* footnote 385, at p. 92.

⁴¹⁷Benhabib, S., "Afterword: Communicative Ethics and Current Controversies in Practical Philosophy," in Benhabib, S. and Dallmyr, F., *The Communicative Ethics Controversy*, Cambridge, MA: MIT Press, 1990, at p. 352.

⁴¹⁸McCarthy, T., *Ideals and Illusions: On Reconstruction and Deconstruction in Contemporary Critical Theory*, Cambridge, Massachusetts: MIT Press, 1991 at p. 92.

⁴¹⁹Benhabib and Dallmyr (1990), *Supra.* footnote 398, at p. 352.

⁴²⁰Habermas (1990), *Supra.* footnote 385, at p. 92.

by the norm. Practical discourse, for Habermas, includes not only those who choose to participate but all who are capable of speech and action. The emphasis of discourse ethics is in large part on participation. There appears to be two levels of analysis with regard to participation. On the one level, there are the criteria the participant is required to meet: ideal role taking, mutual and reciprocal recognition, impartiality, capacity (ability), willingness, having a mature autonomous ego, and achieving a rationally motivated consensus. On the other level are the properties of participation:⁴²¹ identity; needs interpretation; autonomy; and will-formation. Habermas identifies three basic stages of identity formation: natural identity, role identity and ego identity; corresponding to three levels of development: cognition, interaction and moral consciousness. It is in the ego identity at the level of moral consciousness where the collective becomes a concern for an individual and therefore it is in this stage that Habermas focuses his discourse ethics. "The rules of discourse require a reflective elucidation of the need interpretations underlying disputed norms. As each agent takes up this critical, reflective attitude toward the norms prepared by another agent, he/she forces the other to be self-critically reflective about his/her own needs and their universality. As needs are examined in the undistorted, dialogical light of discourse, agents have the possibility of reaching more truthful interpretations of their own particular needs as well as those which can be communicatively shared."⁴²² Autonomy derives from the notions of ego identity and needs interpretation and represents the moral aspects of the development of the individual-moral insight. The autonomy of the individual, for Habermas, is achieved and maintained only through the recognition by others in discourse. "In discourse ethics the idea of autonomy is intersubjective. It takes into account that

⁴²¹It seems, to me that, at this level these properties are attached to the concept of a participant.

⁴²²White (1988), *Supra.* footnote 411, at p. 78.

the free actualization of the personality of one individual depends on the actualization of freedom for all."⁴²³ "Collective will-formation refers to the stabilization of mutual behavioral expectations in the case of conflict or to the choice and effective realization of collective goals in the case of cooperation."⁴²⁴

5.4 Discourse Ethics: Consideration of Truth, Gender and Power

A significant aspect of Habermas' theory is his concept of truth within discourse ethics. This thesis maintains his concept of truth is a more appropriate method of deriving truth and knowledge than MacKinnon's because it does not prioritize nor hierarchicalize persons' contributions. Truth is not a fixed concept but rather discursively obtained each time a norm is in conflict. "...[T]ruth is no longer regarded as the psychological attribute of human consciousness, or to be the property of a reality distinct from the mind, or even to consist in the process by which 'givens' in consciousness are correlated with 'givens' in experience. In the discursive justification and validation of truth claims no moment is privileged as a given, evidential structures which cannot be further questioned. ...In the continuing and potentially unending discourse of the community of enquiry there are no 'givens', there are only those aspects of consciousness and reality which at any point in time may enter into our deliberations as evidence and which we find cogent in backing our statements."⁴²⁵ In short, truth is relative and found through discursive means.

There are two shortcomings in Habermas' theory that need to be addressed before it can be applied to sexual harassment: gender, and gender and power. It is not inconsistent to include a gender analysis within a Habermasian framework. When

⁴²³Habermas (1990), *Supra*. footnote 385, at p. 207.

⁴²⁴Habermas, J., "Towards a Communication Concept of Rational Collective Will Formation: A Thought-Experiment," *Ratio Juris*, Vol. 2, No. 2, 1989, at p. 145.

⁴²⁵Benhabib, S., *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, New York, NY: Routledge, Chapman and Hal Inc., 1992, at p. 5.

Habermas discusses the lifeworld, participation, and discourse, it is in the context of reaching mutual understanding under non-coercive conditions. He suggests measures should be instituted to accommodate a lifeworld free of coercion and force, therefore it is hypothesized that a discussion of Habermas' thesis of colonization and emancipation could include a gender subtext. Cohen and Arato agree, arguing that "...the critical potential of the theory and its relevance for feminist movements can be demonstrated."⁴²⁶ They suggest that it is not the model, but Habermas' interpretation, that neglects gender; therefore, what is necessary is a reinterpretation of the theoretical model which would include a gender evaluation.⁴²⁷ Habermas' lack of analysis of power and gender, especially in the private sphere, can also be overcome. Fraser critiques Habermas' failure to acknowledge that the private sphere, where he places the family, is often the site of power and money as well as strategic-instrumental action.⁴²⁸ Nevertheless, I believe that this shortcoming in Habermas' theory can be resolved by conceiving of patriarchy/male dominance as one of the pathologies of social evolution and modernity. Patriarchy and male dominance essentially contradict each of the tenets of communicative action/rationality. Patriarchy and male dominance do not facilitate, in the lifeworld, communication, mutual understanding, nor participation. As Cohen and Arato argue:

The norms underpinning male dominance are an example of traditionalism par excellence; that is, they are based on a conventional normative 'consensus' frozen and perpetuated by relations of power and inequality that lead to all sorts of pathologies in the lifeworld....[Patriarchy and male dominance]...are based on a selectively rationalized civil society and it is precisely the blockages to its further modernization in the normative sense that Habermas's theory tries to articulate.⁴²⁹

Cohen and Arato augment Habermas' analysis of power to include "...gender as a generalized form of communication... a power code distinct from but reinforced by the

⁴²⁶Cohen and Arato (1992), *Supra.* footnote 351, at p. 534.

⁴²⁷*Ibid.* at pp. 535-548.

⁴²⁸Fraser (1985), *Supra.* footnote 309, at pp. 107, 129.

⁴²⁹Cohen and Arato (1992). *Supra.* footnote 351, at p. 539.

media of money and power generated in the subsystems."⁴³⁰

Another fundamental aspect which needs inquiry is power. Habermas' focus on power is centered on an analysis of power relations between and within system and lifeworld. Regarding discourse ethics, he stipulates that practical discourse should be free from power relations. But his analysis basically disregards the issue of gender and race in relation to power. This lack of analysis is problematic since these power relations can have a profound effect on individuals' ability to participate in discourse effectively. As well, power relations seriously undermine the basic tenets of discourse ethics which are equality and freedom. Given the historically subordinate position of women within the system (eg. work) and the lifeworld (eg. family), the existence of substantial equality in practical discourse is threatened. Simply desiring participation to include *all* people does not necessarily change the basic systemic discrimination (and exclusion) experienced by women. Generally, on the level of dialogue, subordination and systemic discrimination seriously undermine the participatory potential for some women. This notwithstanding, discourse ethics still has enormous potential which rests in its principles and meta-norms. The core tenets of these principles and meta-norms are reciprocity and symmetry which translate into equality, freedom and justice. Although gender and race are not specifically accounted for, any systemic discrimination is counter to the core tenets of discourse ethics, therefore it is argued that gender and race can be compensated for. Both Cohen and Benhabib concur, arguing that the logic of discourse ethics allows us to challenge traditional understandings, demystifying discourses of power and their implicit agendas.⁴³¹

⁴³⁰*Ibid.* at pp. 543.

⁴³¹Cohen, J., "Discourse Ethics and the Law: Systems Theory, Normative Justification and Post-modernism," *Northwestern University Law Review*, Vol. 83, No. 1-2, 1989 at pp. 398-460; Cohen, J., "Heller, Habermas and Justice," *Praxis International*, Vol. 18, No. 4, January, 1989 at p. 321;

Chapter 6

Where Do We Go From Here? A Note On Application

Understanding Habermas' Theory of Communicative Action and Discourse Ethics is an arduous task. In identifying sexual harassment's growing legal intervention as troublesome, specifically those aspects where normative validity is in conflict, which is demonstrated at one end of the sexual harassment continuum—Condition of Work—it is necessary to begin a search for complementary means to address conflict regarding social behavior. The concept of discourse ethics is particularly attractive in this regard because of its non-monological and participatory characteristics. Discussion will ensue as to whether there is room for discourse ethics regarding sexual harassment law/policy reform, however idealized, as well as the potential problems that may be anticipated in attempting to develop a practical model of discourse.

Part of the appeal of discourse ethics stems from how I envision its potential operation in a legal context. The *golden rule of justice* is described by Agnes Heller as "That which I do unto you and expect you to do unto me", ⁴³² but it is Habermas' addition to the rule that is so attractive, "That which I do unto you and expect you

Benhabib, S., *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, New York, NY: Routledge, Chapman and Hal Inc., 1992 at pp. 312-313.

⁴³²Heller, A., "The Discourse Ethics of Habermas: Critique and Appraisal," *Thesis Eleven*, No. 10-11, 1984, at p. 16.

to do unto me, *should be decided by you and me.*"⁴³³

It is necessary at this point to first recognize the significance of MacKinnon's contribution to our understanding of sexual harassment, as well as the resulting benefit derived for women. MacKinnon has made substantial beneficial contributions to improve women's workplace. Sexual harassment law has taken what was previously a private behavior and made it a public legal concern whereby women can seek redress. Further, MacKinnon's conceptualization and articulation of sexual harassment as being demonstrative of the systemic discrimination women experience is of particular importance. MacKinnon has identified a real solution to address women's unequal treatment in the workplace. Notwithstanding the benefits of invoking law to transform women's workplace, this benefit does not negate my critique of the limitations of law and the pathologies and paradoxes of juridification. I argue that it is necessary and desirable to seek ideas of addressing social change that can complement law. It is not a question of no law whatsoever but rather conceptualizing ways of dealing with conflict that can complement law.

I recognize that MacKinnon begins by addressing women's systemic discrimination. My argument does not dispute nor challenge this discrimination. Rather, my argument begins from a different starting point with a focus on a different concern. Habermas' analysis is invoked to address concerns about law as a tool of change, first in relation to juridification and second regarding participation. MacKinnon's appreciation of the conflict in society is not inconsistent with a Habermasian analysis. It would, I believe, be incorrect to read Habermas to be consensus oriented in his analysis of society. Within his theory of discourse ethics he argues that consensus can be achieved on a particular norm. However, he does not argue that this consensus

⁴³³*Ibid.* at pp. 16.

is unchanging or static.

It is not an either or choice between these two frameworks. MacKinnon was chosen for my thesis due to her influence and as a way to articulate some of the concerns I had regarding the present sexual harassment law and policy. Habermas' theoretical analysis was chosen because it enabled me to articulate these concerns in a specific context and further allowed me to look at a way to address these concerns (discourse ethics). I wish to argue that there is room for the present law and Habermas' discourse ethics to compliment each other.

In order to articulate the way in which law and discourse ethics can compliment each other, I will discuss law in Habermasian language. Law is conceptualized in lifeworld relations as law as an institution which operates as an external constitution. It is not that there is no role for law in Habermas' analysis, but rather that, with regard to social relations, law functions as an external constitution. Habermas contends that law as an institution is a societal component of the lifeworld, it gives to informal domains of action binding form. Moreover, law as an institution is compatible with institutional life of the lifeworld. Law functions as an external constitution for the sphere of socialization, social integration and cultural reproduction. As an external constitution, law facilitates self-regulatory processes of communication and learning. I posit that sexual harassment, although occurring in the workplace, is in part a lifeworld event. Sexual harassment law attempts to regulate social interaction which falls within the domain of the lifeworld. The role of law as an external constitution for lifeworld relations furnishes an extremely important role for sexual harassment law. Law as an institution, as an external constitution basically looks the way law looks now. Sexual harassment law would fall into the category of law as an institution which would function as an external constitution. It is still a place

to go in conflict.

If law operates as a constitution, it provides a framework within which there is room for people to regulate themselves within the lifeworld. Discourse ethics addresses issues of participation and normative conflict. It is a way of operationalizing the theoretical position of a need for participation of those affected on issues that effect them. In developing a notion of law as constitution with a function of symbolic reproduction; the idea is that there is room for the lifeworld to regulate itself in some contexts through the participation of all its members. Law articulated this way allows us a model of discourse ethics and the lifeworld which both talks about a role for law and a role for participation. It does not emphasize the law and state over participation. Neither does it emphasize participation over any role of law and state. Rather than being mutually exclusive, we can conceive how they can be mutually reinforcing and complementary. The relationship between law and discourse ethics—the mutual complementarity, is in the preservation of space and the regulation of space.

Room for discourse ethics derives from the importance and desire to preserve space for communicative process in a legal arena. Discourse ethics comes with several advantages, the most significant of which is participation. The opportunity of all those affected to be involved in the discourse on issues that pertain to them is highly desirable. It opens space for people to enter into dialogue about matters of which they hold knowledge. Discourse ethics asks for the input of those most effected to determine for themselves what the law/policy should be. Going back to Heller's point, those deciding should be you and me. It is not simply that discourse ethics provides for a wider participation on normative validity where there is contestation, but that it also provides the rules which one can follow that facilitate a practical

discourse in order to arrive at a rationally motivated consensus. The underpinnings of discourse ethics—communication, mutual understanding, participation, etc.—represent all that is most captivating about discourse ethics. It tantalizes our imagination on what could be. Further, discourse ethics provides an opportunity for women to articulate their experience and understanding of sexual harassment to those in their workplace, as well as, allows men to express their understanding, or lack thereof, of sexual harassment and behavior that is inappropriate, whereby the potential is to achieve mutual understanding or at the least a better understanding. Put another way, discourse ethics provides a forum in which knowledge about what is deemed sexual harassment is knowledge that is generated by the people within the workplace rather than knowledge that is developed in law courts for lawyers and then translated back to the workplace.

However, discourse ethics raises some serious questions. Notwithstanding the advantage of participation discussed above, Habermas' concept of participation in discourse ethics has some very demanding preconditions. Participation assumes that participants are willing and capable. This is problematic, since potentially some affected by the norm may not wish to participate. To force one to participate would contradict the rules of discourse ethics, where coercion is expressly forbidden. Further, a potential participant may not be capable of participation.

Another significant problem with discourse ethics is the question of power.⁴³⁴ I am not suggesting that Habermas' discourse ethics removes systemic discrimination. The implementation of discourse ethics is not posed as a means of addressing this problem. Discourse ethics is implemented to speak to conflicts in normative validity. The norms which are at issue in a practical discourse may relate to systemic discrim-

⁴³⁴A more detailed discussion of Habermas with regard to issues of power and gender are discussed in Section 5.4.

ination, as is the case with sexual harassment, but it need not always deal with this problem. Clearly when talking about sexual harassment one needs to acknowledge that power is a problem. How can participants of unequal power come to a discourse on equal footing. I believe that Habermas' analysis cannot totally solve this problem. Yet the logic of discourse ethics allows us to challenge traditional understandings, as well as demystify power relations and their implicit agendas. It is not, I feel, inconsistent with an Habermasian analysis to argue that patriarchy and male dominance represent pathologies in the lifeworld, that patriarchy and male dominance are counter to an appropriate rationalization in the lifeworld and thereby block further modernization. Additionally, the core tenets of discourse ethics—symmetry and reciprocity, speak to issues of equality, freedom and justice. Therefore, systemic discrimination is counter to these core tenets. In another vein, I wish to suggest that there is an empowering component in the participation in a practical discourse. By being a part of the practical discourse, one has the opportunity to be a part of the decision-making process. There is the opportunity to impart one's understanding and knowledge regarding the issue at hand. Nevertheless, I admit that discourse ethics does not totally answer how a powerless, sexually harassed woman, in reality, can speak from an equal position with a powerful harasser. Presuppositional rules, core tenets, and principles cannot in the end totally neutralize power.

I wish to argue that the impetus to implement discourse ethics stems from two sources: law as an external constitution in the form of employer liability and the internal compulsion in the form of the desire of those affected to decide for themselves how their social interaction will be regulated. Law as an external constitution has generated employer liability to provide a sexual harassment free workplace and therefore has made it a necessity for organizations to develop policies regarding sexual

harassment. Employers could impose a policy or they could use practical discourse to derive a policy. The inducement to use discourse ethics is that potentially the policy derived will best represent what everyone needs or wants, and therefore, conceivably more likely to be adhered to. The incentive of employees to be involved in discourse ethics stems from the opportunity to be included in the decision-making process on issues that profoundly affect them, and further to understand the issue that so affects them.

In order to articulate what discourse ethics might look like in a work environment, I will hypothesize what it might look like if it had been implemented at Northwood Pulp and Paper. What is envisioned is not a national practical discourse on sexual harassment (Condition of Work) but rather a practical discourse at each employment site whereby employees through discourse ethics reach a rationally motivated consensus on what *their* policy will be regarding sexual harassment. It is not suggested that there be no law. Discourse ethics in this context would assist law as an institution so that law does not move beyond an external constitution. The legal benefits already established would be reappropriated and translated in Habermasian terms. Discourse on sexual harassment would ensue on what the policy on sexual harassment would be at that particular workplace. This discourse could draw upon present law to provide a guide to developing policy. Discourse could also provide the specific behavior that would be inappropriate in Condition of Work harassment, thereby providing specificity to the open-ended definition provided for in law. Discourse ethics would attempt to find a shared understanding of Condition of Work for this particular workplace, but in the event of a conflict ultimately one can always, in the end, appeal to the law as an institution, as external constitution for redress. Discourse ethics gives everyone the opportunity to come to a mutual understanding

(be it through compromise) on what behaviors would be inappropriate as well as the policy on sexual harassment. In the event of a complaint, a policy will be then in place (that reflects the workplace and its dynamics), to deal with the complaint. If the complainant or any other party is dissatisfied with the result, there is still the opportunity to go to the law for redress. If a conflict does result in going outside the workplace, this could lead to a further discourse to address whatever issue is raised.

As I have indicated, the key difficulty is how power differentials can be neutralized in discourse ethics. The rules of argumentation, ideal role taking and the goal of symmetry and reciprocity, go a long way to speaking to this problem. These conditions of discourse ethics attempt to neutralize the power of any particular individual and demands of participants to listen and respect other's speech. However, in the final analysis it is difficult to remove the power structures that exist, and this certainly will not happen immediately. Practical discourse is a learned process and it is only through engaging in practical discourse that a participant will learn how to meet its requirements. But of course in real life, within a workplace, for example, asymmetries of power remain, when a supervisor (with the power to advance or dismiss) and an employee (who has experienced sexual harassment) sit down in a practical discourse to try to reach a rationally motivated consensus on sexual harassment. I am aware that the problem of equalizing power is not completely solved in Habermas' theoretical analysis and is clearly a problem that needs to be addressed.

In my hypothetical workplace-Northwood, I believe a management commitment to discourse ethics is one of the first steps necessary in implementing practical discourse regarding issues of sexual harassment and to speaking to some of the problems of equalizing power. I realize that simply having management's commitment to discourse ethics will not totally change the power structure between management and

employees in practical discourse, but this could possibly be one way of addressing this problem. If committed to discourse ethics, implicit in this commitment is an adherence to the rules of argumentation which does not privilege one voice, and disallows dominance. A commitment from a company to pursue discourse ethics as a method of determining normative validity on sexual harassment is an important step; without this a practical discourse is bound to fail. This too might cause difficulties in that a management dictate may be met with resistance. However, at present management dictates policy on sexual harassment which does not allow employee participation.

Since Northwood Pulp and Paper employees are represented by a union, it would be necessary to have the union's commitment to allow their members to speak for themselves, as well as allow the result of a practical discourse to stand as the policy of the Northwood employment site. Without union support practical discourse could not be operationalized. I postulate that it would be in a union's best interest to allow its members to speak about sexual harassment since the result would better reflect the concerns of its members. The union's concern about power relations is legitimate and of course every measure possible must be taken to neutralize the power of management in practical discourse. This may not be a totally attainable goal. But again, to reiterate, practical discourse is a worthy goal, even in the event that power differences are not totally neutralized.

The next important step is to have the commitment of the employees. I believe employees have the most to gain by adoption of discourse ethics since it allows them to decide what their work environment will look like. It gives employees the opportunity to articulate to each other (and management) when and in what manner there should be intervention into their interpersonal lives. It is imperative to engage the

employees in decision-making on issues that profoundly affect them. It is erroneous to suppose that there exists some person or group of persons that have a superior knowledge and insight that bestows upon them a preferred opinion. Everyone's knowledge and experience is valuable and should be quintessential in a decision-making process. Although academics and professionals have specialized knowledge which can be crucial to decision-making, it should not be valued preferentially. Habermas does not permit privilege within dialogue; all participants are designated equal. Claims of normative validity in his conception are solely the result of practical discourse and cannot be the consequence of a philosophical or scientific theory on the part of a neutral spectator. Each individual has a wealth of knowledge and experience that is also invaluable to decision-making. It is only through a combination of *all* voices that we are able to discern all the relevant aspects or solution to any given issue/debate, in this case sexual harassment. Again I recognize the difficulty for the employee who has been sexually harassed to engage in practical discourse, but I believe communicating her/his experience is important. As well, it is acknowledged that unfettered communication between employees and management is problematic, but again it is a project worth pursuing.

In developing a model of discourse at Northwood, it would be necessary to build in a method of teaching the skills participants need to participate. It is not enough to assume that participants come to the discourse with the skills needed to articulate their arguments. Even the most gifted orators sometimes have difficulties expressing themselves. In part, learning how to present one's argument comes through practice. The more one participates the better their chances of becoming more skilled. However, that is not enough. What is also required are processes of socialization and education geared to facilitating individuals' dialogical capabilities.

After garnering the commitment of all factions at Northwood Pulp and Paper the next step would be to put in place an arena where discourse could take place. Northwood employs a large number of people (between 600-700), therefore one big practical discourse might be difficult, but not impossible. The advantage of discourse ethics is the potential to be involved in the decision-making as well as the possibility of better understanding the issue at hand. Its not that every single person will be involved in the discourse. Not all people will participate, but let us assume a high percentage will. During contract talks, what has happened in the past, on controversial issues, is that employees have met to discuss these issues at a large hall. Although dialogue on these issues did not correspond directly to a practical discourse, it was an instance of a large number of employees getting together to discuss something that profoundly effected them. A similar circumstance could be set up to engage in a practical discourse on sexual harassment. Only in this instance, communication would follow the preconditions and rules of discourse ethics and would include the possible participation of those potentially affected.

Enforcement of rules of practical discourse is a challenging problem. However, if you presuppose a rationally motivated consensus, then participants will rationally abide by it, without the threat of external compulsions. It is rather like the argument for mediation—if all parties' interests are taken into account, even if no one gets everything they want, all parties will have an interest in abiding by the mediated outcome. By contrast, the adversarial assumption of the litigation approach assumes people only follow adjudicated outcomes (where one side wins) through threat of external sanctions (external constitution).

An important part of discourse ethics is the requirement of coming to a *rationally motivated consensus*. That all (or any for that matter) practical discourses will

result in a consensus is highly improbable, which Habermas explicitly recognizes. Participants often have strong feelings and opinions on norms that are in conflict. Frequently contested norms are represented by dichotomous positions where even coming to a compromise on the normative validity seems unlikely.⁴³⁵ At the very least, diametric opinions create a substantial problem. Compromise seems to be the best solution to the quandary of consensus, and even this upon occasions will be difficult. What is significant regarding discourse ethics, is the willingness of participants to reason from the other's point of view, as well as their willingness to reach an understanding based upon a reasonable agreement.

Rationally achieved consensus, Habermas asserts, is obtained when participants engage in ideal role-taking. Consensus which is contingent on determining the general will requires participants to put themselves in the position of the other, and at the same time to relinquish their own needs and interests. For Habermas the needs and interests of a particular individual count no more or less than those of any other participant. It is this ideal role-taking that conceivably creates understanding. Ideal role-taking could provide an avenue which would enable men to better appreciate the discrimination women experience. Only if women communicate their reality to men, in an egalitarian setting, can men begin to comprehend women's systemic discrimination. The process itself can improve understanding of sexual harassment from others' perspective and thereby improve the work environment for all.

After going through a practical discourse on issues of sexual harassment and arriving at a mutual understanding, the result would reflect the normative validity on sexual harassment for Northwood which would provide the basis for Northwood's policy on sexual harassment. The policy would then have been essentially defined

⁴³⁵Issues such as abortion at times seem insurmountable.

by those it affects and therefore, hopefully would be more willingly adhered to. Law still exists but as an external constitution, a place to go if policy does not address any individual event sufficiently.

The general appeal of discourse ethics is in large part connected to how I would like to situate myself philosophically. I am interested in theory that provides for the widest possible degree of participatory democracy. The idealized is an appealing concept. It is recognized that the ideal is unachievable, but this does not preclude striving for the ideal. Even though discourse ethics represents a utopia, this does not preclude the implementation of discourse ethics on a more realistic level. It is recognized that the ideal is most likely unreachable, however there is plenty of room for a discourse ethics-like process in the determination of contested social norms. The key becomes quantifying the minimum of the ideal which would be acceptable in an application of discourse ethics. It is through this exercise that humankind can accomplish the most. Agnes Heller sums up my feelings on discourse ethics quite nicely, "Despite its theoretical shortcomings, Habermas' 'discourse ethics' conveys a message of utmost importance.... With his quest for truth,...[he] may look old-fashioned amidst the waves of relativistic zeal. But philosophy is about a utopian reality. And nothing is more modern than utopian reality."⁴³⁶

⁴³⁶Heller (1984), *Supra*, footnote 432, at p. 17.

Appendix 1: EEOC Guidelines

1604.11 Sexual harassment.

(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 substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee of labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job function performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to persons other than those mentioned in paragraph (c) of this

section, an employer is responsible for acts of sexual harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

(c) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Appendix 2: Human Rights Commission of Canada Policy Statement

[a] protection against acts of harassment extends to incidents occurring at or away from the workplace, during or outside normal working hours provided such acts are committed within the course of employment, or in the provision of goods, services, facilities or accommodation;

[b] harassment may be related to any of the discriminatory grounds contained in the Canadian Human Rights Act. Such behavior may be verbal, physical, deliberate, unsolicited or unwelcome; it may be one incident or a series of incidents. While the following is not an exhaustive list, harassment may include:

- verbal abuse or threats;
- unwelcome remarks, jokes, innuendos or taunting about a person's body, attire, age, marital status, ethnic or national origin, religion, etc;
- displaying of pornographic, racist or other offensive or derogatory pictures;
- practical jokes which cause awkwardness or embarrassment;
- unwelcome invitations or requests, whether indirect or explicit, or intimidation;
- leering or other gestures;
- condescension or paternalism which undermines self-respect;
- unnecessary physical contact such as touching, patting, pinching, punching;
- physical assault;

[c] for a practice to be considered harassment it must be reasonably perceived as a term or condition of employment (including availability or continuation of work, promotional or training opportunities) or of the provision of goods, services, facilities or accommodation customarily available to the general public; or influence decisions on such matters; or interfere with job performance or access to or enjoyment of

goods, services, facilities or accommodation; or humiliate, insult or intimidate any individual;

[d] any act of harassment committed by an employee or an agent of any employer in the course of the employment shall be considered to be act committed by that employer;

[e] an act of harassment shall not, however, be considered to be an act committed by an employer if it is established that the employer did not consent to the commission of the act and exercised all due diligence to prevent the act from being committed and, subsequently, to mitigate or avoid its consequences;

[f] harassment will be considered to have taken place if a reasonable person ought to have known that such behavior was unwelcome;

[g] in investigating and deciding each case, there must be an objective examination of all the circumstances (including the nature and context of the incidents).

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