

## Post-Sexist?

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Claudia Flores, [\*Beyond the Bad Apple-Transforming the American Workplace for Women After #metoo\*](#), 2019 **U. Chi. Legal F.** 85 (2019).

In *Beyond the Bad Apple-Transforming the American Workplace for Women After #metoo*, Professor [Claudia Flores](#) takes on the timeworn cliché of the proverbial “bad apple” who acts aberrantly and out of cultural context in the workplace, as well as a host of other over- and under-simplifications of elusive, pervasive workplace issues that result in the imprudent adjudication of disputes.

She begins from a very simple premise: while sex discrimination and harassment may be rife in the American workplace, there are too many structural and other impediments for any kind of meaningful, large scale individual ability to vindicate one’s rights completely under Title VII. She writes: “Complaint-based employer policies, contractually-mandated arbitration agreements, time-limited administrative exhaustion requirements, and narrow judicial interpretations of actionable conduct have created a myriad of barriers to workers seeking enforcement. For women (and some men) targeted by harassing behavior it has often been too costly—financially, professionally, and personally—to navigate a system that depends almost exclusively on individual complainants to prompt social reform.” (P. 85.) This is all too true. I often posit to my own students that society depends upon the “ripple effects” of Title VII. The statute’s sheer existence and awareness of it as it has pervaded the news and popular culture—recall the 1980’s, during which many situation comedies had “a very special episode,” in which a character encountered sexual harassment. Title VII’s ripples operate to chill offensive behavior in the workplace in a way in which individuals’ access to the courts to vindicate their rights simply does not.

Building on this premise, Professor Flores gets to what is one of the best things about this piece: its frank articulation of what it *is* about sexual harassment law and courts’ interpretation of it that frustrates but eludes people. Right out of the gate, Professor Flores explains the near-ineffable eloquently: “U.S. law has largely relied on the ‘bad apple’ theory of harassment. The harasser is a wayward employee and the employer an innocent third party to interpersonal relations and relation(ship)s that have gone awry.” (P. 85.) Viewed through this lens by those charged with interpreting and navigating this law, Professor Flores explains, courts promulgate flawed frameworks within which to adjudicate sexual harassment cases. These tests, which “rely on prevailing opinions of gendered interactions,” belie what research has taught us about the true typical nature of sexual harassment: that it is inextricably linked to behavioral workplace patterns and culture. (P. 85.)

With this in mind, Professor Flores calls for a reconceptualization of sexual harassment that centers “less on sex and more on harassment and less on liability and more on prevention.” (P. 86.) Indeed, her vision of a more robust enforcement system is then born of a thorough review and assessment of not only the United States’ suboptimal (in her view) system, but also of other countries’ and international standards and approaches. The vision she ultimately posits, both “grounded in the dual concepts of human dignity and equality,” and situating sexual harassment, “as one form of workplace abuse, among others,” indeed does sound like one that will better effectuate Title VII’s objectives and better realize its promise. (P. 86.)

Professor Flores’s journey toward this vision is both engaging and informative. The background and exposition of the law is clear and complete. The ensuing critique of what she terms the United States’ “complaint-dependent, liability-focused process, saddled with under-resourced administrative hurdles and courts that have narrowed the statute’s potential,” is thorough and thoughtful. (P. 94.) Specifically, she issues an entreaty for acknowledgment that sexual

harassment is engendered by a more systemic sexism and by misogyny, and it should not be conceptualized as disembodied interpersonal incidents. Once this occurs, she argues, the law can stop focusing solely on certain paradigmatic incidents, while ignoring or eschewing more nuanced, subtle interactions that feed the same beast. By issuing a cry for sexual harassment to be viewed as a tactic, deployed for gain in some environments, rather than a singular event, this piece adds to the rich literature on the topic of adopting a more holistic in American sexual harassment jurisprudence.

Particularly of interest is this piece's tour through international and comparative approaches to combating sexual harassment in the workplace. By emphasizing the ideological underpinnings of the regulation and the lens through which the harassment is seen in various contexts, this part of the piece is able to shed light on differences among enforcement structures and mechanisms. So, for example, it makes sense that the international human rights legal system conceptualizes sexual harassment as a form of abuse or violence, and thus situates its regulation within workplace rights and standard violations. Whereas in some places, sexual harassment is conceptualized as a "health and safety problem," and its regulation is linked to workplace health and safety maintenance, in others, the problem is inextricably linked to bullying, and harassment is addressed through a lens and within a vehicle that fits into that particular context. It is useful for the reader to understand how the goals and conceptualizations of each legal regime shapes each's regulations, legal frameworks, and enforcement mechanisms. Interestingly, in the United States, the regulation of sexual harassment under Title VII is divorced from the regulation of workplace health and safety issues, which is accomplished through the vehicle of other statutes, and workplace bullying is not unlawful.

What follows is a thoughtful analysis of "Dignity and Equality in the American Context" that explores the question of whether and how a dignity-centered approach to regulation might work in a society that eschews viewing workplace regulation as a "civility code," and prefers to focus on protected class status. (Pp. 105-09.) While the viability of a dignity-based approach has often been dismissed by scholars in the United States, the piece argues, such an approach might just "provide us with a positive vision of the workplace, which we currently lack." Moreover, Professor Flores points out that conceptualizing sexual harassment as an issue of workplace wellbeing, as well as workplace equality, has the potential to impel employer accountability and proactiveness when it comes to workplace maintenance.

I started this piece admittedly predisposed to favor a dignity-centered model of regulation, and I finished it better informed about the way in which sexual harassment is viewed and addressed in numerous other contexts, and convinced, more than ever, that Professor Flores has the right idea. Sexual harassment law, as it is, is clunky and porous. The regulation of sexual harassment probably does belong more in the same conversation as issues such as wage inequality, workplace health and safety, unemployment insurance, the minimum wage, that devalue and debilitate the American worker. As Professor Flores puts it, "sexual harassment is likely to thrive in environments where workers are not valued, where women workers are particularly undervalued, and where employers have not provided a functional environment that discourages exploitation of existing societal status-based hierarchies and inequalities." (Pp. 115-16.) And she has the evidence: "#MeToo reports circulated in the media this year were filled with examples of workplaces with no regulation, little worker value, and the absence of working systems of accountability." (P. 116.) At the end of the day, the piece's reframings, holistic approach, and suggestions are worthy of consideration. Its critiques of the current approach in this country are valid. It's a worthwhile read; you will like it lots.

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