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ARTICLES

What's Wrong With Sexual Harassment?

Katherine M. Franke*

In this article, Professor Franke asks and answers a seemingly simple question: why is sexual harassment a form of sex discrimination under Title VII of the Civil Rights Act of 1964? She argues that the link between sexual harassment and sex discrimination has been undertheorized by the Supreme Court. In the absence of a principled theory of the wrong of sexual harassment, Professor Franke argues that lower courts have developed a body of sexual harassment law that trivializes the legal norm against sex discrimination. After illustrating how the Supreme Court has not provided an adequate theory of sexual harassment as sex discrimination, she traces the theoretical arguments advanced by feminist scholars on behalf of a cause of action for sexual harassment under Title VII: 1) it violates formal equality principles; 2) its sexism lies in the fact that the conduct is sexual; and 3) sexual harassment is an example of the subordination of women by men. Professor Franke provides a critique of each of these accounts of sexual harassment, in part, by showing how each is unable to provide an account of whether same-sex sexual harassment should be actionable under Title VII. She argues that flaws in both the theory and the doctrine are amplified in the marginal cases of same-sex harassment. Professor Franke then argues that the discriminatory wrong of sexual harassment, between parties of different or same sexes, should be understood as a technology of sexism. That is, the sexism in sexual harassment lies in its power as a regulatory practice that feminizes women and masculinizes men, renders women sexual objects and men sexual subjects.

I. INTRODUCTION

What exactly is wrong with sexual harassment? Why is it sex discrimination? The time has come to ask these seemingly simple questions anew. The gravity of the problem of sexual harassment together with its doctrinal com-

* Associate Professor of Law, University of Arizona College of Law. I have benefited tremendously from thoughtful comments on previous drafts of this article from Tracy Higgins, Kathryn Abrams, Toni Massaro, Susan Sturm, Deborah Rhode, Linda McClain, Jane Korn, Sally Goldfarb, Sherry Colb, Janet Jakobsen, and Barbara Gutek. Particular thanks to Julie Goldscheid who time and again helped me work through the hardest parts of the argument. An earlier version of the article was presented as part of the Women's Studies Colloquium Series at the University of Arizona and at the University of Arizona College of Law and Stanford Law School Faculty Workshops. I thank the participants for their insights and engagement with this topic. My grateful thanks to Kim Ellis for her able research assistance. My research was supported by a grant from the University of Arizona College of Law.

plexity demand a clear, careful, and principled argument that some workplace sexual conduct is a form of sex discrimination. In this article, I undertake to make that argument, and in so doing, reveal cracks in the doctrine as it has evolved in the almost twenty years since the concept of sexual harassment was introduced to the law—cracks that are in great need of repair.

Why is it necessary to make this argument today, more than ten years after the Equal Employment Opportunity Commission and the Supreme Court first embraced the notion that sexual harassment is a form of sex discrimination? Indeed, each year the federal courts entertain hundreds of sexual harassment claims under Title VII,¹ without ever questioning the underlying link between sexual harassment and sex discrimination. While our intuitions may lead us to conclude that when a man directs offensive sexual conduct at a female colleague, sex discrimination is afoot, the Supreme Court has not offered a theory as to why this is the case. In *Meritor Savings Bank, FSB v. Vinson*,² the Court concluded, without argument, that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”³ Over time, the Supreme Court has provided lower courts with an ample description of the *what* of sexual harassment,⁴ without ever providing a sufficient account of *why* sexual harassment is actionable under laws prohibiting discrimination because of sex.

There are at least two ways to explain why the Court has been so penurious in its theorizing about sexual harassment; one more cynical, the other more generous. First, the lack of an articulated theoretical link between sexual harassment and sex discrimination could reflect an avoidance technique: The *Meritor* Court was not prepared to embrace Catharine MacKinnon’s theory of sexual harassment that conflated male sexuality with the subordination of women.⁵ Yet the Court may have been convinced that the sexual harassment of women by men reflects a kind of gendered power that Title VII is designed to address. In stating a legal conclusion and then proceeding to evidentiary finer points, the Court could avoid a difficult doctrinal question while recognizing the sexism in sexual harassment. So might argue the cynic.

On the other hand, the *Meritor* Court may have believed that nothing more need be said about why sexual harassment is sex discrimination. On *Meritor*’s facts,⁶ where a man is charged with sexually harassing a woman, and the conduct is severe or pervasive, unwelcome, and hostile to a reasonable person, the Court may have regarded the conduct as a kind of per se violation of Title VII:

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

2. 477 U.S. 57 (1986).

3. *Id.* at 64.

4. To be actionable under Title VII, conduct of a sexual nature must “be sufficiently severe or pervasive,” *id.* at 67, so as to “create an abusive working environment,” *id.* (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The conduct must also be unwelcome, *id.* at 68, and reasonably perceived as hostile or abusive, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

5. For a discussion of MacKinnon’s theory, see text accompanying notes 177-194 *infra*.

6. In *Meritor*, Mechelle Vinson alleged that her male supervisor “suggested that they go to a motel to have sexual relations. . . . [He also] made repeated demands upon her for sexual favors, . . . fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.” 477 U.S. at 60.

"[S]ex discrimination plain and simple."⁷ I am among those who believe that it is both reasonable and efficient to draw this inference in the typical sexual harassment case where a man subjects a woman to offensive sexual comments, come-ons, or physical abuse. But drawing this inference based upon our intuition that sexism is what this conduct *means* must take place within the context of a theory of why sexual harassment is, or can be, a form of sex discrimination. The inference we draw in the central cases is an efficient application of what principle?

Although the Supreme Court has not provided such a theory, feminist theorists and lower courts have attempted to do so. Over time, three principal justifications have emerged for considering workplace sexual harassment a violation of Title VII's proscriptions against discrimination "on the basis of sex"⁸: (1) it is conduct that would not have been undertaken but for the plaintiff's sex; (2) it is conduct that violates Title VII precisely because it is sexual in nature; and (3) it is conduct that sexually subordinates women to men.

Each of these approaches to the wrong of sexual harassment has formed the foundation for successful litigation challenging sexually hostile working environments under Title VII. Yet to varying degrees, all three of these paradigms fail to provide an adequate account of why sexual harassment is a form of sex discrimination. In this article, I will show that these theories of the wrong of sexual harassment don't do the work they purport to. When pressed, they provide indeterminate and unprincipled outcomes to both central and marginal cases of sexual harassment. What is more, these theories misdirect attention from the real problem: sexual harassment is a sexually discriminatory wrong because of the gender norms it reflects and perpetuates.

According to the theory I develop herein, the sexual harassment of a woman by a man is an instance of sexism precisely because the act embodies fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered, men as masculine sexual subjects and women as feminine sexual objects. If a "technology" is a manner of accomplishing a task, or the specialized aspect of a particular field,⁹ then sexual harassment is both the manner of accomplishing sexist goals, and the specialized instantiation of a sexist ideology. Sexual harassment is a technology of sexism. It is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects. This dynamic is both performative and reflexive in nature. Performative in the sense that the conduct produces a particular identity in the participants, and reflexive in that both the harasser and the victim are affected by the con-

7. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) (addressing sex discrimination in the context of peremptory strikes against women).

8. Title VII prohibits discrimination in hiring, firing, compensation, or terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1994).

9. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2348 (Philip Babcock Grove ed., 1993).

duct. The account I suggest provides a better theoretical context from which to draw the inference that, in cases like *Meritor*, the sexual harassment of women by men, "without question," is discrimination "because of sex."¹⁰ At the same time, this framework has the advantage of furnishing a principled way to approach the increasing number of new sexual harassment cases at the margin involving same-sex sexual harassment. Neither the existing Supreme Court account of sexual harassment, nor the three dominant theories of the wrong of sexual harassment can provide an adequate or principled answer to these two questions: (1) why should we draw the inference, in cases like *Meritor*, that sexual harassment is sex discrimination?; and (2) does the sexual harassment of a man by another man constitute sex discrimination?

In the late 1970s and early 1980s, feminist theorists and litigators began to depict sexual harassment as an instrument of sexual subordination. Rejecting the notion that sexual harassment was a private, interpersonal kind of sexual mischief, feminists began to regard it as a species of sex discrimination, committed because of sex, and therefore vulnerable to legal attack. That courts adopted this view of sexual harassment was a tremendous victory for women.

In the years since 1977, when the first appellate court held that sexual harassment was a form of sex discrimination,¹¹ the conclusion that conduct of a sexual nature was "based on sex" has come to go without saying.¹² In most contemporary sexual harassment cases, when a woman alleges that her workplace became hostile or intimidating due to a man's or men's unwelcome sexual conduct, courts neither require her to prove, nor do courts make the argument themselves that the conduct was based on sex.

The jurisprudential shorthand by which courts have come to assume that some sexual conduct is sex discrimination, frequently reflects a kind of jurisprudential laziness that is best stirred from its malaise. This is not to say that in many, or even most, cases it isn't fair to make such a leap. Rather, my aim is to highlight how some courts, and some theorists, have lost sight of why such a leap is possible and desirable according to a feminist analysis of sexual harassment. Not readily apparent in traditional cases, this laziness is amplified when viewed at the margins of sex discrimination doctrine—the same-sex sexual harassment cases. These cases make clear that the time has come to reaffirm the view that sexual harassment is a kind of gender subordination, and they demand that we not merely assume, but also provide an account of why this is the case.

No longer a hypothetical counterexample, sexual harassment claims filed by persons of one sex against another person of the same sex are being litigated in large numbers in the federal courts under Title VII. As of this writing, scores of same-sex sexual harassment cases have been decided by federal dis-

10. 477 U.S. at 64.

11. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

12. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (stating that "[t]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course").

strict and circuit courts.¹³ While the facts of these cases are certainly curious, often tragic, and in many cases appalling, same-sex sexual harassment plaintiffs have been met by a perplexed judiciary unsure how to deal with the legal questions these cases present: Is same-sex sexual harassment sex discrimination under Title VII? Is it the same as or at least similar to different-sex sexual harassment? If so, why? If not, why not? Extending established Title VII sex discrimination doctrine from more traditional cases to this new wave of claims has proven to be a rather difficult task. In effect, the same-sex sexual harassment claims have raised the infrequently asked question: Why is sexual harassment discrimination "because of sex?"

Yet, the same-sex harassment cases can do more than merely raise this difficult question. The disjunctive doctrine that has emerged from the courts' difficulty in dealing with the same-sex cases provides a timely opportunity and excuse for reexamining, reaffirming, and updating feminist conceptions of sexual harassment as a form of sexual discrimination.

The early writings that first advanced the notion that sexual harassment was a violation of Title VII no longer provide an adequate or complete account of the wrong of sexual harassment. In this article I provide an updated account of sexual harassment that better articulates the discriminatory wrong, both for traditional sexual harassment cases in which men harass women, and in the newly litigated cases involving same-sex sexual harassment.

In Part II of the article, I briefly trace the history of sexual harassment theory and jurisprudence, beginning with early cases in which the courts could not or would not regard sexual harassment as sex discrimination. I then review the theoretical arguments developed by feminists that conceptualized the wrong of sexual harassment as a discriminatory wrong, and I trace the application and evolution of those theories in the courts throughout more than twenty years of litigation. As is to be expected, in the hands of the judiciary the doctrine evolved, or devolved, in ways that differ from the feminists' original vision.

In Part III, I critique each of the three dominant formulations of sexual harassment. I show how the existing doctrine fails in male/female as well as male/male or female/female cases. Courts have had a difficult time disposing of the same-sex cases in accordance with existing sex discrimination principles. In large measure, the courts' difficulty with these cases can be explained by the doctrine's infidelity to its theoretical roots. But close examination of these cases reveals something more: that these theoretical roots simply provide too jaundiced an account of why, in any case, sexual harassment is a form of sex discrimination. A more complete explanation of the sexism in sexual harassment is required. The reasons why the doctrine has failed in the same-sex cases—the conditions of failure, if you will—reveal interesting faults in the jurisprudence of sexual harassment at the core that merit reinforcement and repair.

Finally, in Part IV, I propose a more refined approach to same-sex harassment cases. I begin with the work of theorists who have advanced an under-

13. See notes 16-18 *infra* and accompanying text for examples of such cases.

standing of sexual harassment as a kind of sexual subordination, and improve upon that work in light of the theoretical advances in gender and sexuality studies undertaken since the concept of sexual harassment was introduced to the law. In so doing, I hope to provide a more principled way of understanding harassing sexual conduct between people of the same sex as a form of sex discrimination, and at the same time reaffirm and elaborate further on the original conceptions of the wrong of sexual harassment provided by feminists in the late 1970s and early 1980s. On my account, sexual harassment—between any two people of whatever sex—is a form of sex discrimination when it reflects or perpetuates gender stereotypes in the workplace. I suggest a reconceptualization of sexual harassment as *gender harassment*. Understood in this way, sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex, not because it is sexual, and not because men do it to women, but precisely because it is a technology of sexism. That is, it perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men. Sexual harassment perpetuates these norms because it takes place within a culture and history that in large part reduces women's identity to that of a sex object, and reinforces men's identity as that of a sexual aggressor. Sexual harassment also can be understood to enforce gender norms when it is used to keep gender nonconformists in line. For example, women who work in nontraditional jobs, such as the women who worked at the Jacksonville Shipyards,¹⁴ frequently experience extreme sexual harassment from their male coworkers as a way of putting them in their "proper place." Similarly, sexual harassment operates as a means of policing traditional gender norms particularly in the same-sex context when men who fail to live up to a societal norm of masculinity are punished by their male coworkers through sexual means. As a tool of sexism, sexual harassment can do its dirty work in either a different-sex or a same-sex context. Thus, the sexism in sexual harassment lies not in the fact that it is sexual, but in what it does as a disciplinary, constitutive, and punitive regulatory practice.

Before I proceed, a few observations about the same-sex sexual harassment cases are in order. These cases, many and growing in number, are as varied in their facts as are different-sex sexual harassment cases. However, they fall into roughly three distinct categories that the differentiation of which will assist an understanding of how the courts have approached them and why the existing doctrine appears strained in its application to these seemingly unusual cases.

The first set of cases involve a gay male¹⁵ supervisor who seeks sexual favors from or creates a sexually hostile environment for his male subordinates or coworkers.¹⁶ These cases have been the easiest for the courts to dispose of

14. See *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

15. There are some cases of same-sex sexual harassment by lesbian supervisors, but compared to the gay male supervisor harassment cases, they are few in number. See, e.g., *Pritchett v. Sizeler Real Estate Management Co.*, No. CIV.A.93-2351, 1995 WL 241855 (E.D. La. Apr. 25, 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995).

16. See, e.g., *Yeary v. Goodwill Indus.-Knoxville, Inc.*, No. 96-5145, 1997 WL 73312, at *6 (6th Cir. Feb. 24, 1997); *McCoy v. Macon Water Auth.*, No. 5:94-cv-480-4, 1997 WL 50037 (M.D. Ga. Feb. 5, 1997); *Swage v. Inn Phila. & Creative Remodeling Co.*, No. CIV.A.96-2380, 1996 WL 368316 (E.D.

because they most closely parallel the traditional different-sex cases in which a heterosexual man is charged with sexually harassing a female coworker or subordinate.

The second set of cases involve nongay same-sex harassment. Here, the defendant is either heterosexual, or at least not alleged to be gay, and is charged with exhibiting sexual behavior in the workplace in such a way that another male employee regards as both unwelcome and offensive.¹⁷ In these cases, the harasser neither wants to have sex with the plaintiff, nor does he desire to have sex with members of the class of people to which the plaintiff belongs. Rather than sexually objectifying the plaintiff, the harasser engages in sexual behavior that is designed to or has the effect of making the plaintiff annoyed, uncomfortable, offended, humiliated, intimidated, or otherwise victimized by the defend-

Pa. June 21, 1996); Johnson v. Community Nursing Servs., 932 F. Supp. 269 (D. Utah 1996); Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393 (D. Minn. 1996); Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495 (E.D. Va. 1996); Rushing v. United Airlines, 919 F. Supp. 1101 (N.D. Ill. 1996); Williams v. District of Columbia, 916 F. Supp. 1 (D.D.C. 1996); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351 (D. Nev. 1996); Ton v. Information Resources, Inc., No. 95 C 3635, 1996 WL 5322 (N.D. Ill. Jan. 3, 1996); Wrightson v. Pizza Hut of Amer., Inc., 909 F. Supp. 367 (W.D.N.C. 1995), *rev'd*, 99 F.3d 138 (4th Cir. 1996); King v. M.R. Brown, Inc., 911 F. Supp. 161 (E.D. Pa. 1995); Fredette v. BVP Management Assocs., 905 F. Supp. 1034 (M.D. Fla. 1995); Noguera v. University of P.R., 890 F. Supp. 60 (D.P.R. 1995); EEOC v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995); Roe v. K-Mart Corp., No. CIV.A. 2:93-2372-18AJ, 1995 WL 316783 (D.S.C. Mar. 28, 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545 (M.D. Ala. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981).

17. See, e.g., Miller v. Vesta, Inc., 946 F. Supp. 697 (E.D. Wis. 1996); Torres v. National Precision Blanking, 943 F. Supp. 952 (N.D. Ill. 1996); Schoiber v. Emro Mktg. Co., 941 F. Supp. 730 (N.D. Ill. 1996); Wiley v. Burger King, No. CIV.A. 96-4859, 1996 WL 648455 (E.D. Pa. Nov. 7, 1996); Larry v. North Miss. Med. Ctr., 940 F. Supp. 960 (N.D. Miss. 1996); Ward v. Ridley Sch. Dist., 940 F. Supp. 810 (E.D. Pa. 1996); Shermer v. Illinois Dept. of Transp., 937 F. Supp. 781 (C.D. Ill. 1996); Marciano v. Kash N' Karry Foodstores, Inc., No. 94-1657CIV-T-17A, 1996 WL 420879 (M.D. Fla. July 1, 1996); Gerd v. United Parcel Serv., Inc., 934 F. Supp. 357 (D. Colo. 1996); Kaplan v. Dacomor Corp., No. 95 C 6987, 1996 WL 89148 (N.D. Ill. Feb. 27, 1996); Gibson v. Tanks Inc., 930 F. Supp. 1107 (M.D.N.C. 1996); Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044 (N.D. Ala. 1996); Ladd v. Sertoma Handicapped Opportunity Prog., Inc., 917 F. Supp. 766 (N.D. Okla. 1995); Ecklund v. Fuisz Tech. Ltd., 905 F. Supp. 335 (E.D. Va. 1995); Sardinia v. Dellwood Foods, Inc., No. 94 Civ. 5458 (LAP), 1995 WL 640502 (S.D.N.Y. Nov. 1, 1995); Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368 (C.D. Cal. 1995); Dixon v. State Farm & Cas. Ins. Co., No. CIV.A.4:94cv165, 1995 WL 810016 (E.D. Va. Aug. 23, 1995); Mayo v. Kiwest Corp., 898 F. Supp. 335 (E.D. Va. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996); Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995); Blozis v. Mike Raisor Ford, Inc., 896 F. Supp. 805 (N.D. Ind. 1995); Quick v. Donaldson Co., 895 F. Supp. 1288 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996); Raney v. District of Columbia, 892 F. Supp. 283 (D.D.C. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133 (C.D. Ill. 1995); Vandeventer v. Wabash Nar'l Corp., 887 F. Supp. 1178 (N.D. Ind. 1995); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); Boyd v. Vonnahmen, No. 93-CV-4358-JPG, 1995 WL 420040 (S.D. Ill. Mar. 29, 1995); Oncale v. Sundowner Offshore Servs., Inc., No. CIV.A.94-1483, 1995 WL 133349 (E.D. La. Mar. 24, 1995), *aff'd*, 83 F.3d 118 (5th Cir. 1996); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229 (S.D. Ga. 1995); Ryczek v. Guest Servs., Inc., 877 F. Supp. 754 (D.D.C. 1995); Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); Fleenor v. Hewitt Soap Co., No. C-3-94-182, 1995 WL 386793 (S.D. Ohio Dec. 21, 1994), *aff'd*, 81 F.2d 48 (6th Cir.), *cert. denied*, 117 S. Ct. 170 (1996); Jones v. Commander, Kan. Army Ammunitions Plant, 147 F.R.D. 248 (D. Kan. 1993); Moore v. Northland Evergreens, Inc., No. 1:90-CV-440, 1992 WL 295068 (W.D. Mich. Jan. 27, 1992); Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991); Dilorio v. Perry, 1994 WL 741630 (EEOC Nov. 22, 1994); Martin v. Runyon, 1994 WL 746784 (EEOC Sept. 29, 1994).

ant's conduct. In most of these cases, we might all agree that the defendant's conduct is inappropriate; the hard question is whether the conduct is *sexually discriminatory*.

The third set of same-sex sexual harassment cases are similar to those just described but differ from them in one significant way: the harassing conduct of a sexual nature was undertaken because of the plaintiff's gender identity.¹⁸ That is, the plaintiff was not sufficiently masculine according to the individual defendant's standards of proper masculine presentation, the gender rules of the particular workplace, or according to masculine gender normativity as defined by the culture more generally.

This third category shows clearly how sexually harassing conduct can effectively enforce particular gender orthodoxies in the workplace. Yet, by and large, courts have been unwilling to recognize this kind of sexual harassment—between men as a way of policing hetero-masculine gender norms—as a form of discrimination because of sex and therefore actionable as sex discrimination. The fact that current sexual harassment jurisprudence has been unable to recognize the sexual discrimination in this last set of cases suggests that something is wrong with the doctrine both at the margins and at the center. This failure begs a reexamination of what exactly is wrong with sexual harassment, and why that wrong is a form of sex discrimination. As the early theorists argued, sexual harassment offends equality principles because it is a kind of sexual subordination. But the current jurisprudence has lost sight of why this is the case. The time has come, then, to reaffirm the anti-subordination principle and articulate it anew in light of the case law and theoretical work undertaken in the twenty years since sexual harassment first became actionable as sex discrimination.

II. THE JURISPRUDENTIAL HISTORY OF SEXUAL HARASSMENT DOCTRINE

The concept of sexual harassment as a kind of sex discrimination entered the legal imagination relatively recently. After a period of unsuccessful litigation in which sexual harassment claims were dismissed under a kind of "boys will be boys" view of the harm, feminist advocates provoked a paradigm shift in the late 1970s and early 1980s in which the sexism in sexual harassment was recognized in the law. In this Part, I discuss the jurisprudential history of sexual harassment doctrine, beginning with the judicial view that trivialized the harm as an inescapable result of the sexual integration of the wage-labor market. I then discuss the three dominant theories under which sexual harassment has been understood to be a form of sex discrimination: formal equality, sex as sexism, and subordination.

A. *Sexual Harassment as an Expression of Private, Personal Sexual Desire*

Early sexual harassment litigation produced a series of defeats for plaintiffs who sought to challenge sexually harassing work environments under Title VII.

18. See, e.g., *McWilliams v. Fairfax County Bd. Of Supervisors*, 72 F.3d 1191 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 138 (S.D. Tex. 1993); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

In *Corne v. Bausch and Lomb, Inc.*,¹⁹ one of the first sexual harassment cases litigated under Title VII, two female clerical workers alleged that onerous verbal and physical sexual harassment by their immediate male supervisor amounted to discrimination on the basis of sex. The court recognized that Title VII extended beyond discriminatory hiring or firing to the terms and conditions of employment once hired, but nevertheless rejected the plaintiffs' harassment theory. In prior cases, the court observed, the discriminatory acts had been undertaken pursuant to company policy, or in pursuit of some relative corporate advantage derived from the discriminatory practices.²⁰ The sexually harassing conduct of which Corne complained, however, was different:

In the present case, [harasser's] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [harasser] was satisfying a personal urge. Certainly no employer policy is here involved . . . [A]n our growth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.²¹

In *Tomkins v. Public Service Electric & Gas Co.*,²² a female clerical worker had gone to lunch with her supervisor with the expectation of discussing a promotion. Instead, he became drunk, made sexual advances toward her, and threatened retaliation when she tried to leave the restaurant. During the several hours that he demanded she remain there with him, he talked of having sex with her and kissed her. Tomkins' attorney argued, among other things, that sexual harassment was a form of sex-role stereotyping prohibited by Title VII insofar as it reflected a view of women as sex objects, while ignoring their individual characteristics.²³

In ruling on the defendant's motion to dismiss the case, the judge acknowledged that "Title VII was enacted in order to remove those artificial barriers to full employment which are based upon unjust and long-encrusted prejudice,"²⁴ but did not regard the conduct of which Adrienne Tomkins complained as grounded in prejudice:

[N]atural sexual attraction can be subtle. If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrim-

19. 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without reported decision*, 562 F.2d 55 (9th Cir. 1977).

20. *Id.* at 163.

21. *Id.* at 163-64.

22. 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977).

23. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 70 (1979) (analyzing the *Tomkins* case and discussing Tomkins' attorney's arguments).

24. *Tomkins*, 422 F. Supp. at 556.

ination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.²⁵

On this view, sexual content or coercion in workplace relationships is merely the inevitable result of a sexually heterogeneous workplace—it is the price women pay for participating equally in the public sphere.²⁶ Here equality is thinly understood as mere access to previously foreclosed areas of the wage-labor market. Compounded by the specter of a well-lubricated slippery slope, the *Tomkins* court further reasoned that while the conduct complained of might be actionable under state criminal statutes, or could give rise to a civil action in tort, “[Title VII] is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.”²⁷

Corne and *Tomkins* are typical of the kind of response that early sexual harassment plaintiffs received when they sought to extend the reach of Title VII

25. *Id.* at 557. Interestingly enough, since *Tomkins* was decided, the number of federal district judges has increased to 645. See Statistical Report for Justices and Judges of the United States, Administrative Office of the United States Courts (Feb. 29, 1996) (on file with the *Stanford Law Review*). This increase is due, in large part, however, to the federalization of numerous drug crimes, not the proliferation of sexual harassment claims under Title VII. See David Masci, *Crossing State Lines: Criminal Law and the Federal Government*, 50 CONG. Q. WKLY REP. 3676, 3678 (1992) (following their federalization, “the number of federal drug prosecutions has ballooned by 280 percent since 1980,” burdening a federal judiciary that, in the same time frame, has “increased by only 10 percent”). It is also worth noting that in all statistical probability, the number of sexual harassment cases filed represents a small percentage of the actual incidents of sexual harassment that take place in the wage-labor market everyday.

26. The notion that sexual harassment is a foreseeable consequence of sexually heterogeneous workplaces is reflected in the line of cases holding that emotional injuries sustained as a result of sexual harassment are exclusively compensable under workers’ compensation laws, rather than sex discrimination statutes. See, e.g., *Zabkovic v. West Bend Co.*, 789 F.2d 540, 544 (7th Cir. 1986) (defining emotional injury sustained from sexual harassment as an “accident” subject to the state’s Worker’s Compensation law); *Wangler v. Hawaii Elec. Co.*, 742 F. Supp. 1465, 1467-68 (D. Haw. 1990); *Miller v. Lindenwood Female College*, 616 F. Supp. 860, 861 (E.D. Mo. 1985) (finding emotional injury resulting from sexual harassment an “accident” compensable under state workers’ compensation law); *Byers v. Labor and Indus. Review Comm’n*, 547 N.W.2d 788, 790-91 (Wis. Ct. App. 1996), review granted, 549 N.W.2d 732 (Wis. 1996). But see Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1384-89 (1993) (arguing that allowing compensation under workers’ compensation statutes misrepresents sexual harassment as a naturally occurring, inherent risk in the workplace); Ruth C. Vance, *Workers’ Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, or a Shield for Employers?*, 11 HOFSTRA LAB. L.J. 141, 200 (1993) (arguing that the intentional nature of sexual harassment brings injury outside of workers’ compensation laws, and that tort claims should be permitted instead).

27. *Tomkins*, 422 F. Supp. at 556; see also *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (“It is conceivable, under plaintiff’s theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attractions plays at least a subtle part in most personnel decisions.”), *rev’d and remanded*, 600 F.2d 211 (9th Cir. 1979). But see *Garber v. Saxon Bus. Prod., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (finding cause of action under Title VII when complaint alleges employer’s acquiescence in practice of compelling female employees to submit to sexual advances of male supervisors); *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D.D.C. 1976) (holding retaliatory actions taken by male supervisor after female employee refused his advances constitute sexual harassment under Title VII), *rev’d and remanded on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978).

to sexual harassment.²⁸ On one level, the early sexual harassment cases were about the interpretation of Title VII in light of preexisting agency principles.²⁹ On a deeper level, however, the cases both reified and legitimized a view of workplace sexual harassment that regards the plaintiffs' claims as private "gripes" rather than discriminatory "grievances," and regards the defendants' conduct as normal and healthy (maybe a little too healthy) manifestations of male sexuality that have simply gotten out of hand.³⁰

28. This view of workplace sexual harassment echos the judicial impulse to minimize and normalize certain kinds of rape. In *People v. Gauntlett*, a trial judge made the following remarks when sentencing a man who, by pleading guilty to the aggravated rape of his fourteen-year-old stepdaughter, had the charges dropped in connection with his sexual assault of his twelve-year-old stepson:

On your behalf, there are many things that you are not. You are not a violent rapist who drags women and girls off the street and into the bushes or into your car from a parking lot; and I have had a lot of these in my courtroom . . . You are not a child chaser, one whose obsession with sex causes him to seek neighborhood children or children in parks or in playgrounds, and we see these people in court. You are a man who has warm personal feelings for your stepchildren, but you let them get out of hand, and we see a number of people like you in our courts.

352 N.W.2d 310, 313 (Mich. Ct. App. 1984).

29. In order to find employer liability, Title VII jurisprudence has evolved from requiring proof of an official employer policy to a "knew or should have known" standard. In 1980 the EEOC issued guidelines clarifying the appropriate standard of employer liability in sexual harassment cases:

Applying general [T]itle VII principles, an 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. . . . With respect to conduct between fellow employees, 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, unless it can show that it took immediate and appropriate corrective action.

29 C.F.R. §§ 1604.11(c)-(d) (1980). For applications of these guidelines, see *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-16 (8th Cir. 1988) (applying "knew or should have known" standard and finding employer liable where supervisor knew of abusive treatment of women by male coworkers); *Yates v. Avco Corp.*, 819 F.2d 630, 634-35 (6th Cir. 1987) (using EEOC guidelines to find that employer knew or should have known supervisor was sexually harassing women); and *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982) (applying EEOC guidelines and finding employer was on notice about hostile work environment, and was therefore liable for sexual harassment).

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court refrained from deciding whether or not to adopt the EEOC Guidelines on employer liability. 477 U.S. 57, 72 (1986). The four concurring justices in *Meritor* would have adopted the standard set forth by the EEOC. See *id.* at 75. Applying traditional agency principles, some courts have held that the law imposes strict liability for quid pro quo harassment undertaken by a supervisor or member of management. See, e.g., *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989); *Henson*, 682 F.2d at 909-10.

30. This view of sexual harassment has been described as the "natural-biological" model of sexual harassment. Sandra S. Tangri, Martha R. Burt & Leonor B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, J. Soc. Issues, Fall 1982, at 33, 35-37 (proposing the natural/biological model as one of three explanatory models of sexual harassment). Elaborating on the model, Barbara Gutek explained:

The natural-biological model assumes that sexual harassment and other forms of sexual expression at work are simply manifestations of natural attraction between two people. It is not sexist or discriminatory and does not have harmful consequences. Most of all, there is no intent to harass. . . . [O]ne version of this model suggests that because men have a stronger sex drive, they more often initiate sexual overtures, at work as well as in other settings.

BARBARA A. GUTEK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS* 13 (1985).

B. *Sexual Harassment as Sex Discrimination*

The fact that sexual harassment is a sexually discriminatory wrong is not a legal conclusion necessarily revealed in the text of Title VII. Rather it requires an argument. Nothing in either the text or the legislative history of Title VII would expressly compel one to conclude that "discrimination based on sex" reaches sexual harassment. However, rather than conceptualize sexual harassment as an independent wrong, say, of sexual misconduct, feminist advocates and theorists argued that the conduct is a species of sex discrimination, because "only the sex discrimination laws provide a coherent examination of sexually harassing conduct as a legal wrong."³¹

Many feminists take pride in the fact that the law of sexual harassment represents "the first time in history . . . that women have defined women's injuries in a law."³² Indeed, some maintain that "[s]exual harassment is the quintessential feminist harm,"³³ and that "[t]he very existence of such a cause of action is a triumph for feminist scholars and practitioners, as well as for the victims of sexual harassment."³⁴

In response to the ways in which the judiciary privatized, decontextualized, and normalized the sexual harassment of women in the workplace, in the 1970s the Working Women's Institute,³⁵ and feminists such as Carol Brodsky,³⁶ Lin

31. Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, J. SOC. ISSUES, Spring 1995, at 193 (citation omitted).

32. CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 105 (1987); see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991) (arguing that feminists must name and explain "separation assault" so that "we can develop legal rules to deal with this particular sort of violence") (footnotes omitted); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 642-43 (1986) (noting that "[t]he experience of what is now called sexual harassment did not even have a name until feminist thinkers provided it with one") (footnote omitted).

The civil rights remedy of the Gender-Motivated Violence Act, 42 U.S.C. § 13981 (1994), contained in the Violence Against Women Act ("VAWA"), *id.* §§ 13931-14040, represents the result of a similar political process by which feminists sought to give voice to women's experience of violence, name it "gender-motivated violence," and then organize to pass a law that specifically addressed that experience. The fact that other laws might have provided a remedy for domestic violence or other forms of gender-motivated violence prior to the enactment of the VAWA, is, in some part, besides the point since one of the purposes of the VAWA is the political objective of calling this behavior what it is: sexist violence. Of course, many of the provisions of the VAWA are designed to bridge gaps in state and federal statutory and common law that prevented women from recovering for injuries caused by various forms of gender-motivated battery, such as marital rape exemptions and interspousal immunities. See Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 506-08 (1995) (discussing the inadequacies of federal civil rights laws and state civil and criminal statutes that VAWA is intended to address).

33. Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 38 (1993) [hereinafter Chamallas, *Writing About Sexual Harassment*]. Elsewhere Chamallas has written that the "claim of sexual harassment is also a grassroots claim in that it was discovered by asking employed women what practices they regarded as discriminatory, as unfair, or as posing a barrier to their success at work." Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 96-97 (1992) [hereinafter Chamallas, *Feminist Constructions of Objectivity*].

34. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816 (1991).

35. Peggy Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women*, WORKING/WOMEN'S INST. 7 n.3 (Working/Women's Institute Research Series Report No. 3, Fall 1979) (defining sexual harassment as "any repeated and/or unwanted sexual attention, jokes, innu-

Farley,³⁷ Rosabeth Kanter,³⁸ and Catharine MacKinnon³⁹ suggested ways to understand sexual harassment as more than harmless conduct. MacKinnon asked:

[w]hether sexuality is, in itself, a source, form, and sphere of social inequality or whether it is merely a sphere onto which other forms of unequal power—for example, physical force or economic clout—are displaced and imposed, a ground on which other battles (including those of gender) are fought. Behind the doctrinal arguments, conceiving of sexual harassment as unequal treatment based on sex raises fundamental questions of the definitions of, and the relations between, gender, sexuality, and power.⁴⁰

Having framed the problem of sexual harassment as a problem of sex-based power, MacKinnon suggested that sexually harassing conduct takes two principle forms: quid pro quo and condition of work harassment.⁴¹ She defined quid pro quo harassment as conduct by which “sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity.”⁴² The EEOC later promulgated regulations embodying this conception of quid pro quo sexual harassment as a violation of Title VII.⁴³

Condition of work harassment, later termed harassment that creates a sexually hostile work environment, MacKinnon defined as “the situation in which sexual harassment simply makes the work environment unbearable.”⁴⁴ The 1980 EEOC regulations also included this kind of sexual harassment as a form of sex discrimination.⁴⁵

endoes, touching, or propositions from someone in the workplace that make you uncomfortable and/or cause you problems on your job”); *Sexual Harassment on the Job: Results of Preliminary Survey*, WORKING/WOMEN UNITED INST. (Working/Women United Inst., New York, N.Y.), 1975 (presenting the first statistics ever gathered about sexual harassment on the job).

36. CARROLL M. BRODSKY, *THE HARASSED WORKER* (1976) (arguing that all forms of harassment are informal mechanisms by which harassers attempt to maintain their competitive advantage in the workplace).

37. LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978) (offering a Marxist-feminist critique of sexual harassment as a tool by which men control women’s participation in the labor market).

38. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977) (observing that men tend to underscore gender differences in order to reinforce their dominant status in corporate culture).

39. MACKINNON, *supra* note 23.

40. *Id.* at 59.

41. *See id.* at 32.

42. *Id.* MacKinnon provided the following examples of quid pro quo harassment: “‘If I wasn’t going to sleep with him, I wasn’t going to get my promotion;’ ‘I think he meant that I had a job if I played along;’ ‘You’ve got to make love to get a day off or to get a good beat;’ ‘[Her] foreman told her that if she wanted the job she would have to be ‘nice’;’ and ‘I was fired because I refused to give at the office.’” *Id.* (citations omitted).

43. 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

29 C.F.R. § 1604.11 (a).

44. MACKINNON, *supra* note 23, at 40.

45. “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of

Seven years after MacKinnon made the argument for understanding sexual harassment as a form of sex discrimination in her book *Sexual Harassment of Working Women: A Case of Sex Discrimination*, the Supreme Court adopted much of her perspective in *Meritor Savings Bank v. Vinson*.⁴⁶ Treating the legal conclusion as entirely self-evident,⁴⁷ Justice Rehnquist declared, on behalf of a unanimous Court, that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."⁴⁸ The Court then went on to embrace the notion that sexual harassment took two forms: that of an economic quid pro quo and that which creates a hostile environment.⁴⁹

A unanimous Supreme Court endorsement of what was unthinkable to lower courts such a short time before signaled a remarkable transformation in the legal and cultural understanding of the workplace harassment which many women endured. Feminist theorists instigated this paradigm shift by formulating three ways to consider how a particular pattern, practice, or instance of sexual harassment might constitute sex discrimination: (1) the equality principle: the conduct would not have been undertaken but for the plaintiff's sex; (2) the anti-sex principle: the conduct was discriminatory precisely because it was sexual; and (3) the anti-subordination principle: the conduct subordinated women to men.

The equality principle⁵⁰ sets forth that similarly situated persons or groups of persons should be treated similarly. Borrowing arguments from race-based discrimination cases, advocates have used the equality principle as the dominant analytical tool to dismantle sexism in the workplace.⁵¹ The EEOC's current position on sexual harassment relies heavily upon this account of the nature of discrimination:

[I]n sexual harassment cases as in all other sex discrimination cases, the relevant question is whether the plaintiff was treated differently because of his or her sex. . . . When a plaintiff can demonstrate that he or she would not have been sexually harassed but for his or her sex, that plaintiff states a claim for sex discrimination under Title VII.⁵²

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a).

46. 477 U.S. 57 (1986).

47. This conclusory assumption has been noted by the lower courts. See, e.g., *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1048 (N.D. Ala. 1996) ("[N]either *Harris* nor *Meritor* discussed in any significant detail the doctrinal basis for classifying sexual harassment as sex discrimination.").

48. *Meritor*, 477 U.S. at 64.

49. See *id.* at 65.

50. MacKinnon called it the "differences approach." See MacKinnon, *supra* note 23, at 192-208.

51. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1190-92 (1989) (reviewing advocates' use of the "equality principle" as the primary analytic tool challenging inequality in the workplace, and concluding it has proven inadequate to the task); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 16-23 (1975) (reviewing the equal protection arguments employed by feminist advocates in gender discrimination cases in the early 1970s).

52. Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Opposition to Defendants' Motion for Summary Judgment at 5-6, *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 1996 WL 179860 (D. Minn. 1996) (No. 3-95-538).

Alternatively, the argument has been made that sexual harassment presents a unique form of sex discrimination: it is sex discrimination because it is sexual. This argument ultimately conflates sex and sexism.

Finally, the anti-subordination principle,⁵³ developed by feminist legal theorists, advances another, some might say more radical, analysis of the wrong of sex discrimination. This principle challenges and affirmatively remedies any policy, practice, or attitude that contributes to or perpetuates in intent or effect the subordination of an historically dominated group.⁵⁴ Sexual harassment is a violation of the anti-subordination principle primarily because it replicates the subordination of women by men.

Although each of these ways of understanding sexual harassment as a kind of sex discrimination originates in feminist theory, each approach has become ingrained in the jurisprudence of sexual equality. As courts in the last twenty years have become more comfortable with sexual harassment cases, they have, in effect, adopted these theories on sexual harassment and made them their own. As a result, the theories have evolved and departed in some important respects from initial feminist conceptions of the wrong of sexual harassment. In the sections that follow, I discuss each of the three predominant ways in which feminists have urged, and courts have found, that sexual harassment is a form of sex discrimination. Each account reflects a different understanding of sexual harassment, due, in large part, to different underlying assumptions about the meaning and scope of sexual equality.

1. *Sexual harassment is sex discrimination because it violates formal equality principles.*

The dominant guiding principle in antidiscrimination jurisprudence is that of formal equality. It protects the meritocratic ideal—that social status should be based upon individual merit, abilities, and achievements, rather than on characteristics such as race, sex, family background, wealth, or graft. As such, the merit principle aspires to be fundamentally color and sex-blind.⁵⁵ Discrimination, therefore, “is irrational and unjust because it denies the individual what is due him or her under society’s agreed upon standards of merit.”⁵⁶ Disregard-

53. In her early work, Catharine MacKinnon called it the “inequality approach,” targeting “[p]ractices which express and reinforce the social inequality of women to men.” MACKINNON, *supra* note 23, at 174. In her later work and in the writing of Ruth Colker, however, it is described as the “antisubordination” principle. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (describing the anti-subordination principle and arguing that this approach should inform courts’ analysis of equal protection cases).

54. See Colker, *supra* note 53, at 1012 (arguing that “the anti-subordination perspective is consistent with the history of the equal protection clause”) (footnote omitted).

55. See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992) (tracing the history of the legal argument for, and conception of, a color-blind Constitution as a normative ideal). But see Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 18 (1991) (arguing that “consideration of race does not automatically corrupt a fair social decisionmaking process” and that “[o]ne cannot literally follow a color-blind standard of conduct in ordinary social life”).

56. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 710; see also Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853, 858-69 (1995) (reviewing various critiques of the meritocratic ideal).

ing racial or sexual differences protects human dignity and equality,⁵⁷ and guarantees meritocratic decisionmaking, free from the distorting effects of racial and sexual stereotypes.⁵⁸

Title VII's prohibition of discrimination against "any individual . . . because of such individual's race, color, religion, sex, or national origin,"⁵⁹ embodies this notion of equality. By targeting discrimination, or different treatment, because of membership in a protected class, Title VII aims to identify and then remedy those employment practices that illegitimately take into account race, color, religion, national origin, or sex. The oft-cited directive that "similarly situated" persons should be treated similarly⁶⁰ can thus be understood to mean that similarly meritorious persons should be treated similarly.⁶¹

How has sexual harassment come to fit within the paradigm that condemns practices that treat similarly situated persons dissimilarly because of their sex? In *Sexual Harassment of Working Women*, Catharine MacKinnon argued that sexual harassment is sex discrimination because it causes arbitrary differentiation between men and women in the workplace, such that "men are not placed in comparable positions to women when they are comparably circumstanced."⁶² In short, "[s]exual harassment limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions."⁶³ So understood, it amounts to disparate treatment of women based on their biological sex,⁶⁴ and thus violates the equality principle and meritocratic ideal that underlie Title VII.⁶⁵

To show that sexual harassment was sex discrimination according to the equality principle, MacKinnon and other feminist advocates began with the rel-

57. See, e.g., Hortense J. Spillers, *Martin Luther King and the Style of the Black Sermon*, in 3 MARTIN LUTHER KING JR.: CIVIL RIGHTS LEADER, THEOLOGIAN, ORATOR 876, 888 (David J. Garrow ed., 1989) (citing Dr. Martin Luther King, Jr., Speech, *I Have a Dream* (Aug. 28, 1963)) ("I have a dream today that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.")

58. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 153 (1980) ("[P]rejudice is a lens that distorts reality.")

59. 42 U.S.C. § 2000e-2(a)(1) (1994).

60. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.10 (1953) ("State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.") (quoting *Belton v. Gebhart*, 87 A.2d 862, 865 (Del. Ch. 1952)); see also *Califano v. Webster*, 430 U.S. 313, 314 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 506-07 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 680-81 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

61. For an excellent summary and critique of the equality principle, see Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201.

62. MACKINNON, *supra* note 23, at 216.

63. *Id.* at 193.

64. See *id.* at 40 ("Unwanted sexual advances, made simply because she has a woman's body, can be a daily part of a woman's work life.")

65. See *id.* at 195 ("Sexual harassment, in most cases, is an employment practice that would not have occurred if the victim's sex had been different.") In answer to the question of why sexual harassment is sex discrimination, MacKinnon argues that "[t]he basic question the differences approach poses is: how can you tell that this happened because one is a woman, rather than to a person who just happens to be a woman? The basic answer, which presupposes sex comparability, is: a man in her position would not be or was not so treated." *Id.* at 192.

atively small body of Title VII sex and race discrimination cases decided in the mid to late 1970s. The case for finding quid pro quo harassment a violation of Title VII was the easiest to make. In 1977, the D.C. Circuit first recognized the conditioning of employment-related economic benefits on sexual favors as sex discrimination.⁶⁶ In *Barnes v. Costle* the plaintiff alleged that her job had been eliminated by her male supervisor because she refused his sexual advances; advances that would not have been tendered had Barnes been a man.⁶⁷ The trial court granted the defendant's motion for summary judgment on the all too familiar theory that

[t]he substance of (appellant's) complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of (appellant's) supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on (appellant's) sex.⁶⁸

The Court of Appeals reversed, however, holding:

But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.⁶⁹

In a footnote, the court further clarified that this principle would apply with equal force to a heterosexual woman who sexually harasses a man or a homosexual supervisor who harasses another person of the same sex: "[I]n each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, *but for his or her sex*, the employee would not have faced."⁷⁰

The courts were more reluctant to recognize the hostile environment theory of sexual harassment. Again, looking to existing sex and race discrimination jurisprudence, advocates argued that sexual harassment should be prohibited under Title VII. Title VII's antidiscrimination prohibitions applied not only to actions of an economic nature, such as hiring, firing, or promotions, but also to the noneconomic "terms, conditions, or privileges of employment."⁷¹ Early "terms and conditions" cases established, on a case by case basis, that Title VII prohibited a range of practices that granted women lesser workplace privileges than men.⁷² Ultimately, these practices were found to violate Title VII because

66. *See Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

67. *See id.* at 985.

68. *Id.* at 986 (quoting *Barnes v. Train*, Civ. No. 1828-73, slip. op. at 3 (D.D.C. Aug. 9, 1994)).

69. *Id.* at 990 (footnotes omitted).

70. *Id.* at 990 n.55 (emphasis added).

71. 42 U.S.C. § 2000e-2(a)(1) (1994).

72. *See, e.g., Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 194 n.3 (6th Cir. 1978) (giving female physical education teachers inferior locker and shower facilities); *Trivett v. Tri-State Container Corp.*, 7 Fair Emp. Prac. Cas. (BNA) 1292, 1296 (E.D. Tenn. 1973) (requiring female employees to remain at their posts while allowing male employees to line up and clock out first); *Laffey v. Northwest Airlines, Inc.*, 6 Fair Emp. Prac. Cas. (BNA) 902, 910-912 (D.D.C. 1973) (imposing height and weight requirements for female but not male employees, forbidding female but not male employees

Congress intended that the law "strike at the entire spectrum of disparate treatment of men and women."⁷³

Having established that Title VII did not necessarily require a showing of an economic injury, feminist advocates next argued that the "terms and conditions" cases should be extended to include not only those policies that provided men and women with different amenities or imposed different sex-based rules, but to *harassing conduct* that altered the terms and conditions of employment as well.

The idea that Title VII prohibited harassment in the workplace first arose in national origin and race cases. In *Rogers v. EEOC*,⁷⁴ an Hispanic plaintiff challenged the offensive work environment created by her employer, an optometrist who operated his practice in a discriminatory manner by "segregating" his Hispanic and Anglo patients. The Fifth Circuit held:

the phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers⁷⁵

from wearing eyeglasses, and imposing a no-marriage rule on female but not male employees); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 339-40 (D. Or. 1969) (requiring mandatory rest periods for female workers only, thereby eliminating females from consideration for certain positions); EEOC Dec. No. 71-109, 1973 EEOC Dec. (CCH) ¶ 6165, at 4277-78 (July 29, 1970) (affording men, but not women, the right to smoke while they worked); EEOC Dec. No. 70-503, 1973 EEOC Dec. (CCH) ¶ 6114, at 4207-08 (Feb. 4, 1970) (paying death benefits to surviving spouses of male employees, but not female employees); *Nabisco Settles Restroom-Break Suit*, 1996 Daily Lab. Rpt. (BNA) 77 (April 22, 1996) (discussing *Hernandez v. Nabisco, Co.*, No. CV 153713 (Cal. Sup. Ct. Apr. 17, 1996)) (women allowed to use the restroom only during breaks, whereas men allowed to do so anytime they wanted).

73. *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). This language was cited approvingly by the Supreme Court in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) and *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). See also Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 349 (1980) (charging that "stereotypical role expectations" have hampered the effectiveness of Title VII in combating workplace discrimination directed against women, and arguing that they be recognized as "discrimination *per se*").

74. 454 F.2d 234 (5th Cir. 1971).

75. *Id.* at 238.

The *Rogers* conception of national origin based discriminatory workplace "pollution" was later extended to workplace harassment based upon race,⁷⁶ and religion.⁷⁷

In time, courts further interpreted Title VII to prohibit sex-based harassment. Note that *sex-based* harassment is not the same thing as *sexual* harassment.⁷⁸ Sex-based harassment occurs when a person is harassed in the workplace because of her or his sex through the use of nonsexual conduct. Examples of nonsexual, sex-based conduct include calling male employees "men" but female employees "girls,"⁷⁹ indicating that women shouldn't perform certain kinds of work,⁸⁰ that a "woman's place [is] in the bedroom or the kitchen,"⁸¹ that hiring women was undesirable because they would quit and get married,⁸² "that they were taking jobs from men with families,"⁸³ or by issuing different work equipment to women.⁸⁴ These early sex-based harassment cases, like the race-based harassment cases,⁸⁵ took one of two principle forms:

76. See e.g., *Firefighters Inst. for Racial Equal. v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977) (employer's informal acceptance of segregated employee eating clubs); *Gray v. Greyhound Lines*, East, 545 F.2d 169, 176 (D.C. Cir. 1976) (unfair disciplinary and route assignment procedures); *Swint v. Pullman-Standard*, 539 F.2d 77, 89-90 (5th Cir. 1976) (discriminatory job assignments, even absent salary discrimination or economic harm); *Steadman v. Hundley*, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (supervisor's racial slurs and unfairly adverse recommendations may lead to Title VII violation); cf. *United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (hostile work environment for racial minorities constituted a 42 U.S.C. § 1983 claim for people of color employed by city police and fire departments), *aff'd as modified*, 633 F.2d 643 (2d Cir. 1980); *Murry v. American Standard, Inc.*, 373 F. Supp. 716, 717 (E.D. La. 1973) (black employee called "boy"), *aff'd*, 428 F.2d 529 (5th Cir. 1973); *Johnson v. Lillie Rubin Affiliates, Inc.*, 5 Empl. Prac. Dec. (CCH) ¶ 8542, at 7558 (M.D. Tenn. 1973) (black women referred to by first names, while white women were called "Miss" or "Mrs."); EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. (BNA) 852, 852 (May 12, 1972) (racially derogatory graffiti); EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. (BNA) 837, 837-38 (Feb. 2, 1972) (racial joke using "nigger" in training program); EEOC Dec. No. 72-0779, 4 Fair Empl. Prac. Cas. (BNA) 317, 317-18 (Dec. 30, 1971) (black employee called "nigger"); EEOC Dec. No. 71-720, 3 Fair Empl. Prac. Cas. (BNA) 142, 142 (Dec. 17, 1970) (black employee called "little black Sambo").

77. See, e.g., *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (supervisor's demeaning religious slurs); *Rattner v. Trans World Airlines, N.Y. Comm'n on Human Rts.*, Decision No. 4135-J, Sept. 11, 1973 (antisemitic graffiti).

78. See *Harassment on the Basis of Sex and Related Conduct Not Constituting Sexual Harassment*, E.E.O.C. Comp. Man. (CCH) § 615.6, ¶ 3105, at 3217 (Jan. 1982) ("Sexual harassment is one type of harassment based on sex. However, it is not the only type of unlawful harassment which is sex-based or which stems from sex discrimination. For proper processing and investigation of harassment charges, it is important to correctly distinguish sexual harassment from other forms of sex-based harassment and related conduct.")

79. EEOC Dec. No. 72-0679, 4 Fair Empl. Prac. Cas. (BNA) 441, 441-42 (Dec. 27, 1971).

80. See *Lipsett v. University of P.R.*, 864 F.2d 881, 906 (1st Cir. 1988) (comments that women should not be surgeons).

81. *Fox v. Southeast Transp., Inc.*, Nos. CIV.A. 89-1442-WF & CIV.A. 89-1449-WF, 1993 WL 543203, at *2 (D. Mass. Dec. 9, 1993), *aff'd*, 25 F.3d 1037 (1st Cir. 1994).

82. See *Parton v. GTE North, Inc.*, 802 F. Supp. 241, 245-46 (W.D. Mo. 1991) (female employee asked repeatedly when she would quit and get married), *aff'd*, 971 F.2d 150 (8th Cir. 1992).

83. *Fox*, 1993 WL 543203, at *2.

84. See *Parton*, 802 F. Supp. at 247 (female employees issued yellow safety strap for climbing ladders that male employees not required to use).

85. Courts and theorists alike have drawn heavily from race discrimination jurisprudence in order to show that sexual harassment violates Title VII. However, while sexual harassment is similar to, it is not the same as, racial harassment. Many authorities might say that Title VII proscribes all, or virtually all, conduct of a racial nature in the workplace, but few would argue that Title VII renders actionable all sexual conduct in the workplace. Indeed, the EEOC has stated quite clearly that "Title VII does not

the harassment either conveyed the harasser's subjective discriminatory mental state (e.g., women should stay home and have babies or are not fit for certain types of work), or took a form that could have been motivated by a number of reasons, including sexist or misogynist attitudes (e.g., denying female workers adequate breaks).⁸⁶

In the first kind of cases, the discriminatory nature of the harassment was transparent from the substance of the harassing conduct—its sexism spoke for itself. These cases factually echoed early race-based harassment cases in which African Americans were harassed for being “uppity”⁸⁷ or “trouble-makers.”⁸⁸ In both contexts, the harassment was undertaken because women and/or people of color had violated gender and race norms. In the second kind of cases, however, further evidence was necessary to prove that the harassing conduct was undertaken “because of the target's sex.” This additional evidence put the harassment in a context that revealed its discriminatory nature by showing that similarly situated male workers were not treated similarly. In either case, the underlying notion was that a person should not suffer harassment, sexual or otherwise, in the workplace because of his or her sex.

Based upon these precedents, feminists argued that Title VII's proscriptions against sex discrimination should be understood to prohibit not only sex harassment, but sexual harassment—that is, conduct of a sexual nature.⁸⁹ While it may seem self-evident today that one can legitimately infer discriminatory mo-

proscribe all conduct of a sexual nature in the workplace. Thus it is crucial to clearly define sexual harassment. . . .” *EEOC: Policy Guidance on Sexual Harassment*, 8 Fair Empl. Prac. Man. (BNA) ¶ 405, at 6681 (Mar. 19, 1990).

86. See EEOC Dec. No. 71-2046, 1973 EEOC Dec. (CCH) ¶ 6242, at 4428 (May 12, 1971) (female employees as a class placed in shifts that did not qualify for breaks).

87. See, e.g., *Robertson v. Granite Sch. Dist.*, No. 90-4164, 1992 WL 2883, at *2 (10th Cir. Jan 7, 1992) (African-American male school coach terminated in part because he was “an uppity nigger”); *Williams v. Cerberonics*, 871 F.2d 452, 456 (4th Cir. 1989) (former African-American woman referred to as that “black uppity female”); *Marable v. H. Walker & Assoc.*, 644 F.2d 390, 396 (5th Cir. Unit B 1981) (finding that a landlord refused to rent to African-American man because, inter alia, he was “uppity”); EEOC Dec. No. 70-198, 1973 EEOC Dec. (CCH) ¶ 6087, at 4133 (Oct. 9, 1969) (black employee discharged because his self-confident manner caused resentment among white employees).

88. See, e.g., *Daugherty v. City of Danville*, No. 87-5850, 1988 WL 90892, at *4 (6th Cir. Sept. 1, 1988) (former African-American police officer alleged chief of police said he wanted to weed out “nigger troublemakers”); *Thomas v. Daniel Parker*, CIV.A. No. 76-1852, 1979 WL 149, at *7 (D.D.C. Feb. 8, 1979) (black Foreign Service officer denied tenure because he was “greatly concerned with minority rights” which made him a “trouble-maker.”); EEOC Dec. No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) 1242, 1243 (Apr. 12, 1971) (black female employee called “trouble-maker”).

89. In 1993 the EEOC issued proposed guidelines that provided standards by which to evaluate all kinds of harassment whether based on race, color, religion, disability, national origin, or gender. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266-69 (1993) (to be codified at 29 C.F.R. pt. 1609) (proposed Oct. 1, 1993). The proposed guidelines emphasized that they “cover[ed] sex-based harassment that is non-sexual in nature” because “[s]exual harassment is covered by the Commission's Guidelines on Discrimination Because of Sex.” *Id.* at 51,268 n.1. A year later however, responding to political pressure, the EEOC withdrew the proposed guidelines. See *Withdrawal of the Proposed Guidelines*, 59 Fed. Reg. 51,396 (1994); see also Sarah E. Burns, *Evidence of A Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*?, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 401 n.310 (1994-95) (noting that political pressure from “conservative Christian groups” lead to the EEOC's “reopening of the issue”). As a result, the only EEOC guidelines addressing the problem of sex-based harassment in the workplace concern workplace sexual harassment. See *Guidelines on Discrimination Because of Sex, Sexual Harassment*, 29 C.F.R. § 1604.11(a)-(g) (1996).

tives when a man engages in unwelcome conduct of a sexual nature toward a woman, why is this so? In the individual case of hostile environment sexual harassment, why should we conclude that sex discrimination has occurred, rather than wholly inappropriate workplace sexual misconduct actionable under appropriate state tort or contract laws? Is sexual harassment transparently sexist, thereby amounting to a kind of per se violation of Title VII? Does it violate Title VII because it targets female and not male employees? Or does it inflict a kind of harm that is discriminatory in its impact on women workers? To pose these sorts of questions is to examine the significance of the sexually explicit content of sexual harassment: Is sexual harassment more like telling women they should stay home and have babies or more like disabling their safety equipment? Or is it neither? The answers to these questions have serious implications for the scope and meaning of "discrimination because of sex," gender-role stereotyping, and ultimately, male and female agency.

In *Bundy v. Jackson*,⁹⁰ the D.C. Circuit Court of Appeals accepted the paradigm shift urged by MacKinnon and other feminists with respect to the sexually discriminatory nature of sexually hostile work environments. In *Bundy*, a female employee alleged that her immediate male supervisor had propositioned her numerous times and had frequently engaged in offensive sexual conversations with her. To make matters worse, when she reported the incidents to her supervisor's male superior, *he* asked her to go to a motel to have sex with him, and remarked that "any man in his right mind would want to rape you."⁹¹ Relying on their 1977 decision in *Barnes v. Costle*,⁹² the D.C. Circuit held that this conduct amounted to discrimination because of Sandra Bundy's sex. The *Bundy* court noted that "the question is one of but-for causation: Would the complaining employee have suffered the harassment had he or she been of a different gender?"⁹³ Noting that *Barnes* acknowledged the problem of quid pro quo harassment, the *Bundy* court extended the *Barnes* holding to instances of hostile environment, or "condition of employment" harassment. In so doing, the *Bundy* court relied heavily upon both the *Rogers v. EEOC* theory of racial harassment⁹⁴ and Catharine MacKinnon's then-new book on sexual harassment.⁹⁵

The "hostile environment" interpretation of Title VII, which began with *Bundy* in 1981, culminated in the Supreme Court's statement in *Meritor Savings Bank, FSB v. Vinson*⁹⁶ that discriminatory employment practices reached not only a "tangible loss" of "an economic character" because of a person's sex,⁹⁷ but that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive environment."⁹⁸

90. 641 F.2d 934 (D.C. Cir. 1981).

91. *Id.* at 940.

92. 561 F.2d 983 (D.C. Cir. 1977)

93. 641 F.2d at 942 n.7.

94. *See id.* at 944-45.

95. *See id.* at 945-46.

96. 477 U.S. 57 (1986).

97. *Id.* at 64.

98. *Id.* at 66.

While the Supreme Court provided no reasoning to support this conclusion, many courts have since adopted the D.C. Circuit's approach, determining that a person has been discriminated against on the basis of her sex if she has been subjected to sexual overtures, conduct, or behavior from a supervisor that would not have been forthcoming "but for" her sex, meaning biological sex.⁹⁹ Such was the Supreme Court's construction of the wrong of sex discrimination in *City of Los Angeles Department of Water & Power v. Manhart*.¹⁰⁰ There, the Court held that the department's policy which required female employees to make larger contributions to the pension fund than male employees amounted to sex discrimination because "[s]uch a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"¹⁰¹

Construed according to formal equality principles, the wrong of sex discrimination amounts to the dissimilar treatment of otherwise similarly situated workers. Thus, where women are treated differently than men in the workplace, they are being discriminated against because of their sex: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁰² This oft-cited language mirrors the EEOC's interpretation of the meaning of sexual harassment,¹⁰³ and is repeated time and again in EEOC briefs.¹⁰⁴

99. See, e.g., *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (holding that "the district court correctly considered incidents of harassment and unequal treatment that would not have occurred but for the fact that [plaintiffs] were women"); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (noting that "a plaintiff must demonstrate that she would not have been the object of harassment but for her sex"); *Jones v. Flagship Int'l.*, 793 F.2d 714, 719 (5th Cir. 1986) (listing the "but for" requirement as one of five factors which must be satisfied in order to establish a hostile work environment claim); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) ("In proving a claim for a hostile work environment due to sexual harassment, therefore, the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment."); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) (noting that "[i]t is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner'" (quoting *Skelton v. Blazano*, 424 F. Supp. 1231, 1235 (D.D.C. 1976))). See also *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971) [hereinafter *Developments in the Law*] (reporting that "treatment of a person in a manner which but for that person's sex would be different is a prima facie unlawful employment practice as defined in section 703(a) [of Title VII]").

100. 435 U.S. 702 (1978).

101. *Id.* at 711 (quoting *Developments in the Law*, *supra* note 99, at 1170); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring) ("[A] substantive violation of [Title VII] only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action."). The "but for" analysis has also been relied upon in race cases. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (applying "but for" analysis to race discrimination in voting rights); Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) ("[T]he anti-discrimination principle disfavors race-dependent decisions and conduct . . . that would have been different but for the race of those benefited or disadvantaged by them.").

102. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

103. See EEOC Compl. Man. (BNA) ¶ 615.2(b)(3) (1982).

104. See, e.g., Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Opposition to Defendants' Motion for Summary Judgment at 6-7, *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 1996 WL 179860 (D. Minn. 1996) (No. 3-95-538).

Given the natural inclination to turn to something familiar when in foreign or uncomfortable territory, overwhelmingly courts have used a "but for" test to determine whether complaints of same-sex sexual harassment rise to the level of discrimination because of sex. In *Wright v. Methodist Youth Services Inc.*,¹⁰⁵ the first reported same-sex sexual harassment case, a male plaintiff alleged that his immediate supervisor had made, in the words of the court, "homosexual advances"¹⁰⁶ toward him. Noting that there was no precedent for such a claim, the court looked to more traditional quid pro quo sexual harassment cases. "Those holdings are predicated on the notion that making a demand of a female employee that would not be made of a male employee involves sex discrimination."¹⁰⁷ Because Wright's supervisor made a sexual demand of a male employee that would not have been directed at a female employee, the court concluded that the conduct amounted to discrimination based upon sex.¹⁰⁸

More recently, in *EEOC v. Walden Book Co.*,¹⁰⁹ the first same-sex sexual harassment case to go to a jury, a male employee of defendant Waldenbooks alleged that his supervisor, a gay man, had harassed him by making offensive sexual advances toward him. Ruling on the defendant's motion for a judgment on the pleadings, the court began by noting that "[t]o prevail in a sexual harassment case, a plaintiff must show that but for the plaintiff's sex, the plaintiff would not have been the object of harassment."¹¹⁰ Applying the "but for" test to the facts at hand, the court held:

When a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment. Thus, this Court finds that same-sex sexual harassment is actionable under Title VII.¹¹¹

The inclination to reduce the "because of sex" element of a sexual harassment prima facie case to "but for" causation is particularly appealing in cases like *Wright* and *Walden Book Co.*, where the harasser is either proven to be or believed to be gay. In fact, in most of the same-sex sexual harassment cases involving a gay harasser, whether quid pro quo or hostile environment cases, courts have held that the conduct violated Title VII because the harasser's sexual orientation provided conclusive evidence of "but for" causation:

If a plaintiff complains of unwelcome homosexual advances, the offending conduct is based on the employer's sexual preference and necessarily involved the plaintiff's gender, for an employee of the non-preferred gender would not

105. 511 F. Supp. 307 (N.D. Ill. 1981).

106. *Id.* at 308.

107. *Id.* at 310.

108. *See id.*

109. 885 F. Supp. 1100 (M.D. Tenn. 1995).

110. *Id.* at 1100.

111. *Id.* at 1103-04. A little more than a month after the judge denied the defendant's motion for a judgment on the pleadings, the case went to trial and a jury awarded the plaintiff \$1.6 million in punitive damages and \$75,000 in compensatory damages. *Harassment Victim Awarded \$1.6 Million*, 1995 Daily Lab. Rpt. (BNA) 98 (May 22, 1995).

inspire the same treatment. Thus, unwelcome homosexual advances, like unwelcome heterosexual advances, are actionable under Title VII.¹¹²

Thus, while "but for" causation is implicit in the conclusion that different-sex sexual harassment is discriminatory, it is often articulated explicitly in same-sex cases as a way to limit actionable harassment only to that undertaken by homosexuals.

2. *Sexual harassment is sex discrimination because it is sexual.*

The doctrine of formal equality has led many theorists to make the argument that sexual harassment violates the principle "that people who are the same should be treated the same."¹¹³ Others have made a different argument: Sexual harassment violates Title VII because it is sexual.

Susan Estrich, who has written extensively on the social meaning and legal treatment of rape,¹¹⁴ has approached the problem of sexual harassment by addressing the issue of "where and how 'sexuality' fits into sexual harassment."¹¹⁵ According to Estrich, the "but for" formula of sex discrimination "ignores the 'sexual' aspect of sexual harassment and the unique meaning of such harassment in a male-female context. . . . What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual."¹¹⁶ Greatly facilitating this interpretation of Title VII is a nominal complexity in the wording of the statute that appears, at first blush, to be "merely" linguistic:

In the English language, the word "sex" has two very different meanings. It means gender and gender identity, as in "the female sex" or "the male sex." But sex also refers to sexual activity, lust, intercourse, and arousal, as in "to have sex." This semantic merging reflects a cultural assumption that sexuality is reducible to sexual intercourse and that it is a function of the relations between women and men. This cultural fusion of gender with sexuality has given

112. *Parrish v. Washington Nat'l Ins. Co.*, No. 89-C4515, 1990 U.S. Dist. LEXIS 13934, at *9 n.2 (N.D. Ill. Oct. 19, 1990); see also *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335, 339 (E.D. Va. 1995) (holding that plaintiff must show that, "but for" her sex, plaintiff would not have been subject to harassment in order to maintain sexual harassment claim); *Raney v. District of Columbia*, 892 F. Supp. 283, 288 (D.D.C. 1995) (approving "but for" analysis in holding same-sex claim cognizable under Title VII); *Pritchett v. Sizeler Real Estate Management Co.*, No. CIV.A. 93-2351, 1995 WL 241855, at *2 (E.D. La. Apr. 25, 1995) ("Same gender [homosexual] harassment is clearly a form of gender discrimination because 'but for' the gender of the subordinate, she would not have been subjected to the harassment."); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995) ("When a homosexual man propositions or harasses a male subordinate, but does not similarly proposition or harass female workers, the male employee has been singled out because of his gender. *But for his being male, the harassment would not have occurred.*") (emphasis added) (citation omitted).

113. *MacKinnon*, *supra* note 23, at 107.

114. See *Susan Estrich, REAL RAPE* (1987).

115. *Estrich*, *supra* note 34, at 820.

116. *Id.* at 819-20. Samuel Marcossou also argues that the sexual harassment of gays and lesbians should be considered discrimination because "the sexual content of the harassment is enough, regardless of whether the harasser is motivated by the target's gender." Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 *Geo. L.J.* 1, 15 (1992); see also Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 *CAL. W. L. REV.* 87 (1995) (asserting that if conduct is sexual in nature it violates Title VII).

rise to the idea that a theory of sexuality may be derived directly out of a theory of gender.¹¹⁷

Yet, if "the sexual aspect" is going to do much of the work in a jurisprudence that regards sexual harassment as a kind of sex discrimination, then where is the sexism in sex?

For Estrich, the fact that the conduct is sexual in nature is not merely an accidental aspect of the harm, but rather, lies at the core of what makes the conduct sex discrimination. Sex in the workplace is regarded almost as a toxic pathogen by Estrich for reasons also embraced by other feminists.¹¹⁸ For these theorists of sexual harassment, the sexual aspect of sexual harassment does all the hegemonic work and has the effect and purpose of sexualizing women workers by reducing their humanity generally, and their status as workers specifically, to objects of male sexual pleasure.¹¹⁹

MacKinnon is in complete agreement with these insights. For MacKinnon, the harm of sexual harassment lies, in significant part, in the fact that it is an instrument of sex-role stereotyping. She observes that "a sex stereotype is present in the male attitude, expressed through sexual harassment, that women are sexual beings whose privacy and integrity can be invaded at will, beings who exist for men's sexual stimulation or gratification."¹²⁰

More than anything else, Catharine MacKinnon's life work has been committed to making the connection between sexism, sex, and power. While few courts have gone as far as MacKinnon and Estrich to hold that male sexual behavior is, in some sense, fundamentally sexist,¹²¹ most courts do treat *sex* harassment differently from *sexual* harassment. The sexual content of the harassing behavior makes a difference to them just as it does to many feminist theorists. But what is this difference? It is rather disingenuous to answer that sexual harassment is conduct "because of sex" by arguing that the "sex" in Title VII refers to a class of human activity and not the identity category. In order to better understand the role that sex (as in "to have sex" or "to engage in sexual activity") plays in sexual harassment, it is helpful to compare the differ-

117. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 307 (Carole S. Vance ed., 1984).

118. See Estrich, *supra* note 34, at 830 ("It is precisely this humiliation and fear that makes simply untenable the analogy between complaints about a dentist treating you unjustly and complaints about your boss forcing you to have sex with him."); see also Abrams, *supra* note 51, at 1205 ("Because of the inequality and coercion with which [sex] is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience."). Sally Burns, too, could well be read to hold this position. See Burns, *supra* note 89, at 427 (stating that the sexual pictures of women at the Jacksonville Shipyards "clearly ha[d] a disproportionately demeaning impact on the women . . . working at [the shipyards]").

119. Abrams, *supra* note 51, at 1186; see also *id.* at 1209 (noting that while women have gained "hard-won" access to jobs previously denied them, they encounter demeaning treatment that exploits their sexuality and "prevents them from feeling, and prevents others from perceiving them, as equal in the workplace."). Similarly, MacKinnon writes: "A woman is a being who identifies and is identified as one whose sexuality exists for someone else, who is socially male." Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *SIGNS* 515, 533 (1982).

120. MacKinnon, *supra* note 23, at 179.

121. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), comes closest to this position. See also text accompanying notes 186-187 *infra*.

ent ways that courts approach claims of sexual harassment based primarily on nonsexual conduct with claims of sexual harassment based primarily on sexual conduct.

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court recognized two kinds of sexual harassment, quid pro quo and hostile environment harassment.¹²² In fact, there are three kinds of sex harassment: (1) quid pro quo harassment, which by definition is sexual in nature;¹²³ (2) hostile environment sexual harassment, whereby the plaintiff alleges that the defendant engaged in unwelcome conduct of a sexual nature that created an intimidating, hostile, or offensive working environment;¹²⁴ and (3) hostile work environment sex harassment, in which the plaintiff alleges that, because of the plaintiff's sex, the defendant engaged in nonsexual conduct that created an intimidating, hostile, or offensive working environment.¹²⁵

With regard to the last two kinds of harassment, the law distinguishes between sexually oriented harassment¹²⁶ and sex-based harassment,¹²⁷ sometimes called gender-based harassment. Although in principle the former is a subset of the latter, courts for the most part have treated them independently. Most courts have been willing to recognize claims for sexual harassment based upon

122. 477 U.S. 57, 65 (1986).

123. Recall that quid pro quo harassment occurs when submission to sexual conduct is implicitly or explicitly made a condition of concrete employment benefits. See 29 C.F.R. § 1604.11(a)(1)-(2) (1996).

124. See *id.* § 1604.11(a)(3).

125. This form of sex harassment was explicitly addressed in the proposed *Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability*. 58 Fed. Reg. 51,266, 51,269 (1993) (to be codified at 29 C.F.R. pt. 1609) (proposed Oct. 1, 1993). However, since the proposed guidelines were withdrawn by the EEOC, see note 89 *supra*, there is no current provision in the guidelines dealing explicitly with this type of harassment. For the argument that 29 C.F.R. § 1604.11(a) includes this type of sex harassment, see note 128 *infra*; see also *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (declining to hold that sexual harassment must "take the form of sexual advances or of other incidents with clearly sexual overtones").

126. Sexually oriented harassment refers to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. See *Meritor*, 477 U.S. at 65 (citing EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1985)). The plaintiff must also show that conduct of a sexual nature is unwelcome and "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

127. Sex-based harassment refers to "[i]ntimidation and hostility toward women because they are women" and "the predicate acts underlying a sexual harassment claim need not be clearly sexual in nature." *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988). In *Hall*, male construction workers called the female workers obscenities, urinated in their gas tanks, and refused to give the women a truck to take to town for bathroom breaks. See *id.*; see also *Spain v. Gallegos*, 26 F.3d 439, 447 (3d Cir. 1994) ("[A]n employee can demonstrate that there is a sexually hostile work environment without proving blatant sexual misconduct."); *Chambers v. American Trans Air, Inc.*, 17 F.3d 998 (7th Cir. 1994) (noting that harsher discipline, heavier workloads and overt hostility directed toward female workers can create a sexually harassing work environment); *Stacks v. Southwest Bell Yellow Pages, Inc.*, 996 F.2d 200 (8th Cir. 1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("To constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones . . ."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (finding that Title VII prohibits harassment that is not sexually explicit); *McKinney*, 765 F.2d, at 1136-40 (interpreting Title VII to prohibit a wide range of harassing behaviors); *Konstantopoulos v. Westvaco Corp.*, 893 F. Supp. 1263, 1277 (D. Del. 1994) (finding that, in addition to some sexually explicit conduct, nonsexually explicit conduct contributed to the intimidation and hostility directed at plaintiff because she was a woman).

either conduct that is sexual in nature or conduct that creates a hostile environment but is nonsexual in its content.¹²⁸ Nevertheless, the analysis used by the courts as to why the conduct is discrimination "based upon sex" differs depending upon whether the conduct complained of is or is not sexual. Typically, in

128. See, e.g., *Hall*, 842 F.2d at 1014 ("Intimidation and hostility toward women *because they are women* can obviously result from conduct other than explicit sexual advances.") (emphasis added); *McKinney*, 765 F.2d at 1138 ("We have never held that sexual harassment . . . must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones."); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1173 (D. Nev. 1995) ("If this [nonsexual] conduct were directed only at men, or were directed at plaintiffs because they were men, it might be actionable as gender oriented harassment . . ."); see also *Stacks*, 27 F.3d at 1326; *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993); *Smolsky v. Consolidated Rail Corp.*, 780 F. Supp. 283, 294 (E.D. Pa. 1991).

In either case, sexual harassment remains difficult to prove. The Seventh Circuit recently emphasized the heavy burden carried by hostile work environment plaintiffs even when the conduct complained of is sexual in nature. In *Baskerville v. Culligan Int'l Co.*, Chief Judge Posner held that Title VII was designed to protect against only that conduct which renders the workplace "hellish for women," and not "the occasional vulgar banter[] tinged with sexual innuendo." 50 F.3d 428, 430 (7th Cir. 1995).

A minority of courts, however, have limited sexual harassment claims only to that conduct that is sexual in nature. See, e.g., *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986); *Downes v. Federal Aviation Admin.*, 775 F.2d 288, 290 (Fed. Cir. 1985); *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982). This interpretation of the meaning of "sexual harassment" stems, in part, from the courts' plain reading of the term, which on its face appears to require that the conduct be sexual. The EEOC Guidelines arguably provide further justification for such a reading. The guidelines state: Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1996).

If the second sentence of the EEOC Guidelines were understood to modify the first sentence, then only conduct of a sexual nature would be actionable under a Title VII hostile environment theory of recovery. One could, however, read the first sentence of the Guidelines to state a general principle, and the second sentence as merely an illustration of how explicit sexual conduct could be considered sexual harassment. See, e.g., *Hall*, 842 F.2d at 1014 ("Although appellants correctly note that the definition of sexual harassment in the EEOC regulation emphasizes explicitly sexual behavior, the regulations do not state that other types of harassment should not be considered."); *McKinney*, 765 F.2d at 1138 n.20 ("[W]e do not believe that an EEOC regulation that identifies certain activities as prohibited by Title VII can or should be taken to mean that any other activities are allowed."); see also *Marcosson*, *supra* note 116, at 14 n.58 (claiming that the EEOC has recognized harassment which is "sex-based but not sexual in nature").

Possible meanings of the term "sexual harassment" are further complicated by the EEOC's issuance of proposed *Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability*, 58 Fed. Reg. at 51,266, which explicitly excluded harassment that is sexual in nature from coverage within the Commission's *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.

The EEOC made clear that to the extent that the proposed guidelines concerned sex or gender-based harassment, they pertained to harassing conduct that was not sexual in nature because [s]exual harassment [as distinguished from gender harassment] continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis.

Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. at 51,267.

By distinguishing sexual harassment from gender harassment, one could reasonably conclude that the EEOC interprets sexual harassment as limited to harassing conduct of a sexual nature, and gender harassment as referring to all other nonsexual harassing conduct that is undertaken because of the target's sex. See Lynn McClain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII?*, 10 U. BALT. L. REV. 275, 290-91 (1981) (expressing concern that the EEOC Guidelines are underinclusive to the extent that they do not address conduct that is sexist but not explicitly sexual in nature).

harassment cases involving nonsexual conduct, courts explicitly require that the plaintiff show that the conduct was "based upon sex."¹²⁹ However, in cases where the plaintiff alleges hostile conduct of a sexual nature, most courts, including the Supreme Court in *Meritor*, are willing to infer,¹³⁰ if not conclude,¹³¹ that the conduct was based upon sex without demanding any specific proof thereof beyond the sexual nature of the conduct. In the traditional scenario, where a man has engaged in unwelcome and offensive sexual conduct toward a woman in the workplace, proof of conduct that is consistent with the description of sexual harassment in the EEOC Guidelines¹³² will typically establish a prima facie case.¹³³ Indeed, many courts intone the "because of sex" element and then never discuss it again.¹³⁴ For many courts, proof of the "because of sex" element is not required because "once the plaintiff in such a case proves that harassment took place, the most difficult legal question typically will concern the responsibility of the employer for that harassment."¹³⁵

129. In the nonsexual cases, most courts demand that the plaintiff establish the "because of sex" element of the prima facie case by proving "but for" causation. *See, e.g., Hall*, 842 F.2d at 1014 ("[T]he district court correctly considered [nonsexual] incidents of harassment and unequal treatment that would not have occurred but for the fact that [plaintiffs] were women."); *McKinney*, 765 F.2d at 1138 (holding that conduct need not be sexual to constitute sexual harassment, and that "any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII").

130. *See, e.g., Smolsky*, 780 F. Supp. at 295 (comments such as "[I] would like to 'get into her pants' . . . create the inference that the harassment and discrimination where [sic] intentional and based on the fact that the plaintiff was a woman"); *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) ("[S]exual behavior directed at women will raise the inference that the harassment is based on their sex.") (emphasis added) (citing *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904-05 (11th Cir. 1988)).

131. *See Andrews*, 895 F.2d at 1482 n.3 ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.") (emphasis added); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (finding offensive and sexual nature of cartoons sufficient to establish that harassment was based on sex); *Konstantopoulos*, 893 F. Supp. at 1277 ("Because at least some of the conduct at issue was sexually explicit, it is fair to draw the conclusion that, by virtue of this conduct, plaintiff suffered intentional discrimination because of her sex.").

Catharine MacKinnon's treatment of pornography as the subordination of women mirrors these assumptions. The anti-pornography ordinance passed by the City of Indianapolis, which was drafted by MacKinnon and Andrea Dworkin, sets forth that "[a] woman aggrieved by trafficking in pornography may file a complaint 'as a woman acting against the subordination of women' . . . [yet a] man, child or transsexual also may protest trafficking 'but must prove injury in the same way that a woman is injured.'" *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 326 (7th Cir. 1985) (quoting Indianapolis Code § 16-17(b)), *aff'd*, 475 U.S. 1001 (1986). Thus, the subordinating injury caused by pornography to women is presumed, whereas the injury to men, children and transsexuals must be proven explicitly.

132. The EEOC guidelines provide that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1981).

133. Of course, employer liability would remain to be proven separately.

134. *See, e.g., Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 375 (D. Md. 1994); *Frey v. Penn Sylvania Airlines*, 859 F. Supp. 137, 144 (E.D. Pa. 1992); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1526 (M.D. Ala. 1994); *Cronin v. United Service Stations Inc.*, 809 F. Supp. 922, 927 (M.D. Ala. 1992); *Boarman v. Sullivan*, 769 F. Supp. 904, 909 (D. Md. 1991).

135. *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

This, of course, is a mistake. The EEOC Guidelines on sexual harassment seek to define only part of the Title VII prima facie case. They do not address the entirety of the plaintiff's case. Thus, as the *Henson* court made clear, the elements of a sexual harassment case are as follows: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) proof of respondeat superior.¹³⁶ The EEOC Guidelines interpret only the second and perhaps fourth elements of the plaintiff's prima facie case—the remaining elements must be independently pled and proven. Yet, in most cases, when the plaintiff alleges that the defendant engaged in explicitly sexual conduct, the “based upon sex” element is simply not discussed. Instead, the inference or conclusion is automatically drawn, and no theory is advanced as to why it is legitimate to use such an evidentiary shortcut.

It is worth noting one consequence of the absence of a doctrinal foundation for concluding that sexual harassment is sex discrimination *ipso facto*. Most courts that are inclined to infer discrimination where there is evidence of sexually harassing behavior leave open the question of what the defendant's rebuttal case might look like. Once the inference has been raised, need the defendant come forward with a legitimate nondiscriminatory reason or business necessity for what would otherwise be considered offensive conduct? What would that legitimate nondiscriminatory reason or business necessity be? Do we not then make the discrimination claim turn on the subjective mental state of the defendant, rather than the fact that his actions created a sexually hostile work environment?

In *Stacks v. Southwestern Bell Yellow Pages, Inc.*,¹³⁷ the Eighth Circuit provided an answer to at least one of these questions. In considering the application of the *Price Waterhouse* mixed-motive burden shifting scheme¹³⁸ to a case of sexual harassment, the Eighth Circuit held that “[t]he mixed-motives analysis is inapplicable to a hostile-work environment claim. The analysis was designed for a challenge to ‘an adverse employment decision in which both legitimate and illegitimate considerations played a part.’ *An employer could never have a legitimate reason for creating a hostile work environment.*”¹³⁹ While it may be true that an employer could never have a *legitimate* reason for doing so, current sex discrimination doctrine allows for what some might regard as illegitimate, yet nondiscriminatory excuses: the bisexual or equal op-

136. See *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982).

137. 27 F.3d 1316 (8th Cir. 1994).

138. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989). The *Price Waterhouse* scheme provides that “once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.” *Id.* (footnote omitted).

139. *Stacks*, 27 F.3d at 1326 (quoting *Price Waterhouse*, 490 U.S. at 247) (citations omitted) (emphasis added).

portunity harasser.¹⁴⁰ Because their omnidirectional conduct does not expose "members of one sex . . . to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,"¹⁴¹ at present, sexual harassment doctrine affords a safeharbor that shields these scoundrels from Title VII sexual harassment liability.

One final argument has been made in support of the conclusion that it is the sexual nature of the conduct that renders it sex discrimination. Unlike the examples above, it is an actual argument, rather than a mere conclusion posing as argument. In a few cases, courts have been willing to find that sexual conduct can rise to the level of sex discrimination specifically because the conduct "is disproportionately more offensive or demeaning to one sex."¹⁴² In *Robinson v. Jacksonville Shipyards, Inc.*, the court considered the claim made by female shipyard workers that their workplace, polluted with pictures of naked women and other sexually graphic material, created a sexually hostile work environment, even though many of the sexual materials were not directed at them individually.¹⁴³

140. Conceptualizing sex discrimination primarily as conduct that would not have taken place but for the victim's sex has produced an exception for what has come to be known as the bisexual supervisor. See *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."); see also *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996) (same); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (citing *Barnes* for same proposition); Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment under Title VII*, 20 VT. L. REV. 55, 70-78 (1995) (analyzing cases involving bisexual harassers and arguing that the courts' treatment of them is proper because they do not involve disparate treatment on the basis of gender); Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013 (1996) (arguing that the exception for the bisexual harasser is misguided and that the focus should be on whether the harasser acts to discriminate on the basis of gender). The bisexual supervisor, however, is not the only scoundrel who can avoid Title VII liability for offensive sexual conduct in the workplace under the "but for" formulation of the wrong of sexual harassment. His friend, the "equal opportunity harasser," creates a sexually hostile working environment for both male and female employees, but, unlike the bisexual supervisor, no facts are adduced with respect to his sexual orientation or desires. This harasser has also enjoyed immunity from liability in a few cases. See, e.g., *Cabaniss v. Coosa Valley Med. Ctr.*, CV 93-PT-2710-E, 1995 WL 241937, at *27 (N.D. Ala. Mar. 20, 1995) (mem.) (implying that if harasser treated both men and women equally badly he would not be guilty of gender discrimination). Several other courts, however, have considered and rejected a Title VII safe harbor for the "equal opportunity harasser." See, e.g., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994) (rejecting equal opportunity harasser defense and noting that both male and female employees could have viable harassment claims) *cert. denied*, 115 S. Ct. 733 (1995); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337-38 (D. Wyo. 1993) (holding that supervisor's harassment was actionable even though he may have harassed both sexes equally, because the individual plaintiffs were harassed because they were male).

141. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

142. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991). The *Robinson* court identified three ways in which the plaintiffs could show that the conduct was based upon sex: (1) proof of harassing behavior lacking sexually explicit content but directed at women and motivated by animus against women; (2) proof of sexual behavior directed at women thereby raising the inference that the harassment is based upon sex; and (3) proof of behavior that is not directed at a particular individual or group of individuals, but that is disproportionately more offensive or demeaning to one sex. *Id.*; see also *Stair v. Lehigh Valley Carpenters Local Union No. 600*, No. CIV.A. 91-1507, 1993 WL 235491, at *20 (E.D. Pa. July 24, 1993) (discussing conduct which is "disproportionately more offensive or demeaning to one sex"), *aff'd*, 43 F.3d 1463 (3d Cir. 1994).

143. See *Robinson*, 760 F. Supp. at 1523.

In finding that sexual conduct can be disproportionately more offensive and demeaning to women than to men, the court concluded "that the presence of the pictures, even if not directed at offending a particular female employee, sexualizes the work environment to the detriment of all female employees."¹⁴⁴ In so holding, the court acknowledged the expert testimony of Dr. Susan Fiske, an expert in sex stereotyping and professor of psychology at Amherst College. Dr. Fiske testified that sexually explicit materials in the workplace, like that in the plaintiffs' workplace, act as stimuli that may "prime" or "encourage a significant proportion of the male population in the workforce to view and interact with women coworkers as if those women are sex objects."¹⁴⁵ Relying on Dr. Fiske's testimony, the court concluded:

"the presence of pictures of nude and partially nude women, sexual comments, sexual joking, and other behaviors previously described creates and contributes to a sexually hostile work environment. Moreover, this framework provides an evidentiary basis for concluding that a sexualized working environment is abusive to a woman because of her sex."¹⁴⁶

The defendants argued that the dirty pictures had not been hung with the intent to offend female workers. Since the pictures were present in the workplace long before women worked at the shipyards, they couldn't amount to intentional discrimination because of the plaintiffs' sex. The court rejected this argument, reasoning:

The pictures themselves fall into the third category, behavior that did not originate with the intent of offending women in the workplace (because no women worked in the jobs when the behavior began) but clearly has a *disproportionately demeaning impact on the women* now working at JSI. The expert testimony of Dr. Fiske provides solid evidence that the presence of the pictures, even if not directed at offending a particular female employee, sexualizes the work environment to the detriment of all female employees.¹⁴⁷

The *Robinson* "disproportionately more offensive or demeaning" rule could be interpreted to mean that all sexual conduct in the workplace creates a sexually hostile and discriminatory work environment for women because it sexualizes the workplace. Under this rationale, sexual harassment has a disparate impact upon women by virtue of their special vulnerability to sexual conduct in the workplace.¹⁴⁸ Therefore, one might conclude, we should rid the workplace of as much sexual conduct as possible because of its presumptively discriminatory effects on women. Yet, to the extent that the *Robinson* rule has been rec-

144. *Id.*

145. *Id.* at 1503. This process is called "priming," in which "specific stimuli in the work environment prime certain categories for the application of stereotypical thinking." *Id.*; see also John A. Bargh, Shelly Chaiken, Rajen Govender & Felicia Pratto, *The Generality of the Automatic Attitude Activation Effect*, 62 J. PERSONALITY & SOC. PSYCHOL. 893 (1992) (examining how "attitude objects" achieve particular behaviors in viewers).

146. *Robinson*, 760 F. Supp. at 1505.

147. *Id.* at 1523 (emphasis added).

148. See Burns, *supra* note 89, at 426-27 (discussing disparate impact evidence in hostile environment claims). Other courts have held that sexual harassment amounts to the disparate treatment of women. See, e.g., *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 144 (2d Cir. 1993); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

ognized by other courts, it has been construed in a more limited fashion. That is, not all sexual conduct is demeaning to women; only that which depicts women as sex objects, sexually ridicules, insults them, or suggests sexual violence toward women. So, in *Fox v. Sierra Development Co.*, the court declared that it was "unaware of any modern case standing for the proposition that sexuality itself is harmful to men or women."¹⁴⁹ Rather, according to the court in *Stair v. Lehigh Valley Carpenters Local Union No. 600*,¹⁵⁰ the content of the sexually explicit writings, drawings or discussions must, like "'girlie' calendars . . . communicate [] to women that the [defendant] views them as sexual objects rather than as skilled co-workers."¹⁵¹ The advantage of *Robinson's* "disproportionately more offensive or demeaning" rule is that it begins to answer the question: What is sexist about sex? Although *Robinson* does not provide a satisfactory answer, at least it represents a more principled response to this infrequently asked, but fundamental, question.

Just as in the different-sex context, in same-sex cases some courts have found that the sexual nature of the complained of conduct is significant, if not dispositive. In *Martin v. Runyon*,¹⁵² a male postal employee complained that a male coworker called him "sweetie pie" and "bitch." The EEOC, however,

149. *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175 (D. Nev. 1995); cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-12 (1975) (stating nonobscene exposure to sex is not something that the government may prevent).

150. No. CIV.A. 91-1507, 1993 WL 235491 (E.D. Pa. July 24, 1993), *aff'd*, 43 F.3d 1463 (3d Cir. 1994).

151. *Id.* at *21. At least one commentator has explicitly taken issue with the view that the sexism in sex depends upon its content. See Marcossou, *supra* note 116, at 23 ("The whole point of this discussion is to show that harassment that is sexual in nature but not gender-based can constitute sexual harassment under Title VII.") (emphasis added). Not surprisingly, content-based limits on workplace speech, such as those advanced by the plaintiffs in *Robinson*, *Fox*, and *Stair*, are immediately met by First Amendment objections, particularly in the public employment setting. See *Robinson*, 760 F. Supp. at 1534-38 (addressing the employer's First Amendment concerns and concluding that injunctive relief would not violate guarantee of free speech); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (arguing that regulation of harassing speech under Title VII constitutes impermissible viewpoint discrimination and chills speech); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993) (arguing that the EEOC guidelines on sexual harassment are probably facially unconstitutional because they are overbroad, and as applied they sweep in protected speech); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (arguing that harassment law currently regulates too broadly and proposing a new framework by which to draw the line between harassing workplace speech that must be protected and that which may be regulated). These arguments have been answered by those who seek a middle ground between the First Amendment and sexual harassment doctrine, see, e.g., Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990) (arguing that courts should balance First Amendment concerns against the state's interest in eradicating sexist speech from the workplace), and by those who see no First Amendment right, see CATHARINE A. MACKINNON, *ONLY WORDS* 109 (1993) (proposing redefining free speech rights to account for the law of equality); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 475 (1995) (arguing that Browne and Volokh overstate the conflict between the First Amendment and harassment law, and that "First Amendment interests are not substantially furthered by allowing free reign to speech which effectuates discrimination"); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757, 777-82 (1992) (arguing that some regulation of workplace sexual harassment is necessary to the advancement of women's equality, but that too much regulation would undermine the goals of both free speech and equality).

152. *Demetrius Martin*, Appeal No. 01934718, 1994 WL 746784 (EEOC Sept. 29, 1994).

determined that he had not made out a prima facie case of sexual harassment because "the terms 'sweetie pie' and 'bitch,' though they appear to be derogatory references to appellant's sexual orientation, are not explicitly sexual in nature."¹⁵³ In *Mogilefsky v. Superior Court*,¹⁵⁴ a male employee charged that his male supervisor violated California's Fair Employment and Housing Act when he ordered Mogilefsky to play a pornographic video and asked how much he would charge to perform acts similar to those seen on film.¹⁵⁵ The state appeals court reversed a lower court's order granting the defendant's demurrer, concluding that conduct of a sexual nature is always "because of sex" for purposes of the statute, "whether motivated by hostility or by sexual interest."¹⁵⁶

Martin and *Mogilefsky*, however, represent the minority view of the significance of the sexual nature of the conduct to a claim of same-sex sexual harassment. Unlike the different-sex cases, in same-sex cases brought under Title VII most courts demand that the plaintiff show something more than that the conduct was unwelcome and of a sexual nature. In *Vandeventer v. Wabash National Corp.*,¹⁵⁷ for instance, the male plaintiff alleged that a male coworker used obscene language toward him. In ruling on the defendant's summary judgment motion, the court held:

The words "sex" and "sexual" create definitional problems because they can mean either "relating to gender" or "relating to sexual/reproductive behavior." The two are not the same, but are certainly related and easily confused. Title VII only recognizes harassment *based* on the first meaning, although that frequently *involves* the second meaning. However, harassment which involves sexual behavior or has sexual behavior overtones (i.e., remarks, touching, display of pornographic pictures) *but is not based on* gender bias does *not* state a claim under Title VII.¹⁵⁸

The court then went on to state that when a man touches a woman in a sexual manner, it can be presumed that he does so because of her sex, but that such a presumption should not be drawn from intra-male sexual behavior. Something else must be shown in order to establish the "because of sex" element of the prima facie same-sex sex harassment case. According to the *Vandeventer* court, merely calling the plaintiff a "dick sucker" was not enough, because "[t]his was a common epithet, not a sexual advance."¹⁵⁹ So too, in *Johnson v. Hondo, Inc.*,¹⁶⁰ the court treated comments such as "suck my dick" as crude, boorish, and vulgar, thus evidencing a grudge match between two male employees, but not discrimination because of sex.¹⁶¹

153. *Id.* at *4.

154. 26 Cal. Rptr. 2d 116 (Cal. Ct. App. 1993).

155. *See id.* at 117.

156. *Id.* at 119.

157. 887 F. Supp. 1178 (N.D. Ind. 1995).

158. *Id.* at 1181 (footnote omitted).

159. *Id.* at 1181 n.2.

160. 940 F. Supp. 1403 (E.D. Wis. 1996).

161. *Id.* at 1410.

In contrast, however, if a man calls a female coworker a "fucking cunt" this term is not considered a mere epithet.¹⁶² And without question, if a male employee asked a female employee to "suck my dick," no court would hesitate to find a violation of Title VII. Thus, the transparency of the sexism in different-sex harassment does not transfer to same-sex harassment cases. Something more than sexual conduct must be proved to render the conduct sex discrimination.

The Massachusetts Supreme Judicial Court's recent opinion in *Melnychenko v. 84 Lumber Company*¹⁶³ provides a salient illustration of the gap between sex and sexism in sexual harassment doctrine. Leonid Melnychenko, James Quill, and Stephen LaRochelle accused the male manager of the lumber store at which they all worked of grabbing their genitals, fondling their buttocks, exposing himself, and asking for blow jobs, among other things.¹⁶⁴ A Massachusetts employee is protected against workplace harassment under two different provisions of the Massachusetts Fair Employment Act.¹⁶⁵ One provision prohibits discrimination "based on sex," which general language has been judicially interpreted to include a prohibition against sexual harassment.¹⁶⁶ A separate provision of the same law, however, renders sexual harassment a per se violation of the law, without requiring that the plaintiff show that the conduct was undertaken "based on" or "because of" the victim's sex.¹⁶⁷

Upon the urging of the State Attorney General as amicus curiae,¹⁶⁸ the Supreme Judicial Court in *Melnychenko* ruled that the conduct alleged by the plaintiffs was a per se violation of the Massachusetts Fair Employment Act and did not require that the plaintiffs demonstrate that same-sex sexual harassment was discrimination "because of the victim's sex."¹⁶⁹ The statute as issue in *Melnychenko* is, in an important sense, a more honest legislative approach to the problem. That is, by dropping out the "because of sex" or "based upon sex" element of the sexual harassment prima facie case, the Massachusetts legislature codified what was already taking place in most courts.

162. See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), cert. denied, 115 S. Ct. 73 (1995); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 782 (E.D. Wisc. 1984), aff'd in part and rev'd in part, 789 F.2d 540 (7th Cir. 1988). But see *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (holding that a man calling a female coworker "bitch" did not, under the facts presented, constitute sexual harassment, but noting that "[t]he terms 'fucking broads' and 'fucking cunts' are more gendered than 'bitch'").

163. 1997 WL 63637 (Mass. Feb. 18, 1997).

164. See Brief Amicus Curiae of Gay & Lesbian Advocates & Defenders, Women's Bar Association of Massachusetts, American Civil Liberties Union of Massachusetts, & Massachusetts Lesbian and Gay Bar Association at 4, *Melnychenko v. Lumber Co.*, 1997 WL 63637 (Mass. Feb. 18, 1997) (No. 07029).

165. See MASS. GEN. LAWS ANN. ch. 151B (West 1996)

166. See *id.* § 4(1) (prohibiting discrimination "because of sex"); *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination*, 508 N.E.2d 587, 591 (Mass. 1987) (interpreting the general language pertaining to discrimination "because of sex" to evidence a legislative intent to prohibit sexual harassment).

167. See MASS. GEN. LAWS ANN. ch. 151B, § 4(16A) (West 1996).

168. See Brief of the Attorney General Amicus Curiae at 27-28, *Melnychenko v. Lumber Co.*, 1997 WL 63637 (Mass. Feb. 18, 1997) (No. 07029).

169. See *Melnychenko*, 1997 WL 63637, at *2.

However, under Title VII, neither the different-sex nor same-sex cases satisfactorily answer the question: What is sexist about sex? In the different-sex cases, for the most part, the link is simply presumed. Yet, in the same-sex cases, many courts observe that Title VII does not and should not be read to collapse sex and sexism—something more is needed for sexual conduct to be considered sexually discriminatory. Both MacKinnon and Estrich want to provide that something more. Estrich's concern with the social construction of male and female sexuality stems from deep skepticism about when or whether sexual conduct between men and women in the workplace can ever take place in the absence of coercion. She finds merit in the assertion that "there is no such thing as truly 'welcome' sex between a male boss and a female employee who needs her job."¹⁷⁰ To those who say that a male supervisor's advances are not sexual harassment unless the woman objects, Estrich replies: "At the very least, we might demand that such men look for 'love' outside of work, or at least ask for it first."¹⁷¹ Both Estrich and MacKinnon share a grave doubt that sexual conduct could ever be equally offensive to male and female employees alike.¹⁷²

Based on this, Estrich makes a rather austere recommendation:

As things stand now, we protect the right of a few to have "consensual" sex in the workplace (a right most women, according to the studies, do not even want), at the cost of exposing the overwhelming majority to oppression and indignity at work. Is the benefit to the few so great as to outweigh the costs to so many more? I think not. For my part, I would have no objection to rules which prohibited men and women from sexual relations in the workplace, at least between those who worked directly for the other.¹⁷³

According to this view, men should keep their hands off women in the workplace¹⁷⁴ and refrain from sex-talk that reflects "the most traditional and most sexist attitudes."¹⁷⁵ Further, sexual relations between coworkers, even if "consensual," should be deemed per se inappropriate in the workplace.¹⁷⁶

3. *Sexual harassment is sex discrimination because it is sexually subordinating.*

The argument has been made that sexual harassment is a kind of sex discrimination either because it violates formal equality principles, or because it is sexual. A third approach advances another way to understand sexual harassment as a kind of discrimination based on sex: it is a practice that subordinates

170. Estrich, *supra* note 34, at 831.

171. *Id.* at 828.

172. Francis Olsen could be read to take the same dim view of sex in the workplace. See Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1551 (1983) ("One explanation for banning sexual harassment is that such behavior does not belong in the marketplace.").

173. Estrich, *supra* note 34, at 860.

174. See *id.* at 842.

175. *Id.*

176. *Id.* at 860.

women to men. For MacKinnon, the inequality, or anti-subordination, approach

understands the sexes to be not simply socially differentiated but socially *unequal*. In this broader view, all practices which subordinate women to men are prohibited. The differences approach, in its sensitivity to disparity and similarity, can be a useful corrective to sexism; both women and men can be damaged by sexism, although usually it is women who are. The inequality approach, by contrast, sees women's situation as a structural problem of enforced inferiority that needs to be radically altered.¹⁷⁷

MacKinnon believes that the inequality or anti-subordination approach best explains the harm of sexual harassment when applied to women's working lives, and has the greatest potential to transform sexually discriminatory workplace practices through the use of law. She relies heavily upon a subordination account of sexual harassment by defining it in terms of what it does:

Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men's control over women's sexuality and capital's control over employees' work lives.¹⁷⁸

....

Similar to the way in which the status of American blacks of both sexes encompasses personal and economic exploitation, sexual harassment deprives women of personhood by relegating them to subservience through jointly exploiting their sexuality and their work.¹⁷⁹

For MacKinnon sexual harassment is sex discrimination because it helps create and further inequality among the sexes. In her view, "[s]exual 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."¹⁸⁰ At times she disavows the notion that biology predetermines male aggression,¹⁸¹ arguing that biological males are taught to express their sexuality as power and to express power in sexual ways. In this regard, sexual harassment is sex discrimination because "[s]exual harassment is discrimination 'based on sex' within the social meaning of sex, as the concept is socially incarnated in sex roles."¹⁸² When making this argument, MacKinnon understands male sexuality as eroticized domination: power is sexualized, sex is power.¹⁸³ While MacKinnon states that the male perspective is a social, not a biological, con-

177. MACKINNON, *supra* note 23, at 4-5.

178. *Id.* at 174.

179. *Id.* at 177.

180. *Id.* at 191-92.

181. *See, e.g.,* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 114 (1989) ("Male is a social and political concept, not a biological attribute, having nothing whatever to do with inherency, preexistence, nature, essence, inevitability, or body as such.").

182. MACKINNON, *supra* note 23, at 178.

183. "Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy; gender is one. . . . The male sexual role, this information and analysis taken together suggest, centers on aggressive intrusion on those with less power. Such acts of dominance are experienced as sexually arousing, as sex itself." MACKINNON, *supra* note 181, at 127 (footnotes omitted).

struct, she more frequently writes of subordination as something that men inevitably do to women.¹⁸⁴

While the formal equality and sex-equals-sexism approaches to sexual harassment have been adopted by a number of courts, the anti-subordination approach has found less judicial acceptance.¹⁸⁵ Once again, *Robinson v. Jacksonville Shipyards, Inc.*,¹⁸⁶ represents the jurisprudential high water mark in this area. The court in *Robinson*, more than almost any other court, was willing to regard the shipyards' sexually polluted work environment as an expression of a kind of coercive male sexuality from which female workers could not escape short of quitting their jobs.¹⁸⁷ More typical are cases in which notions of subordination presumably animate the court's willingness to infer that sexual conduct was undertaken because of sex. One might conclude from the *Meritor* decision¹⁸⁸ that the Court embraced the notion that sexual harassment is about sex-based power, while refusing MacKinnon's fundamental insight that the subordination of women is always sexual.

Not surprisingly, the anti-subordination principle has acted as a roadblock to same-sex sexual harassment plaintiffs. Where a man directs offensive sexual conduct at a woman in the workplace, the conduct reproduces a subordinating dynamic that it is widely believed Title VII was intended to address.¹⁸⁹ But when a man directs offensive conduct of a sexual nature at another man, it fails to reproduce that same historical script, or so the argument goes. For this reason, virtually all of the courts that have refused to find a cause of action for same-sex sexual harassment have reasoned either that the conduct did not create an anti-male environment,¹⁹⁰ or that as a matter of law men cannot be sexu-

184. See, e.g., *id.* at 114 ("The feminist theory of knowledge is inextricable from the feminist critique of power because the male point of view forces itself upon the world as its way of apprehending it.").

185. MacKinnon notes that the anti-subordination approach is infrequently used in sex and race equality cases: "This approach to inequality is marked by the understanding that sex discrimination is a system that defines women as inferior from [sic] men, that cumulatively disadvantages women for their differences from men, as well as ignores their similarities. Few judicial opinions exhibit this awareness, but its spirit moves beneath most decisions that bestow rights upon women." MACKINNON, *supra* note 23, at 116. Ruth Colker makes a similar observation, but wants to take it one step further:

Although much of the scholarship on equal protection doctrine assumes that the antidifferentiation principle is justifiably the dominant perspective, a comparison of race and sex cases, as well as of constitutional and statutory cases, reveals that the anti-subordination principle better explains both much of the law and the aversion we feel to race and sex discrimination.

Colker, *supra* note 53, at 1011 (footnotes omitted).

186. 760 F. Supp. 1486 (M.D. Fla. 1991).

187. "Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish to be viewed in the workplace." . . . [O]nly those women who are willing to and can accept the level of abuse inherent in a given workplace—a place that may have historically been all male or historically excluded women intentionally—will apply to and continue to work there." *Id.* at 1526 (quoting Abrams, *supra* note 51, at 1212 n.118).

188. 477 U.S. 57 (1986).

189. See *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) ("The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.").

190. See notes 320-340 *infra* and accompanying text.

ally harassed by other men because they are not a discrete and vulnerable group.¹⁹¹

Under the anti-subordination view, sexual harassment is sex discrimination precisely because it replicates and perpetuates a sexual hierarchy in which men possess and maintain their power by virtue of their ability to define women in terms of their sexuality:

A theory of sexuality becomes feminist methodologically, meaning feminist in the post-marxist sense, to the extent it treats sexuality as a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender.

....

The gender issue, in this analysis, becomes the issue of what is taken to be "sexuality"; what sex means and what is meant by sex, when, how, with whom, and with what consequences to whom.¹⁹²

Men, therefore, cannot be the victims of sexual harassment because their sexual objectification, either at the hands of women or other men, would not mirror this subordinating social hierarchy. Sexual epithets, thus, "do not demean men as a group, but only demean the recipient by implying that, although he is male, he is not properly a member," or that his male pedigree is otherwise questionable.¹⁹³ This less sophisticated form of the anti-subordination principle underlies the courts' findings in many same-sex harassment cases that the conduct complained of does not and cannot violate Title VII. While I agree with Burns' observation that often times the harassment of men does not demean men as a group, I disagree that this insight takes the problem out of a subordination paradigm. Rather, as I develop more fully below, when some men are harassed because they "are not properly a member" of the male sex that the anti-subordination analysis should apply: an account of sexual subordination must include a proscription against the enforcement of intra-sexual gender stereotypes.

MacKinnon has articulated most clearly, and undoubtedly, most prolifically, the view that male sexuality is the principle form and means of women's

191. See, e.g., *Ashworth v. Roundup, Co.*, 897 F. Supp. 489, 493-94 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 525-26 (D.S.C. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834-35 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir.) (affirming without relying on the "discrete and vulnerable" group analysis), *cert. denied*, 117 S. Ct. 70 (1996); *Fleenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793, at *2 (S.D. Ohio 1994); cf. *Wrightson v. Pizza Hut of Am., Inc.*, 909 F. Supp. 367, 368 (W.D.N.C. 1995), *rev'd*, 99 F.3d 138 (4th Cir. 1996).

The court in *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993), advanced a slightly different version of this argument:

Taking the point one step further, it also seems peculiar to call sexual harassment of a male by a male, or [of] a female by a female, sex discrimination. . . . What the harasser is really doing is preferring or selecting some one member of his [own] gender for sexual attention, however unwelcome that attention may be to its object. He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive.

Id. at 1337 n.1 (quoting Ellen Frankel Paul, *Sexual Harassment as Sexual Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 351-52 (1990) (footnotes omitted)); see also *Hopkins*, 871 F. Supp. at 833, (quoting from the same passage).

192. MACKINNON, *supra* note 181, at 128-29.

193. Burns, *supra* note 89, at 421 n.397.

domination. This is a very important insight. Indeed, MacKinnon is so committed to the political, metaphysical, and epistemological power of sex and domination that she rejects the notion that there is anything we can safely regard as "just sex."¹⁹⁴ It was this underlying analysis of the coextensivity of sex and power that formed the basis for her declaring the expression of male sexuality in the workplace a kind of discrimination "because of sex." MacKinnon's subordination analysis is necessary to make the logical bridge here. Unfortunately, her analysis is either too complicated or too radical for most judges. As a result, her work has engendered a sexual harassment jurisprudence in which sex is understood as sexism (when expressed between people of different sexes) according to a jaundiced analysis as to *why*. It is a theory of the why of sexual harassment that I believe is missing from our sexual harassment jurisprudence. Judges can't merely insist, based upon their intuitions, that they know it when they see it.

All three accounts of sexual harassment as a form of sex discrimination have, at one time or another, convinced courts that the sexual harassment of working women violates Title VII. At the same time, all three paradigms have proven inadequate in providing an account of how sexual harassment might be a kind of sex discrimination. I believe that the inferences courts now draw in traditional male/female sexual harassment cases make sense. They represent an appropriately efficient method by which female plaintiffs can prove that they have been discriminated against because of their sex. What concerns me is that these inferences are drawn in the absence of an underlying theoretical account of the wrong of sexual harassment. The absence of a coherent doctrine both in traditional different-sex cases, and in more novel same-sex cases has significant consequences, and is ultimately dangerous for the larger project of ending gender-based discrimination and bias. In the following section, I show how the three dominant accounts of sexual harassment do not do the work they promise to do, and that they deflect attention from the real gender-based harm that makes sexual harassment a form of sex discrimination.

III. A CRITIQUE OF THE PREVAILING CONCEPTIONS OF SEXUAL HARASSMENT AS SEX DISCRIMINATION

The sexual nature of the offending conduct figures prominently in all three of the dominant accounts of the wrong of sexual harassment. And so it should, given that it is the sexual content of the harassment that sets it apart from all other forms of workplace harassment, and that distinguishes it from sex discrimination more generally. But by locating sex at the center of the analysis, all three accounts make a serious mistake. They obscure the degree to which sex is the method, but sexism is the meaning of sexual harassment. That is, sex is "[the] means through which power is articulated."¹⁹⁵ Even as courts have

194. MACKINNON, *supra* note 181, at 140.

195. JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* 45 (1988).

embraced, either expressly,¹⁹⁶ or implicitly,¹⁹⁷ some feminist conceptualizations of sexual harassment as sex discrimination, they have simplified, distorted, and selectively (mis)appropriated the arguments made by feminists in favor of recognizing a Title VII cause of action for sexual harassment.

In this Part, I discuss the ways in which the formal equality, sex-equals-sexism, and subordination paradigms in sexual harassment jurisprudence have come to rest upon unprincipled footings. Close scrutiny reveals how these theories reinforce other biased ways of thinking about the relationship between sex and gender, and take us down doctrinal paths that reinforce rather than break down gender stereotyping in the workplace. Ultimately, it is because of these significant flaws in the doctrine as it has developed that I urge a rethinking of the wrong of sexual harassment.

First, I will explain how formal equality—understood as “but for” causation—inappropriately reduces the harm of sexual harassment to the simple expression of sexual desire. The seriousness of this error is starkly revealed in the same-sex cases where it has been magnified and fixed in ways that will haunt both same and different-sex cases in the future. Next, the simple equation of sex with sexism—a dynamic that figures prominently in some of the cases many feminists consider “good” cases¹⁹⁸—portends dangerous consequences for female sexual agency within and without the workplace. Finally, while I regard the anti-subordination view of sexual harassment as the most principled account of the wrong of sexual harassment, this theory must abandon the notion that sexual subordination is something that men, and only men, can do to women, and only women.

A. *The Mistake of Desire*

The “but for” formulation of the wrong of sexual harassment, implicit in most different-sex cases, yet explicit in the same-sex cases, has been regarded as an uncontroversial and even principled way of understanding the “because of sex” element of the prima facie sexual harassment case. That courts have turned to the “but for” formulation in order to resolve same-sex sexual harassment cases should come as no surprise, but should give us pause. It is an expedient way of approaching same-sex cases because it derives from the assumption in different-sex cases that sexual harassment is undertaken because of the harasser’s unfettered libido. However, in both the same- and different-sex contexts, this account fails to address why sexual harassment is a kind of sex discrimination. At best, “but for” is an evidentiary short cut that Title VII plaintiffs may use in order to prove sex discrimination. As a conception of the wrong of sexual harassment, however, the “but for” formulation threatens to

196. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (citing the work of Professors Nancy Ehrenreich and Kathryn Abrams); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1504-05 (M.D. Fla. 1991) (relying upon the testimony of Dr. Susan Fiske).

197. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”).

198. See, e.g., *Robinson*, 760 F. Supp. at 1486.

obscure as much as it illuminates. The error arises when the evidentiary methodology stands for, or worse, is understood to constitute the underlying wrong it is designed to prove.

As noted above,¹⁹⁹ in considering the "because of sex" aspect of the prima facie sexual harassment case in different-sex cases, courts frequently observe that this element "is implicit, and thus should be recognized as a matter of course."²⁰⁰ The assumption that animates such a conclusion is the notion that men sexually harass women as an expression of their (hetero)sexuality:

When someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is "because of" the victim's gender. This presumption is grounded on the reality that sexual conduct directed by a man, for example, toward a woman is usually undertaken because the target is female and the same conduct would not have been directed toward another male. . . . But when the harasser and the victim are the same gender, the presumption is just the opposite because such sexually suggestive conduct is usually motivated by entirely different reasons.²⁰¹

The Sixth Circuit recently employed this logic in finding that the sexual harassment of Terry Yeary, a man, by Robert E. Lee, a gay male coworker, amounted to discrimination because of sex:

[This case] is about an employee making sexual propositions to and physically assaulting a coworker because, it appears, he finds that coworker sexually attractive. *This is a scenario that has been found actionable countless times over, when the aggressor is a male and the victim is a female. . . . [W]hen a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male—that is, "because of . . . sex."*²⁰²

199. See text accompanying notes 130-135 *supra*.

200. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).

201. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); see also *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 738-39 (N.D. Ill. 1996) ("In an effort to sort sexual from platonic harassment, courts would be forced to distinguish between locker room antics and sexual foreplay . . ."); *Shermer v. Illinois Dep't of Transp.*, 937 F. Supp. 781, 784-85 (C.D. Cal. 1996) ("[W]ithout proof that a harasser acted out of sexual attraction, it is very difficult for a plaintiff to prove a same-sex hostile environment claim."); *Kennedy v. GN Danavox*, 928 F. Supp. 866, 871 (D. Minn. 1996) ("To satisfy element three[—the harassment was based on sex—]the harassment must be of a sexual origin. . . . However, in his deposition testimony [plaintiff] admits that [defendant] did not wish to have a sexual relationship with him, thus belying the notion that [defendant's] conduct was sexual in nature."); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) ("[W]ithout the presumption of sexual gratification, there is no evidence that the harasser intentionally singled out the victim for offensive treatment because he was male. Thus, there is no sex discrimination."); *Easton v. Crossland Mortgage, Corp.*, 905 F. Supp. 1368, 1382-83 (C.D. Cal. 1995) ("In the typical hostile environment case—that is, a male supervisor makes sexually suggestive remarks to a female employee—the conduct is presumptively discriminatory. . . . In a same-gender sexual harassment case, however, conduct of a sexual or gender-oriented nature can not be presumed to be discriminatory.")

202. *Yeary v. Goodwill Indus.-Knoxville, Inc.*, No. 96-5145, 1997 WL 73312, at *6 (6th Cir. Feb. 24, 1997) (emphasis added).

The Sixth Circuit construed the facts in *Yeary* as "as traditional as they come, albeit with a twist,"²⁰³ and left open the question of whether "same-sex sexual harassment can be actionable only when the harasser is a homosexual."²⁰⁴

To regard sexual harassment as a form of sex discrimination because the harasser would not have undertaken the conduct "but for" the sex of the victim is to understand the harasser to have engaged in sexual harassment primarily because he finds the target physically attractive,²⁰⁵ would like to have sex with her or him, and/or derives libidinous pleasure from sexualizing their otherwise professional relationship. Interestingly enough, on this view, the harasser's sexual orientation, either assumed or proven, plays a central role in determining whether the offending sexual conduct was "because of sex." In fact, in these cases "but for" causation collapses into sexual orientation. Under this view, a harasser only sexually harasses members of the class of people that he or she sexually desires. As such, "because of sex," primarily means "because of the harasser's sexual orientation," and only secondarily means "because of the victim's sex."

Many same-sex harassment cases make this aspect of sexual harassment jurisprudence abundantly clear. While proof of the harasser's heterosexuality is never required in different-sex cases because it is merely assumed, proof of homosexuality is frequently required in same-sex cases in order to demonstrate that the conduct was undertaken "because of sex." In *McWilliams v. Fairfax County Board of Supervisors*,²⁰⁶ the Fourth Circuit held that same-sex sexual harassment claims could be actionable if and only if the defendant were shown to be homosexual: "[T]he fact of homosexuality . . . should be considered an essential element of the claim, to be alleged and proved."²⁰⁷ Shortly thereafter, trial courts in the Fourth Circuit began applying the *McWilliams* rule. In *Tietgen v. Brown's Westminster Motors, Inc.*,²⁰⁸ the court found that the male plaintiff established a claim for same-sex sexual harassment because the facts made it clear that the defendant was a homosexual man: "it was apparent that these solicitations were in earnest . . ."²⁰⁹ In contrast, in *Martin v. Norfolk Southern Railway Co.*,²¹⁰ the court dismissed the male plaintiff's Title VII action because the defendant was a heterosexual man.²¹¹

203. *Id.*

204. *Id.*

205. I use the male pronoun simply because sexual harassers are overwhelmingly male. See GUTER, *supra* note 30, at 66, 73 (profiling victims and initiators of sexual harassment and concluding that "[t]he most common kind of sexual encounter at work involves a female recipient and a male initiator who behaves the same way toward other women").

206. 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996).

207. *Id.* at 1195 n.5. *McWilliams* involved a developmentally disabled man who alleged that he had been brutally sexually harassed by other men in the county-run auto mechanic shop in which he worked. See *id.* at 1193.

208. 921 F. Supp. 1495 (E.D. Va. 1996).

209. *Id.* at 1497.

210. 926 F. Supp. 1044 (N.D. Ala. 1996).

211. "[I]n the case of same-sex heterosexual hostile working environment sexual harassment, the presumption of sexual gratification and thus, sex discrimination, ceases to exist. . . . Therefore, the court holds that same-sex heterosexual hostile working environment sexual harassment is not actionable under Title VII." *Id.* at 1049-50; see also *Mayo v. Kiwest Corp.*, No. 95-2638, 1996 WL 460769, at *4 (4th

The Fourth Circuit's approach to same-sex harassment came full circle in *Wrightson v. Pizza Hut of America, Inc.*,²¹² in which five gay male Pizza Hut employees were charged with sexually harassing heterosexual male coworkers. After summarizing the Circuit's prior holdings in cases where the harassers were not shown to be homosexual, the panel held that "a claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual . . . [because] 'but for' the employee's sex, he or she would not have been the victim of discrimination."²¹³

Prior to the Fourth Circuit's decisions in *McWilliams*, *Tietgen*, and *Wrightson* the sense of anxiety in the courts' opinions in same-sex harassment cases was quite palpable: how were courts to decide these cases based on any principled theory of sex discrimination? The inferences that ordinarily make sexual harassment cases obviously justiciable under Title VII exhaust their utility in same-sex cases. It is at this point, at the margins, that the principles animating the presumptions at the center must be articulated aloud. But the central cases do not provide such a theory. Thus, the Fourth Circuit's "homosexuals-only" rule has operated as a kind of doctrinal oasis for judges handling these cases. While based on an erroneous theory of sexual harassment, the rule has proven irresistible to many judges desperate for a way to dispose of these unpleasant disputes.

In effect, the "but for" and "homosexuals only" cases mean that when a man harasses a woman in violation of Title VII he does so as an expression of his heterosexuality, and when a man harasses another man in violation of Title VII he does so as an expression of his homosexuality. To limit actionable different-sex sexual harassment to heterosexual sexual desire and same-sex sexual harassment to homosexual sexual desire runs contrary to the uncontroverted principle in Title VII jurisprudence that the "because of sex" language in Title VII does not mean "because of sexual orientation."²¹⁴ Whatever one might think of this construction of the "because of sex" language in Title VII, in practice all of these cases are about sexual orientation in general, and the sexual orientation of the harasser in particular.²¹⁵

Cir. Aug. 15, 1996); *Ward v. Ridley Sch. Dist.*, No. 94-7480, 1996 WL 570487, at *4 (E.D. Pa. Oct. 4, 1996); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 738-39 (N.D. Ill. 1996); *Shermer v. Illinois Dep't of Transp.*, 937 F. Supp. 781, 784-85 (C.D. Ill. 1996); *Gibson v. Tanks Inc.*, 930 F. Supp. 1107, 1109 (M.D.N.C. 1996); *cf. Dixon v. State Farm Fire & Cas. Ins. Co.*, 926 F. Supp. 548, 550-51 (E.D. Va. 1996).

212. 99 F.3d 138 (4th Cir. 1996).

213. *Id.* at 141-42.

214. *See* 2 EEOC Comp. Man. (CCH) ¶ 3101, § 615.2 example 2 ("If a male supervisor harasses a male employee because of the employee's homosexuality, then the supervisor's conduct would *not* be sexual harassment since it is based on the employee's sexual preference, not on his gender."); *see also* *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *7 (6th Cir. Jan. 15, 1992) (holding that "homosexuality is not an impermissible criteria [sic] on which to discriminate with regard to terms and conditions of employment").

215. For a similar insight, *see* *Marcosson*, *supra* note 116, at 32-34 (arguing that sexuality is integrally tied to sexual harassment, and that courts' focus on homosexual plaintiffs' sexuality as a way to remove their cases from the ban on sexual harassment is misguided). *See also* *Levitsky*, *supra* note 140, at 1035 (noting that in traditional sexual harassment cases in which men sexually harass women, courts typically do not raise the issue of sexual orientation, but that in same-sex cases, courts invariably

Yet, actionable sexual harassment²¹⁶ should not be understood merely as inappropriate or boorish expression of otherwise healthy or robust heterosexual or homosexual desire. The inclination to normalize sexual harassment reflects a reversion to the primordial ooze of Title VII doctrine evidenced in the *Corne* and *Tomkins* cases.²¹⁷ The law and our culture have evolved beyond that rather primitive view. But we can say more. Sexual harassment cannot and should not be understood as sex discrimination just because it may be an expression of sexual desire. Rather, sexual conduct, whether or not motivated by desire, becomes sex discrimination when it operates as a means of enforcing gender norms. To the extent that desire plays a role in actionable sexual harassment, it does so secondarily.²¹⁸

invoke a victim's sexual orientation as a reason for dismissal). Of course, gay people in the workplace are caught in a double bind: when a gay male employee is sexually harassed because he is gay, courts feel compelled to hold that Title VII is limited to discrimination on account of sex, not sexual orientation. See, e.g., *Dillon*, 1992 WL 5436, at *1. Yet when a gay male employee is doing the harassing, courts have been inclined to hold that the offensive conduct *is* sex discrimination because of the defendant's sexual orientation; that is, he or she would not have engaged in the conduct but for the sex of the plaintiff. See, e.g., *EEOC v. Walden Book Co.*, 885 F. Supp. 1100 (M.D. Tenn. 1995) (gay male harasser); *Pritchett v. Sizeler Real Estate Management Co.*, No. CIV.A. 93-2351, 1995 WL 241855, at *1-*2 (E.D. La. Apr. 25, 1995) (lesbian harasser). Therefore, the principle that sex is a concept distinct from sexual orientation is invoked to deny protection to targets who are gay, yet the conflation of these two terms is necessary to find a harasser liable under current Title VII doctrine. As such, gay men and lesbians are subject to all of the law's prohibitions and penalties, yet enjoy none of its protections and remedies. To add insult to injury, one court has held that the sexual harassment of a heterosexual man by homosexual coworkers, because he was hired to fill what "was 'commonly known as a "gay" job,'" was actionable sex-based, not sexual orientation-based discrimination. *Matthews v. Superior Court*, 40 Cal. Rptr. 2d 350, 352 (Cal Ct. App. 1995).

216. I limit my observations to actionable sexual harassment because current sex discrimination doctrine limits Title VII's application to sexual conduct that is linked to the grant or denial of an economic quid pro quo and to unwelcome conduct of a sexual nature that is so severe and pervasive that it creates a hostile work environment. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The "'mere utterance of an . . . epithet which engenders offensive feelings in an employee,' . . . does not sufficiently affect the conditions of employment to implicate Title VII." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 67.) Typically, an awkward or even inappropriate request for a date, or isolated comments of a sexual nature, without more, will not rise to the level of a Title VII violation. "Sexual harassment is a complex social problem. The less severe forms of sexual harassment could very well represent simply clumsy or insensitive expressions of attraction, while more severe forms may be clear abuses of social power . . ." John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 *SEX ROLES* 269, 287 (1987). I leave to others the task of critiquing the Supreme Court's construction of "severe and pervasive" and the requirement that the conduct be unwelcome. See, e.g., *Abrams*, *supra* note 51, at 1202-15 (criticizing judicial reliance on an ostensibly objective perspective that is actually male-centered, and arguing that the response of the plaintiff should be of primary concern); *Estrich*, *supra* note 34, at 826-47 (criticizing the "unwelcomeness" requirement as both unnecessary and reminiscent of rape law, and analyzing the difficulties plaintiffs face in making out claims of quid pro quo or hostile environment harassment). I do, however, think it wise to resist the urge to label all workplace sexual conduct sexual harassment, for reasons I discuss more fully below. See text accompanying notes 290-295 *infra*.

217. See text accompanying notes 19-30 *supra*.

218. Kathryn Abrams has made a similar observation. See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 *MICH. L. REV.* 2479, 2511 n.127 (1994) (noting the "misunderstanding in some early sexual harassment opinions that harassment—that is, a form of gender discrimination—is largely a matter of unrequited sexual desire").

What then, is wrong with understanding sexual harassment as an expression of sexual desire? A great deal. First, the "but for" conception of sexual harassment is deeply heterosexist in its assumptions. (Hetero)sex implicitly defines the framework within which the court assesses the sexism of sexual harassment. This slippage in the general understanding of sexual harassment as being about sex, not sexism, has the effect of reenacting and reinforcing the fundamental heterosexist assumption that all or virtually all intersexual interactions have some sexual aspect to them, and that all intrasexual interactions are presumed devoid of sexual desire or interest.

The heterosexism of the "but for" theory of harassment is apparent in its conflation of sex with sexism in different sex cases. While it may be true that when a male supervisor looks at a female employee

and presumes his relation to her is sexual, he is merely putting into explicit practice the fundamental assumption of heterosexism: that sexuality and relations between the sexes are synonymous. The presumption that any relation to the opposite sex is sexual necessarily follows from that assumption. Paradigmatic sexual harassment is literally the enactment of a conflation between the two senses of sex.²¹⁹

The mistake, therefore, lies in ignoring not just the sexist, but the *hetero*-sexist point of view that animates our understanding of the harasser's behavior in cases of this kind. When feminist theorists and the courts accede to this conflation, and worse, make it the centerpiece of their theories of sexual harassment, they build into the theory these underlying heterosexist assumptions.²²⁰ Jane Gallop recently developed this argument in an analysis of sexual harassment in the academy:

[B]y maintaining the heterosexist conflation at the heart of antiharassment discourse, we are not only guilty of the same failing as the harasser himself (which is embarrassing enough) but are unintentionally reinforcing the mindset that produces sexual harassment. What causes someone to assume his relation to the opposite sex is sexual is in fact not merely sexism but heterosexism.²²¹

This mistake reproduces itself in many of the same-sex harassment cases. For many courts, where the harasser is gay, the motivation behind his behavior sufficiently mirrors that of the heterosexual male harasser; therefore the conduct is actionable under Title VII. Yet, as the doctrine is now developing in some jurisdictions, in same-sex cases the plaintiff must actually prove that the defendant was gay in order to benefit from the presumption that the conduct, if sexual, was undertaken "because of sex." In the different-sex cases, heterosexist assumptions permit most courts to presume that sexual conduct between

219. Jane Gallop, *The Lecherous Professor: A Reading*, *DIFFERENCES: J. FEMINIST CULTURAL STUD.*, Summer 1995, at 1, 10.

220. For a related critique of MacKinnon's theory as one that tends "to freeze the relations [of man as dominator and woman as dominated], thus recapitulating the very cultural presumption of a heterosexually framed scene of sexual domination," see Judith Butler, *Against Proper Objects*, *DIFFERENCES: J. FEMINIST CULTURAL STUD.*, Summer-Fall 1994, at 1, 9-10.

221. Gallop, *supra* note 219, at 11.

people of different sexes bespeaks sexual desire.²²² In the same-sex cases those heterosexual assumptions are still at work in such a way that the plaintiff can overcome the presumption that same-sex sexual conduct is not motivated by desire—and therefore not undertaken because of sex—only with direct proof of the defendant's homosexuality.²²³ Importantly, as the doctrine is developing, homosexuality *may not* be “inferred from the nature of the harassing conduct,”²²⁴ even if that conduct amounted to demands for sexual favors, or touching or grabbing other employees' genitals.²²⁵ At the same time, the presumption of a male defendant's heterosexuality, even in the same-sex cases, can be confirmed by such slim evidence as his wife calling him at work. In same-sex cases, once “but for” causation has been eliminated because the de-

222. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.) (“When someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is ‘because of’ the victim’s gender.”), *cert. denied*, 117 S. Ct. 70 (1996); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (“The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course.”); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (“In a situation where a male sexually harasses a female, there is the presumption that he does so because she is a female The presumption arises from the sexually oriented harassing conduct and is predicated upon the perceived need for sexual gratification.”).

223. “In an effort to sort sexual from platonic harassment, courts would be forced to distinguish between locker room antics and sexual foreplay” *Schoiber v. Emro Mktg Co.*, 941 F. Supp. 730, 740 (N.D. Ill. 1996).

224. *Gibson v. Tanks Inc.*, 930 F. Supp. 1107, 1108 (M.D.N.C. 1996); see also *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.5 (4th Cir.) (rejecting the dissent’s claim that the defendants’ homosexuality may be inferred from the harassing nature of the conduct), *cert denied*, 117 S. Ct. 72 (1996).

225. See *Gibson*, 930 F. Supp. at *2. Incredibly, in *Martin*, the court held that the facts did not draw the harasser’s exclusive heterosexuality into question, even though the complaint alleged that the defendants had asked the plaintiff to bend over a chair so that they could have sex with him, offered to expose their penises to him, asked him to show them his penis and touched him numerous times on his genitals. 926 F. Supp. at 1046-47. “There is also *no evidence* that Martin or any of the individual defendants are homosexual.” *Id.* at 1047 (emphasis added). Significantly, in the face of this trend toward requiring explicit, direct proof of homosexuality in same-sex harassment cases, few courts have expressed any discomfort with the problem of how the defendant’s sexual orientation might be proved. In *Swage v. Inn Phila. and Creative Remodeling, Inc.*, the court merely asserted that the case involved two homosexuals and then dropped a footnote indicating that the “[p]laintiff does not plead his sexual orientation; defendants attach as exhibits to their reply brief newspaper interviews where plaintiff states he is [a] homosexual.” No. CIV.A. 96-2380, 1996 WL 368316, at *4 n.4 (E.D. Pa. June 21, 1996). That the court might have to go down this kind of road to ascertain the sexual orientation of a party did not bother the judge; rather he observed that “[c]onsideration of unverified newspaper articles, not matters of record, violates Fed.R.Civ.P. 12(c) and 56.” *Id.* There are notable exceptions to this lack of judicial attention. See *McWilliams*, 72 F.3d at 1198 (Michael, J., dissenting) (“[R]equiring proof of defendant’s sexual orientation] would burden the statute too much because the focus would shift from an examination of what happened to the plaintiff to a pursuit (surely to be complicated, far-ranging and elusive) of the ‘true’ sexual orientation of the harasser.”); *Dixon v. State Farm Fire & Cas. Ins. Co.*, 926 F. Supp. 548, 551 n.2 (E.D. Va. 1996) (“The Fourth Circuit has not provided guidance on what constitutes proof of ‘homosexuality-in-fact’ The effort to pinpoint and prove a ‘level’ of homosexuality evokes Justice Stewart’s infamous ‘I know it when I see it’ standard.”) (citations omitted); *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754, 762 (D.D.C. 1995) (“[T]he prospect of having litigants debate and juries determine the sexual orientation of Title VII defendants is a rather unpleasant one.”). Two vexing problems immediately emerge from the Fourth Circuit’s rule: what would a workable definition of ‘homosexuality-in-fact’ be, and what proof would be both probative and relevant thereof? See *McWilliams*, 72 F.3d at 1195 n.5 (noting that “homosexual innuendo” and “conduct merely suggestive of homosexuality” are not sufficient to state a claim under Title VII; instead, the plaintiff must prove “homosexuality-in-fact”).

endant has not been shown to be homosexual, the offensive sexually harassing conduct is construed by many courts as “‘mere locker room antics, joking, or horseplay,’ which by its very nature is not discriminatory.”²²⁶ As a logical matter, this reasoning works only in a world populated exclusively by Kinsey Ones and Kinsey Sixes, that is, people who are exclusively heterosexual or exclusively homosexual.

Gallop urges us to think about this problem differently:

In order to combat sexual harassment, we must disrupt rather than subscribe to this ambient heterosexism. Whereas the harasser’s heterosexism leads him to discriminate by being sexual, the antiharasser’s heterosexism leads her to assume that all sexuality [between the sexes] is discriminatory. In both cases no distinction is made between sexuality and the relation between the sexes. While the harasser is, in one and the same act, sexist and sexual, precisely *because* he is, we must be able to distinguish sexuality and sexism. And we must always bear in mind that harassment is despicable and illegal, not because it is sexual, but because it is sexist.²²⁷

Against background assumptions that assume heterosexuality and conflate “because of sex” with “because of sexual desire,” the sexism and heterosexism underlying the harassment of nonmasculine men by hyper-masculine men is rendered invisible to the courts. The third kind of same-sex sexual harassment cases present this exact problem—cases where men were sexually harassed because they failed to live up to societal expectations of proper masculinity. In the first case of this kind, *Goluszek v. H.P. Smith*,²²⁸ Anthony Goluszek worked in the defendant’s paper plant as an electronic maintenance mechanic. The court described Mr. Goluszek as a man who “ha[d] never been married nor ha[d] he lived anywhere but at his mother’s home.”²²⁹ He came from “an ‘unsophisticated background’” and had led an “‘isolated existence’ with ‘little or no sexual experience.’ Goluszek ‘blushe[d] easily’ and [was] abnormally sensitive to comments pertaining to sex.”²³⁰

Shortly after Mr. Goluszek began work, his male coworkers began to make fun of him, asking why he didn’t have a wife or girlfriend, and “jok[ed] that one had to be married to work there.”²³¹ Among the other harassment the plaintiff experienced were comments that he needed to “‘get married and get some of that soft pink smelly stuff that’s between the legs of a woman,’”²³² periodic questions as to whether “he had gotten any ‘pussy’ or had oral sex,” and forcibly being shown pictures of nude women.²³³

226. *Martin*, 926 F. Supp at 1049 (quoting *Tietgen v. Brown’s Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996)).

227. Gallop, *supra* note 219, at 11.

228. 697 F. Supp. 1452 (N.D. Ill. 1988).

229. *Id.* at 1453.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 1454.

In response to these as well as other sexual and nonsexual harassment,²³⁴ Goluszek filed a Title VII action against his employer claiming that he had been subjected to a sexually hostile work environment. The trial court rejected Goluszek's claim, concluding that "the defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII."²³⁵

Similarly, in *Polly v. Houston Lighting & Power Co.*,²³⁶ the plaintiff claimed that he had been sexually harassed by his male coworkers because, inter alia, he would not "engage in their dirty conversations' . . . [and] because he had disapproved and complained of his co-workers' use of profanity at work."²³⁷ The court held that this evidence was not sufficient to establish the third element of a prima facie Title VII case—"that the harassment complained of was based upon his sex."²³⁸ "Polly ha[d] not shown that, but for his being male, he would not have been treated by his co-workers in the manner that he was."²³⁹

Finally, in *McWilliams v. Fairfax County Board of Supervisors*,²⁴⁰ the Fourth Circuit considered a claim by a man that he had been sexually harassed by his male coworkers, known as the "lube boys."²⁴¹ McWilliams worked as an automotive mechanic in the all-male Fairfax County Equipment Management Transportation Agency. When he was hired, he informed his supervisor that he had a learning disability as well as arrested cognitive and emotional development.²⁴²

The manner in which the lube boys harassed McWilliams was abominable:

They teased him, asked him about his sexual activities, and exposed themselves to him. They taunted him with remarks such as, "The only woman you could get is one who is deaf, dumb, and blind." On one occasion, a coworker who sometimes took on supervisory responsibilities placed a condom in McWilliams' food.²⁴³

If that were not bad enough, they also physically assaulted him:

On at least three occasions, coworkers tied McWilliams' hands together, blindfolded him, and forced him to his knees. On one of these occasions, a coworker placed his finger in McWilliams' mouth to simulate an oral sexual act. During another of these incidents, a coworker, Doug Witsman, and another placed a broomstick in McWilliams' anus while a third exposed his genitals to McWilliams. On yet another occasion, Witsman entered the bus on which McWilliams was working and fondled him.²⁴⁴

234. Among the many horrible things Goluszek's coworkers did was poke him in the buttocks with a stick. See *id.*

235. *Id.* at 1456.

236. 825 F. Supp. 135 (S.D. Tex. 1993).

237. *Id.* at 138 (quoting deposition of Mr. Polly).

238. *Id.* at 137-38.

239. *Id.* at 138.

240. 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996).

241. *Id.* at 1193.

242. See *id.*

243. *Id.*

244. *Id.*

Mr. McWilliams complained to the management about obscenity in the workplace, as well as the verbal and physical harassment he received from his coworkers. The conduct nevertheless continued. Eventually, and not surprisingly, McWilliams left his employment due to "severe emotional problems."²⁴⁵ Shortly thereafter, he filed suit in federal court claiming that he had been sexually harassed by the lube boys. Ultimately, the Fourth Circuit affirmed the trial court's grant of summary judgment for the defendants, concluding that McWilliams had not been discriminated against because of his sex. A hostile environment claim must fail, the court reasoned, where, as on these facts, both the harassers and the victim are heterosexual and of the same sex:

[W]e do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be "because of the [target's] 'sex.'" Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's sex.²⁴⁶

In all three of these cases, the male plaintiffs were sexually harassed by their "appropriately" masculine male coworkers because of the plaintiffs' failure to conform to a norm of masculinity that assumed certain hetero-patriarchal²⁴⁷ parameters: heterosexuality, sexual experience, sexual interest in and desire to objectify women, and an inclination to engage in the social customs of manliness. Never was it alleged, or for that matter believed, that the men who harassed Goluszek, Polly, and McWilliams wanted to have sex with their victims. Yet to hold that the absence of desire precludes discrimination, as was the Fourth Circuit's holding in *McWilliams*, is to ignore the critical role that gender stereotypes played in these cases: the sexual harassment of these men amounted to a form of discipline and punishment because they were insuffi-

245. *Id.* at 1194.

246. *Id.* at 1195-96.

247. Hetero-patriarchy, first used in the legal literature by Frank Valdes, refers to "the fusion of androsexism and heterosexism, both socially and sexually, to obtain and maintain the supremacy of 'masculinity' and of 'masculine'-identified (heterosexual) men, over personal, economic, and cultural life." Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 8 n.14 (1995); see also Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracking the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 170 (1996) ("[T]he ideology of compulsory hetero-patriarchy rests on four key tenets: The bifurcation of personhood into 'male' and 'female' components under the active/passive paradigm; the polarization of these male/female sex/gender ideals into mutually exclusive or even opposing, identity composites; the penalization of gender atypicality or transitivity; and the devaluation of persons who are feminized.") (footnote omitted). Embedded within the concept of hetero-patriarchy are two acceptable sites of human identity: hetero-masculinity and hetero-femininity. These concepts embody traditional notions of maleness and femaleness constructed from within the normative preferences and assumptions of heterosexuality and heterosexism. See Katherine Franke, *Cunning Stunts: From Hegemony to Desire A Review of Madonna's Sex*, 20 N.Y.U. REV. L. SOC. CHANGE 549, 563 n.81 (1993-4) (book review) ("Heteromascularity refers to the unstable object lying at the intersection of compulsory heterosexuality and sexism.").

ciently masculine. In these same-sex cases, the possibility of sexism in the absence of desire is unimaginable, and certainly unactionable.²⁴⁸

To understand sexual harassment primarily in terms of sexual desire is wrong for many of the same reasons that it is a mistake to understand rape as primarily a crime of passion or lust.²⁴⁹ To claim as much is to choose sides, or at a minimum, to list heavily to one side of the ongoing intramural debate within feminism about whether rape should be understood as a crime of violence or sex. The claim that rape is a crime of violence, not sex, was first made most clearly in 1975 by Susan Brownmiller in *Against our Will: Men, Women and Rape*.²⁵⁰ Brownmiller provided a feminist critique of the psychological literature that had portrayed the rapist as a sexual psychopath who had been treated by criminologists similarly to exhibitionists, homosexuals, and prostitutes.²⁵¹ For Brownmiller, the Freudian view of rape absolved the rapist of responsibility for his conduct because, after all, it stemmed from an unconscious manifestation of Oedipal urges.²⁵²

As an alternative to the sexual psychopathological account of rape, Brownmiller argued that sociologists provided a better understanding of rape by looking not at pathological individuals who raped, but at group behavior and the social values that have created a culture of violence. Brownmiller valued this work for its conclusion that placed "the rapist squarely within the subcul-

248. See, e.g., *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) ("[I]n the case of same-sex heterosexual hostile working environment sexual harassment, the presumption of sexual gratification, and thus, sex discrimination, ceases to exist."); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996) ("In same-sex harassment cases . . . causation is much less evident and may be difficult to prove. . . because the allegedly harassing conduct is often capable of being construed . . . as mere locker room antics, joking, or horseplay.").

249. The notion that rape is a crime of lust persists today even in the highest echelons of law enforcement, notwithstanding longstanding critiques debunking such a notion. The Hate Crime Statistics Act ("HCSA"), mandates that the Attorney General collect data about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity. Pub. L. No. 101-275, 104 Stat. 140 (1990) (to be codified at 28 U.S.C. 534(b)(1)). In 1995, Senator Paul Simon's office asked the FBI whether it would support the addition of gender to the HCSA. The FBI responded:

The inclusion of gender bias to the Hate Crime Statistics Act is not recommended at this time for several reasons, including the following: 1. A gender bias motivation would be very difficult to determine, e.g., is the crime of rape motivated by lust or hate? Police officers would have to explore the psyche of the offender to determine if hate was a motivating factor.

Letter from C. David Evans, Acting Assistant Director, Criminal Justice Information Services Division, U.S. Department of Justice, Federal Bureau of Investigation, to Honorable Paul Simon 4 (July 5, 1995) (on file with the *Stanford Law Review*).

250. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

251. "By and large the Freudian criminologists, who loved to quibble with one another, defined the rapist as a victim of an 'uncontrollable urge' that was 'infantile' in nature, the result of a thwarted 'natural' impulse to have intercourse with his mother." *Id.* at 178.

252. Brownmiller also noted that Freudian studies of rapists ultimately blamed women for our role in creating the sexual psychopath:

The conclusions reached were that the wives of the sex offenders on the surface behaved toward men in a submissive and masochistic way but latently denied their femininity and showed an aggressive masculine orientation; they unconsciously invited sexual aggression, only to respond to it with coolness and rejection. They stimulated their husbands into attempts to prove themselves, attempts which necessarily ended in frustration and increased their husbands' own doubts about their masculinity. . . . There can be no doubt that the sexual frustration which the wives caused is one of the factors motivating [the] rape

Id. at 179 (quoting DAVID ABRAHAMSEN, *THE PSYCHOLOGY OF CRIME* 165 (1960)).

ture of violence. The rapist, it was revealed, had no separate identifiable pathology aside from the individual quirks and personality disturbances that might characterize any single offender who commits any sort of crime."²⁵³ So situated, rape could be understood as a sexual "'demonstration of masculinity and toughness' . . . the prime tenet of the subculture of violence."²⁵⁴

In contrast, others have taken the position that rape is first and fundamentally a sexual act.²⁵⁵ To regard rape as violence makes

it impossible to see that violence is sex when it is practiced as sex. This is obvious once what sexuality is, is understood as a matter of what it means and how it is interpreted. To say [that] rape is violence not sex preserves the "sex is good" norm by simply distinguishing forced sex as "not sex" This analytic wish-fulfillment makes it possible for rape to be opposed by those who would save sexuality from the rapists while leaving the sexual fundamentals of male dominance intact.²⁵⁶

For MacKinnon, to distinguish rape from sex by calling it violence is to elide her most fundamental insight: Male sexuality is intrinsically violent and is experienced as such by women even when consented to.²⁵⁷

To the extent that MacKinnon over determines male sexuality as violence, she under determines female sexuality as the null set.²⁵⁸ By collapsing violence into the larger category of sex she avoids the problem of calling forced sex "not sex" by calling all sex "bad sex." If the rape-is-violence view pathologizes rape, MacKinnon's view pathologizes sex generally. I will return to this problem later, but for the purposes of critiquing the "but for" formulation of the wrong of sexual harassment, I join Susan Estrich in observing that "[f]ocusing on the violent aspects of rape makes clear that you are not trying to

253. *Id.* at 181 (discussing specifically Menachem Amir's 1971 study of rape in Philadelphia).

254. *Id.* (quoting MARVIN E. WOLFGANG & FRANCO FERRACUTI, *THE SUBCULTURE OF VIOLENCE: TOWARDS AN INTEGRATED THEORY IN CRIMINOLOGY* 154 (1967)); see also MENACHEM AMIR, *PATTERNS IN FORCIBLE RAPE* 314-33 (1971) (reviewing the psychiatric classification and typologies of sex offenders and rapists and presenting a sociological analysis of the subculture of rapists).

255. See LORENNE M.G. CLARK & DEBRA J. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* (1977); ANDRA MEDEA & KATHLEEN THOMPSON, *AGAINST RAPE* (1974) ("Rape is any sexual intimacy forced on one person by another"); DIANA E.H. RUSSEL, *THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE* (1975).

256. MACKINNON, *supra* note 181, at 134-35 (footnote omitted); see also MACKINNON, *supra* note 32, at 233 n.19 ("We must confront the further problem, however, that the line between sex and violence is indistinct and mobile in a society in which violence means violation of that worthy of respect, and women are not.").

257. "Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance." MACKINNON, *supra* note 181, at 174 (footnote omitted). Of course, MacKinnon wants to question the possibility of consensual sex for women under any circumstances: "If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept." *Id.* at 178 (footnote omitted); see also Carole Pateman, *Women and Consent*, 8 *POL. THEORY* 149, 150 (1980) (questioning whether genuine consent is possible within the institutions of a liberal democratic state).

258. See Franke, *supra* note 247, at 556 (criticizing MacKinnon's conclusion that "women can only experience themselves as male sexual fantasies"); Susan Etta Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 *GEO. L.J.* 2195, 2229-30 (1993) (arguing that "MacKinnon's perspective . . . denies women any role in the social construction of their own or of men's sexuality" because "[w]omen's sexuality is constructed for them by an invisible [male] hand").

prohibit all sex and that violent men must . . . be incapacitated as dangerous criminals, not treated as only sexually aberrant."²⁵⁹

That rape is a crime of violence or power expressed through the idiom of sex conforms with the findings of various psychological studies of men who rape or who are likely to rape. In *Men Who Rape: The Psychology of the Offender*,²⁶⁰ Nicholas Groth examined "the psychological and emotional factors that predispose a person to react to situational and life events with sexual violence."²⁶¹ Groth begins his study by observing that "[r]ape is always and foremost an aggressive act. . . . It is sexual behavior in the primary service of non-sexual needs."²⁶²

If, as Groth and others maintain, rape is "a pseudosexual act, a pattern of sexual behavior that is concerned much more with status, hostility, control, and dominance than with sensual pleasure or sexual satisfaction,"²⁶³ couldn't the same be said of sexual harassment? Indeed, many theorists regard rape as lying at the extreme end of a continuum of male-aggression/female-passive patterns of interaction. One commentator has argued that "rape and severe forms of sexual harassment are conceptually similar forms of behavior."²⁶⁴

Psychologist John Pryor has closely studied the factors, dynamics, and proclivities that make a man likely to sexually harass ("LSH") women with whom he works or studies.²⁶⁵ Among other things, according to the methodology set forth by Neil Malamuth, Pryor found that LSH men also tested likely to rape ("LR").²⁶⁶ Furthermore, like LR men, LSH men demonstrated attitude/

259. ESTRICH, *supra* note 114, at 82 (footnote omitted).

260. A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* (1979).

261. *Id.* at xii.

262. *Id.* at 12-13.

In every act of rape, both aggression and sexuality are involved, but it is clear that sexuality becomes the means of expressing the aggressive needs and feelings that operate in the offender and underlie his assault. . . .

. . . [Rape] is, in fact, the use of sexuality to express . . . issues of power and anger.

Id. at 13.

263. *Id.*

264. Pryor, *supra* note 216, at 272 (citation omitted); see also GROTH, *supra* note 260, *passim* (describing rapists as motivated more by aggression than by sexual desire); MEDEA & THOMPSON, *supra* note 255, at 49-55 (equating harassment with rape).

265. See John B. Pryor, Christine M. LaVite & Lynnette M. Stoller, *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction*, 42 J. VOCATIONAL BEHAV. 68, 70 (1993) (presenting findings of studies demonstrating that local norms importantly influence the incidence of sexual harassment and that men likely to sexually harass cognitively link social dominance and sexuality); John B. Pryor, Janet L. Giedd & Karen B. Williams, *A Social Psychological Model for Predicting Sexual Harassment*, 51 J. Soc. ISSUES, Issue 1 1995, at 69 [hereinafter Pryor, *Model*] (presenting a theoretical framework within which to study sexual harassment); John B. Pryor & Lynnette M. Stoller, *Sexual Cognition Processes in Men High in the Likelihood to Sexually Harass*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 163, 163 (1994) (reporting results of study showing that high-LSH men recognized instances of sexuality/dominance word pairs with more frequency and confidence than did low-LSH men); Pryor, *supra* note 216 (presenting the results of three studies of sexual harassment proclivities).

266. See Pryor, *supra* note 216, at 276. Malamuth's methodology for identifying men who possess a propensity to rape entailed scenarios where subjects were asked to indicate on a five point scale the likelihood that they would rape if they could be assured of not being caught or punished. See Neil M. Malamuth, *Rape Proclivity Among Males*, 37 J. Soc. ISSUES, No. 4 1981, at 138, 140. Similarly, Pryor undertook several studies to develop and validate a measure of sexual harassment proclivities in men. See Pryor, *supra* note 216, at 272-74. In so doing, he modeled his methodology on that used by

belief structures that included acceptance of interpersonal violence,²⁶⁷ the desire to dominate women,²⁶⁸ high authoritarianism, and difficulty assuming other people's perspectives,²⁶⁹ that is, they had difficulty being empathetic. Finally, Pryor's findings indicated that LSH men believed deeply in sex-role stereotypes and endorsed stereotypic views of male sex-role norms.²⁷⁰ In summary, building on the rape studies, Pryor confirmed the notion that men engage in offensive sexual conduct in the workplace primarily as a way to exercise or express power, not desire.

The cases bear out Pryor's observations that sexual harassment is, at bottom, about power not desire. In *Wrightson v. Pizza Hut of America, Inc.*,²⁷¹ for example, the Fourth Circuit applied its "homosexuals only" rule to the claim of a heterosexual male who alleged that he had been sexually harassed by gay males in the workplace. According to the Fourth Circuit's logic, gay harassers have engaged in discrimination "because of" the victim's sex by virtue of the fact that the harasser would not have undertaken such conduct had the victim been of another sex. Since gay men desire other men, "but for" causation was found by the court to be present. This reasoning, while logical, is undermined by the facts of the case. Among the many factual findings recited by the court was the fact that these harassers chose heterosexual male, but not female or homosexual male, coworkers to sexually harass.²⁷² If, as the court's logic assumes, gay males will harass only that class of persons whom the desire sexually, then it makes no sense that the harassers picked out only heterosexual men to harass. Rather than explaining the harassers' conduct in the *Wrightson* case according to "but for" causation grounded in assumptions about sexual desire, the better explanation for the harassers' behavior is that gay men were asserting power in the workplace and, given their numbers, were harassing straight men in a manner that reversed the typical alignment of power in the larger culture: where heterosexual men vilify gay men as a matter of course. The facts make clear that this was sexual orientation-based harassment motivated by revenge, not desire.²⁷³ While it may have been wrong for the gay male employees to

Malamuth, based upon the premise that the "similarity of severe forms of sexual harassment to rape suggests that rapists and sexual harassers might share some common characteristics." *Id.* at 272. In order to determine which men were likely to sexually harass ("LSH"), he developed several hypothetical scenarios which placed the male in a social role or in particular circumstances that allowed him "the power to control an important reward or punishment for a female target." *Id.* at 273. Subjects were then asked to indicate the likelihood of pursuing sexually exploitive behavior in these scenarios given an assurance that no negative consequences would result from their choices. *See id.*

267. *See* Pryor, *supra* note 216, at 276.

268. *See* Pryor, *Model, supra* note 265, at 76.

269. *See* Pryor, *supra* note 216, at 288.

270. *See id.* at 288; *see also* Pryor, *Model, supra* note 265, at 75-76 ("The profile that emerges from these findings is that LSH is related to an identification with a stereotype view of masculinity.").

271. 99 F.3d 138 (4th Cir. 1996).

272. *See id.* at 139 ("After Pizza Hut hired a male employee, the homosexual employees attempted to learn whether the new employee was homosexual or heterosexual. . . . If the employee was heterosexual, then the homosexual employees began to pressure the employee into engaging in homosexual sex.").

273. The court considered and rejected the defendant's argument that Title VII did not apply to the claim because plaintiff was not "harassed because of his sex, but, rather . . . because of his sexual orientation as a heterosexual." *Id.* at 143. Relying upon the Supreme Court's mixed motive reasoning

harass their straight male coworkers in this fashion, the court's reasoning fails to adequately explain how such conduct might violate Title VII as discrimination "because of sex."

While cognitive psychological studies indicate that the equation of sexual harassment with sexual desire represents a descriptive error, it may reflect a racial bias as well. Theorists such as Kimberle Crenshaw have argued that the claim that rape is fundamentally an expression of male sexuality employed toward the end of controlling female sexuality "eclipse[s] the use of rape as a weapon of racial terror."²⁷⁴ MacKinnon's inclination to reduce rape to violent sexuality, and violent sexuality alone, ignores the historical role that the rape of black women by white men played in advancing a fundamentally racist and sexist agenda:²⁷⁵ "When Black women were raped by white males, they were being raped not as women generally, but as Black women specifically: their femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection."²⁷⁶

Rape and sexual harassment must not be understood in static terms that allow for fixed meanings regardless of the context in which they occur. Theoretical or judicial analyses of sexual harassment rarely mention the racial identity of the victim or the perpetrator. Just as Crenshaw notes that rape can be used by white men to racially subordinate Black women, so too can sexual harassment operate as a means of enforcing racial subordination in the workplace.²⁷⁷ Thus, sexual harassment may mean different things depending upon the races of the perpetrator and the victim as well as context.²⁷⁸

For all these reasons, it would be both a theoretical and a descriptive mistake to characterize offensive workplace sexual conduct primarily as the ex-

in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989), the Fourth Circuit held that the plaintiff's claim could survive even if "because of the employee's sex" was not the sole reason for the discriminatory actions. *Id.* at 144.

274. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 CHI. LEGAL F. 139, 158.

275. See 5 K.K.K. Hearings, S.C. Ct. Proceedings (Dec. 19 & 30, 1871); 9 Testimony Before the Joint Committee of Mississippi Legislature to Investigate the Meridian Riot (Mar. 21, 1871), reprinted in *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 182-88* (Gerda Lerner ed., 1972) (citing testimony of Black women who were raped by white male Klan members as part of a reign of racial terror unleashed in response to Reconstruction); see also Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983) (examining the racist social meaning of rape in American history).

276. Crenshaw, *supra* note 274, at 158-59 (footnote omitted).

277. It is certainly conceivable to imagine a white man who chooses to express his racist attitudes toward his nonwhite coworkers by sexually harassing them. In this case, his behavior is not motivated by sexual desire, rather he is simply aware that offensive sexual conduct is the best way to hurt them, and thereby discriminate against them because of their race. This is not to say that sexist attitudes do not play a role in conduct of this kind, but is rather to illustrate how offensive sexual conduct can be a weapon used in the service of a number of bigoted attitudes combined with or instead of sexism.

278. See Abrams, *supra* note 218, at 2500-02 (discussing the intersectionality of race and sex in some sexual harassment suits brought by Black women); Chamallas, *Writing About Sexual Harassment*, *supra* note 33, at 52-54 (arguing that the sexual harassment sometimes faced by African-American women has no parallel faced by white women). See generally Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS., No. 1 1981, at 30 (discussing the unique vulnerability of black women to sexual harassment).

pression of sexual desire. Rather, sexual harassment is best understood as the expression, in sexual terms, of power, privilege, or dominance. What makes it sex discrimination, as opposed to the actions of "a philanderer, a terrible person, and a cheapskate,"²⁷⁹ or a racist for that matter, is not the fact that the conduct is sexual, but that the sexual conduct is being used to enforce or perpetuate gender norms and stereotypes.

If that weren't enough, the uncritical over reliance upon a "but for" formulation of the wrong of sexual harassment makes the additional mistake of locating the harasser's subjective mental state—that of sexual desire—at the center of the problem. This mistake, while understandable given the sexual nature of the conduct at issue, reflects a serious conceptual error. "Title VII is not a fault-based tort scheme"²⁸⁰ insofar as it provides a remedy for discriminatory conduct without necessarily requiring a showing that the defendant possessed discriminatory motives or animus.²⁸¹ "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation' of co-workers or employers."²⁸² That Title VII plaintiffs need not prove discriminatory motivation as part of their prima facie case reflects a recognition that many discriminatory actions are justified by "'archaic and overbroad' generalizations"²⁸³ concerning the relative capacities of men and women, or "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"²⁸⁴ In other words, "[c]onduct that many men consider unobjectionable may offend many women."²⁸⁵ Therefore, contemporary sex discrimination jurisprudence denounces conduct that reflects or ratifies benign, yet nonetheless harmful, actions or policies that place women in a cage rather than on a pedestal.²⁸⁶

The notion that Title VII is primarily designed to remedy discriminatory working conditions, rather than to punish actors who possess sexist motives or animus, is most compelling when applied to workplace sexual harassment. Men who engage in conduct that creates a sexually hostile work environment for their female colleagues are not always aware that they are doing so: "A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female

279. Estrich, *supra* note 34, at 819.

280. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991).

281. "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the *purpose or effect* of unreasonably interfering with an individual's work performance . . ." 29 C.F.R. § 1604.11(a) (1996) (emphasis added).

282. *Ellison*, 924 F.2d at 880 (quoting *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971)); see also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (concluding that employment practice which impermissibly burdens minorities is unlawful regardless of employer's intent).

283. *Craig v. Boren*, 429 U.S. 190, 198 (1976) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

284. *Id.* at 198-99 (quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)).

285. *Ellison*, 924 F.2d at 878.

286. "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (footnote omitted).

subordinate, however, may find such comments offensive."²⁸⁷ As Nadine Taub observed: "Because those making sexual demands and allusions are often merely acting out the roles they have been taught by society, unaware of the hostile nature of their conduct, the notion of old-time evil motive, equivalent to racial animus, seems inappropriate."²⁸⁸

For these reasons, Title VII sexual harassment doctrine shifts the focus away from the subjective mental state of the harasser and refocuses, instead, on the degree to which the conduct creates "an environment that a reasonable person would find hostile or abusive."²⁸⁹ The over reliance upon an understanding of sexual harassment as a manifestation of sexual desire has the effect, however, of refocusing the Title VII inquiry away from the conduct as experienced by its targets, and back onto the perpetrator's subjective mental state. This is a problem.

When the inquiry in sexual harassment cases reduces to a finding that "but for" the sex of the target the defendant would not have engaged in the conduct of a sexual nature, we are asking essentially, why did he do it? Either he found her attractive, regards all women as fair game, bears some ill will toward women, or harbors some offensive mental state or sexist ideology. Whatever the reason, the inquiry turns on the fact that he does not feel the same way toward men, as a class, and therefore would not have engaged in the same conduct if the coworker or subordinate had been a man. True, this reasoning demonstrates the disparate treatment of men and women, but it does so by shifting the locus of the inquiry to the defendant's subjective mental state, something that must be avoided in sex discrimination cases generally, and sexual harassment cases specifically.

Finally, I offer one last, although no less important, objection to the manner in which sexuality figures in sex discrimination. Unlike some writers, I, for one, am not prepared to say that the expression of sexuality in the workplace is presumptively illegitimate.²⁹⁰ Shutting down all sexual behavior seems like an overreaction to the problem of sexual harassment, and requires some very disturbing assumptions about the possibility of female sexual agency:²⁹¹ since the law has done a bad job of differentiating welcome from unwelcome sexual conduct, better to declare it all unwelcome.

This paternalistic approach to the problem draws into question women's capacity to either consent or object to certain kinds of workplace sexual activity.²⁹² The requirement that the plaintiff prove the sexual conduct was unwell-

287. *Lipsett v. University of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988), see also *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) ("[M]en and women are vulnerable in different ways and offended by different behavior.").

288. Taub, *supra* note 73, at 361.

289. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

290. See text accompanying notes 113-176 *supra*.

291. See MURIEL DIMEN, *SURVIVING SEXUAL CONTRADICTIONS: A STARTLING AND DIFFERENT LOOK AT A DAY IN THE LIFE OF A CONTEMPORARY PROFESSIONAL WOMAN* 1-12 (1986) (describing how sexism and gender complicate and frustrate female sexual agency).

292. I have the same problem with MacKinnon's tendency to infantilize women by urging an analogy between adult pornography and child pornography. In general, the inequality between children

come²⁹³ clearly presupposes a degree of female agency in these contexts. Yet, sexual content and unwelcomeness are not enough to make offensive workplace sexual behavior *sex discrimination*—something more needs to be proven, or at least inferred, for the wrong to be a sexually *discriminatory* wrong. Recall that to state a hostile environment claim under Title VII a plaintiff must show that the behavior complained of was both unwelcome sexual conduct and exhibited “because of sex.”²⁹⁴ Sexual conduct in the workplace has a special sting for women, not because our sensibilities render us particularly vulnerable to sex, but because the conduct literally sexualizes us. It embodies stereotypic gender norms that become true by virtue of their enactment. When we frame our arguments in terms of sex being “disproportionately more demeaning” to women than to men, or that sex is dangerous for women in some generalized sense,²⁹⁵ we must be careful not to reinforce Victorian notions of women’s special vulnerability to all things sexual. Instead, we should remain focused on a conception of sexual harassment that reveals the constitutive, disciplinary role of sexual harassment.

Taken together, all of these concerns provoke two important questions. First, should we assume that all or most sexual conduct directed by men toward women or undertaken by men in the presence of women is sex discrimination? If so, why? Asked another way: Where is the sexism in sex? Second, are there circumstances under which, in the absence of sexual desire, a person can sexually harass another person of the same sex in violation of Title VII? If so, why? The answers I propose to these questions will, I believe, provide better answers to the more fundamental question: why is sexual harassment a kind of sex discrimination?

B. *The Problem of Reasonableness and Group-Based Discrimination*

Without question, the degree to which the law in sexual harassment cases shifts the focus away from the harasser’s subjective mental state represents a tremendous victory for those seeking to improve working conditions for women in the wage-labor market. But merely asserting that the proper inquiry is whether the conduct complained of created “an environment that a reasonable

and adults together with the inability of children to consent to sex make the production of child pornography a strict liability crime. So too with adult pornography, urges MacKinnon; the relationship of men to women is defined by an intrinsic inequality, and the near metaphysical perfection of male hegemony draws into question the ability of women to consent to subordinating sex with men. Therefore, adult pornography should be a strict liability crime as well, so the argument goes. See MACKINNON, *supra* note 151, at 35-36; MACKINNON, *supra* note 32, at 175-79, 181-82.

293. Susan Estrich, among others, has urged that the unwelcomeness requirement be eliminated from the sexual harassment cause of action, just as consent should have no place as a defense in a rape prosecution. See Estrich, *supra* note 34, at 826-34.

294. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-69 (1986) (applying the unwelcomeness standard).

295. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), for an example of a court that adopts this view. “[T]he presence of the pictures, even if not directed at offending a particular female employee, sexualizes the work environment to the detriment of all female employees.” *Id.* at 1523.

person would find hostile or abusive,"²⁹⁶ produces its own problems for the victims of both different-sex and same-sex sexual harassment. The question remains: what kind of reasonable person are we talking about? A reasonable woman, a reasonable victim of sexual harassment, or some "objective" omni-sexual person who is neither male nor female?

Many advocates have argued for a reasonable woman standard.²⁹⁷ The Ninth Circuit has endorsed such a standard on the theory that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. . . . Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men."²⁹⁸

Other commentators, however, have raised questions about the use of a reasonable woman standard in sexual harassment cases, among other things, because of the essentialism underlying the notion of a coherent and generalizable women's epistemology, as well as the problems with rendering "unreasonable" all women who fail to react to workplace sexual conduct according to theoretical or statistical expectations.²⁹⁹ Does the reasonable woman standard en-

296. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

297. See, e.g., Abrams, *supra* note 51, at 1210 & n.114; Deborah S. Brennehan, *From Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281 (1992); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769; Elizabeth A. Glidden, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825 (1992); Deborah B. Goldberg, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 CARDOZO WOMEN'S L.J. 195 (1995); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984) [hereinafter *Sexual Harassment Claims*]; Bonnie B. Westman, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992).

298. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); see also *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962 n.3 (8th Cir. 1993) (noting and agreeing with *Ellison's* reasonable woman standard for Title VII hostile environment claims); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (holding that among the factors necessary to a successful hostile environment claim is that "the discrimination would detrimentally affect a reasonable person of the same sex in that position"); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (applying a reasonable woman standard because "it seems only reasonable that the person standing in the shoes of the employee be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female"); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part) (arguing for the adoption of a reasonable victim standard to account for the "wide divergence" between men's and women's views of appropriate sexual conduct); *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 457-59 (N.J. 1993) (discussing choice of reasonable woman standard). But see *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454-55 (7th Cir. 1994) (rejecting reasonable woman standard by citing to *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)), *cert. denied*, 116 S. Ct. 473 (1995); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir.) (same).

299. See Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, 1995 DISSENT 48-54, for a clear discussion of the evolution of the arguments for and against the reasonable woman standard. See also *Burns*, *supra* note 89, at 399-403 (advancing a reasonable person in the same or similar circumstances standard); Chamallas, *Feminist Constructions of Objectivity*, *supra* note 33, at 129-30 (urging a victim's perspective, not a reasonable woman's perspective); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1177-78 (1990) (arguing for legitimacy of reasonable person standard despite its "analytical weaknesses"); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 64 (1989) (arguing that a reasonable woman standard could reinforce gender stereotypes).

courage defendants to introduce the testimony of women with whom the plaintiff worked who did not regard the conduct as hostile or offensive?³⁰⁰ Must all, or substantially all, women respond in the same way to particular sexual conduct in order for the conduct to be understood as sex discrimination? What if a woman is selected for harassment because she departs from norms that other women in the workplace regard as reasonable, such as gender norms having to do with feminine attire or comportment?³⁰¹ Could she prevail under a reasonable woman standard? Should she?

The third kind of same-sex harassment cases present this problem precisely. Goluszek,³⁰² Polly,³⁰³ and McWilliams³⁰⁴ were harassed, in the courts' view, not because they were men, but because of some other fact about them—prudery, sexual inexperience, or naivete.³⁰⁵ To reach this result, the courts had to ignore the obvious: Goluszek, Polly, and McWilliams were mistreated in this way precisely because they were not male *enough*, not because of some characteristic exogenous to their maleness.

By crediting sexual inexperience, delicacy, or prudery, and not gender identity, as the trigger that provoked the harassment of these men, the courts elide the role of sex and gender norms in this form of sexual harassment. These men were targeted because they were inexperienced, delicate, or prude *men*. Yet, in assuming that it was these qualities alone, and not their presence in a man, which provoked the harassment, the courts make the mistake of individualizing the harassment. In the context of traditional sexual harassment cases, courts do not assume that because one woman among several is singled out by a male harasser, the reason for her harassment must be something other than her gen-

300. See Chamallas, *Feminist Constructions of Objectivity*, *supra* note 33, at 131-32 (discussing the tendency of defendants in sexual harassment cases to point to the one woman who disagrees with the plaintiff as a way to degender the claim).

301. This scenario represents the flip side of Ann Hopkins' experience. In *Price Waterhouse v. Hopkins*, Hopkins was denied a partnership interest in defendant accounting firm because she was "macho," needed "a course at charm school," and "should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" 490 U.S. 228, 235 (1989) (quoting defendant's exhibits and district court opinion, 618 F. Supp. 1109, 1117 (D.D.C. 1985)). The Supreme Court found that this conduct amounted to gender discrimination because "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. Interestingly enough, while we know that Hopkins did not fit the Price Waterhouse partners' expectations of femininity in a female employee, we do not know, as Mary Anne Case has pointed out, what Ann Hopkins actually looked or acted like—deviations from traditional gendered expectations—were read as personality flaws in Ann Hopkins. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 42-43 (1995).

302. *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988) (male plaintiff lived with his mother and blushed easily).

303. *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 138 (S.D. Tex. 1993) (male plaintiff refused to participate in "dirty conversations").

304. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1193, 1196 (4th Cir.) (male plaintiff harassed by "lube boys"), *cert. denied*, 117 S. Ct. 72 (1996).

305. This reasoning approaches the "sex plus" reasoning used by some courts: women workers with young children are not discriminated against on the basis of their sex, but on the basis of their sex plus some other nonsex based factor, i.e., being a parent. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (refusing to hire woman with preschool children while hiring men with such children barred by Title VII in absence of business necessity).

der.³⁰⁶ The courts' "one of these things is not like the others" logic obscures the central roles that sex and gender norms play in harassment of this nature. It was precisely because Goluszek, Polly, and McWilliams were men that they were victimized in this fashion.

At the same time it seems quite clear that had Polly, Goluszek, or McWilliams been women and had suffered the same harassing conduct of a sexual nature, there would have been no question that they had been discriminated against "because of their sex." In this sense, the *what* of sexual harassment must be distinguished from the *why*. These cases, however, raise a problem for advocates of the reasonable woman standard. Men like Polly, Goluszek, and McWilliams are harassed specifically because they do not represent reasonable men.³⁰⁷ In fact, "reasonable" men did the harassing.³⁰⁸ What use is a reasonable woman standard in sexual harassment cases if it serves as the gold standard by which we distinguish the overly sensitive worker from the reasonably injured victim when it is "reasonable" people who are doing the harassing? The courts' reasoning in *Polly* and *Goluszek*, in particular, has the effect of normalizing the behavior of the harassers to the extent that it characterizes Polly and Goluszek as men who were razzed because they were oddballs, dweebs, or geeks thereby ignoring the gender norms that animated this behavior.

The reasonable woman standard in sexual harassment cases resolves some of the sex-based bias in the law at the price of potentially normalizing and enforcing certain gender stereotypes or commonly accepted social norms³⁰⁹ about women as a group and men as a group. The standard proposed by the EEOC and pending at the time the Supreme Court decided *Harris v. Forklift Systems, Inc.*,³¹⁰ provided a potentially satisfactory middle ground between the unstated male normativity of the reasonable person standard and the essentializing dangers of the Ninth Circuit's³¹¹ reasonable woman standard. The EEOC proposed a construction of the reasonableness inquiry as "whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive."³¹² This standard controls for the concerns of those

306. To do so would invite male harassers to argue that "I didn't harass her because she was a woman, but because she had large breasts, or blond hair, or great legs."

307. In *Ashworth v. Roundup Co.*, a case in which the harassers and the victim were all males, the court required that the plaintiff show that "a reasonable man would find that [defendant's] conduct was 'sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.'" 897 F. Supp. 489, 492 (W.D. Wash. 1995) (emphasis added) (quoting *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)).

308. As yet, there are no reported cases similar to these three where masculine, or at least nonfeminine women, were sexually harassed by other women because they failed to conform to prevailing gender norms. But those circumstances undoubtedly exist.

309. For an example of such social norms, see *Carroll v. Talman Sav. & Loan Ass'n*, 604 F.2d 1028, 1032 (7th Cir. 1979) (employer justified dress code that required only female employees to wear uniforms by claiming women's dress overly influenced by fashion trends and dress competition).

310. 510 U.S. 17 (1993).

311. See *Ellison*, 924 F.2d at 879.

312. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, and Disability, 58 Fed. Reg. 51,266, 51,267 (1993) (to be codified at 29 C.F.R. pt. 1609) (proposed Oct. 1, 1993).

who regard the reasonable person as a proxy for a reasonable man by locating the reasonableness standard in the class of persons in the plaintiff's situation, who are, it is true, overwhelmingly women. Yet, by resisting the urge to assume that all harassment victims are women, and that all reasonable women will react the same way to similarly harassing situations—both unspoken premises of the reasonable woman standard—the EEOC's standard makes room for men like Polly or Goluszek to argue that it was reasonable for them to experience their coworkers' conduct as intimidating, hostile or abusive. Unfortunately, the EEOC standard was withdrawn in October of 1994,³¹³ and to date no court has used it in assessing a sexual harassment claim.³¹⁴

Kathryn Abrams, a legal theorist who undertook some of the early work advancing a reasonable woman standard in sexual harassment cases,³¹⁵ has since developed a more critical posture with respect to its utility.³¹⁶ Interestingly, Barbara Gutek, a writer well known for her work demonstrating that men and women react differently to sexual conduct in the workplace, has also revised her views.³¹⁷ Indeed, much of Gutek's early empirical work formed the basis for legal recommendations in favor of the reasonable woman standard.³¹⁸ Rather than substituting "woman" for "person" in the reasonableness standard and thereby inscribing in law the notion that men and women manifest different forms of rationality, Abrams suggests that Title VII's nondiscrimination mandate motivate us to rethink the concept of reasonability. Thus, she now advances a reasonable person standard "interpreted to mean not the average person, but the person enlightened concerning the barriers to women's equality in the workplace."³¹⁹ This standard has the advantage of shifting the locus of reasonableness from the victim's reaction (was it reasonable that the conduct made her feel so bad?), to the harasser's behavior (regardless of his subjective motivation, was it objectively unreasonable for him to act in such a way in the workplace?).

313. See Burns, *supra* note 89, at 401 n.310.

314. In *United States v. Hollow Horn Bear*, a man who had been charged with assaulting his mother with a kitchen knife attempted to raise a "battered child syndrome" defense so as to introduce evidence that his mother had abused him. No. 94-2484SD, 1994 WL 578218, at *1 (8th Cir. Oct. 20, 1994). The Eighth Circuit affirmed the trial court's jury instruction that the reasonableness of the conduct be assessed according to a "reasonable person in the same or similar circumstances" rather than a "reasonable battered person." *Id.* at *3.

315. See Abrams, *supra* note 51, at 1210-11 (arguing for a sexual harassment standard that incorporates responses reflective of women's socialization).

316. See Abrams, *supra* note 299, at 50-52.

317. Compare GUTEK, *supra* note 30, at 95-111 (describing studies showing men and women have different attitudes about sex in the workplace), with Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. Soc. Issues 151 (1995) (evaluating empirical studies and finding differences between male and female definitions of sexual harassment insignificant).

318. *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 459 (N.J. 1993) (citing Abrams, *supra* note 51, at 1203 (citing GUTEK, *supra* note 30, at 47-54)).

319. Abrams, *supra* note 299, at 52. The feminist retreat from a reasonable woman standard parallels a similar rethinking of the utility of the Battered Women's Syndrome defense in domestic violence cases. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991) (arguing that existing legal standards generally encompass consideration of the circumstances in which battered women kill their abusers).

Abrams' new standard has the additional advantage of being more likely to provoke the transformation of workplace norms rather than merely critique them from a woman's perspective—whatever that might be. This standard embodies a progressive normative bias absent from existing sexual harassment doctrine. At best, the reasonable woman standard imposes liability on men who simply “don't get it,” while at the same time building into the law the notion that men and women “get” sexual conduct differently: reasonable men and reasonable women, in a sense, agree to disagree about the meaning of sexual conduct in the workplace. Abrams' new standard, on the other hand, substitutes a gender neutral normative standard for what is reasonable conduct in the workplace—harassers have to “get with it.” But to the extent that Abrams' standard demands only that reasonable people be enlightened with respect to the barriers to women's equality in the workplace, it demands too little. Title VII should enlighten the underlying causes of women's inequality, which include the sexual harassment of men who deviate from a hetero-patriarchal script. Thus, I urge that we take Abrams' standard one step further, and demand that reasonable people be educated in and sensitive to the ways in which sexism can and does limit workplace options for all persons, male or female.

Related to the gender-based problems that inhere in the reasonable woman standard is the fact that a growing number of courts now require in same-sex cases that the offending conduct create an anti-male or anti-female environment. While the Fourth Circuit has interpreted Title VII's “because of sex” language in same-sex sexual harassment cases to require proof of homosexuality, in the absence of such proof, other courts have interpreted the spirit of Title VII to target those practices that create an anti-male or anti-female environment.

The most notable example of such reasoning is found in *Goluszek v. H.P. Smith*.³²⁰ There, recall, Judge Ann Williams held that the sexual harassment by male coworkers of the plaintiff, a man who “blushes easily” and is abnormally sensitive to comments pertaining to sex,³²¹ did not amount to discrimination “because of sex.” According to the court, “Goluszek may have been harassed ‘because’ he is a male, but that harassment was not of a kind which created an antimale environment in the workplace.”³²² This language has been since relied upon in a number of cases that fall into the second kind of same-sex harassment where men engage in offensive conduct of a sexual nature toward other men, but where the harassers are not shown to be gay and/or sexual desire is not alleged to be the motivation behind the harassment.³²³

320. 697 F. Supp. 1452 (N.D. Ill. 1988).

321. *Id.* at 1453.

322. *Id.* at 1456.

323. See, e.g., *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995) (finding no antimale environment where plaintiff alleged that male supervisor threatened to “butt fuck” him if he didn't get back to work, told plaintiff that he had “a nice ass,” and asked him if he want to touch “peepees” in the bathroom); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 808 (N.D. Ind. 1995) (stating that “[a]bsent extenuating circumstances, it would seem difficult to prove that sexually explicit words or conduct between men would demonstrate an anti-male atmosphere”); *Fleenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793 (S.D. Ohio Dec. 21, 1995) (finding no antimale environment

The anti-male environment rule has been interpreted in a manner that narrows the scope of Title VII in both same-sex and different-sex cases. Some courts interpret *Goluszek* to mean that Title VII is designed to provide a remedy only where members of a disadvantaged group have been discriminated against by members of a dominant group.³²⁴ For instance, in *Quick v. Donaldson Co.*,³²⁵ the court held that "male employees are afforded Title VII protection if they can show they are members of a disadvantaged or vulnerable group (i.e., if they are working in an antimale environment or predominantly female environment)."³²⁶

Under this construction, the conditions precedent for an anti-male environment may be found where men are a statistical minority in the workplace, thereby reversing their more typical cultural status as subordinator to that of subordinated. On this account, unlawful discrimination arises because one's sexual group is outnumbered in the workplace. The paradigmatic case of sex discrimination, so conceived, is crudely reduced in juvenile terms to situations where the boys gang up on the girls, or the girls gang up on the boys.

This view necessarily limits Title VII's application to inter-sexual sexual harassment. Sex discrimination, and sexual harassment as its subset, thus encompass only conduct undertaken by members of one biological sex against members of another biological sex. The court in *Martin v. Norfolk Southern Railway Co.*³²⁷ held that "[t]his theory focuses on whether there is an atmosphere of oppression by a 'dominant gender,' and thus assumes that the harasser and victim must be of opposing genders."³²⁸ Would that the court really meant what it said here: that Title VII prohibits the "masculines" from gaining up on the "feminines"—which is my interpretation of Title VII. Instead, I believe that the court used the term gender to mean sex. Such a narrow view precludes the possibility that a man can be sexually harassed by another man or men. Thus, in dismissing the male plaintiff's same-sex sexual harassment claim in *Fleenor v. Hewitt Soap Co.*,³²⁹ the court felt it relevant to observe that "[i]n his second amended complaint . . . the Plaintiff does not allege that his work-place was other than male dominated. Indeed, with one exception, those mentioned

where male plaintiff alleged that male coworkers exposed their genitals to plaintiff, threatened to force him to engage in oral sex, and stuck a ruler up plaintiff's buttocks), *aff'd*, 81 F.3d 48 (6th Cir.), *cert. denied*, 117 S. Ct. 170, *reh'g denied*, 117 S. Ct. 598 (1996); *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994), *reconsideration denied*, 887 F. Supp. 1178 (N.D. Ind. 1995) (finding no anti-male environment where male supervisor called male plaintiff "dick sucker" and asked if he could perform fellatio without his false teeth). *But see Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996) (holding that district court erred in requiring male plaintiff to show evidence of antimale or predominantly female work environment which made males a disadvantaged group in the workplace).

324. "The 'sexual harassment' that is actionable under Title VII 'is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.'" *Goluszek*, 697 F. Supp. at 1456 (quoting *Sexual Harassment Claims*, *supra* note 297, at 1451).

325. 895 F. Supp. 1288 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996).

326. *Id.* at 1294.

327. 926 F. Supp. 1044 (N.D. Ala. 1996).

328. *Id.* at 1049.

329. No. C-3-94-182, 1995 WL 386793 (S.D. Ohio Dec. 21, 1995), *aff'd*, 81 F.3d 48 (6th Cir.), *cert. denied*, 117 S. Ct. 170, *and reh'g denied*, 117 S. Ct. 598 (1996).

in that pleading are male."³³⁰ Similarly, in *Easton v. Crossland Mortgage Corp.*,³³¹ the court granted summary judgment for the defendants in a female same-sex harassment case in part because "[i]n an all female context . . . [t]he environment, in effect, has become gender neutral and presumptively nondiscriminatory."³³² As such, the court concluded that the abundance of unwelcome sexual conduct undertaken by the plaintiff's female supervisors did not create a discriminatory hostile work environment for Easton. Instead, the court found that Easton's supervisors "presided over a *bawdy sorority* in which the plaintiffs were extended and accepted membership. The fact that the plaintiffs found this offer distasteful is a positive reflection of their character and professionalism, but unfortunately does not advance a claim of discrimination."³³³

In effect, a single-sex workplace cannot embody an anti-male environment for men, or an anti-female environment for women. Some courts, however, have gone even further in implementing the rule against intrasex sexism: "He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself . . ." ³³⁴ Just as reducing sexual harassment to the expression of love or desire is a mistake, so too is it an error to collapse the wrong of sexual harassment into the expression of hate or animus.³³⁵

In a sense, this concept of an anti-male environment picks up on the disparate impact reasoning embraced by the *Robinson* court.³³⁶ This move to explain what sexual harassment is in the individual case in terms of what sexual harassment does to all women workers has great explanatory power in a case like *Robinson*. Yet in *Robinson*, the court identified this category of actionable conduct as one of several ways of understanding harassing behavior as a form of discrimination "because of sex." It is a mistake to treat an anti-male environment as not only a sufficient, but a necessary element of a sexually hostile work environment claim, which is what the same-sex harassment cases do by reading sex discrimination to mean the creation of an anti-male environment.

Surely Title VII does not require that either male or female sexual harassment plaintiffs establish themselves as fungible representatives of their "sexual group" in order to make out a claim of sex discrimination. As Kathryn Abrams observed in her analysis of the *Goluszek* case:

330. *Id.* at *3 (footnote omitted); see also *Shermer v. Illinois Dep't of Transp.*, 937 F. Supp. 781, 784 (C.D. Ill. 1996) (holding that male plaintiff "obviously cannot show that his work environment was anti-male" because he worked on an all-male crew).

331. 905 F. Supp. 1368 (C.D. Cal. 1995).

332. *Id.* at 1382.

333. *Id.* at 1383 (emphasis added).

334. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 833 (D. Md. 1994) (quoting Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL. REV. 333, 352 (1990)), *aff'd*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); see also *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 n.1 (D. Wyo. 1993).

335. For a thoughtful critique of this argument, see Calleros, *supra* note 140, at 69 (pointing out that both heterosexual and homosexual harassers may feel dislike, attraction, or neither for the groups that they belong to).

336. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991) ("A third category of actionable conduct is behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex.").

in insisting on the nexus between social disempowerment and discrimination in the workplace, the court in *Goluszek* imposed a requirement that courts felt free to omit in the cases involving homosexual supervisors . . . the behavior challenged must operate, in some respect, against all members of the protected group. . . . [I]n other words, [according to the *Polly* court] it could have happened to any man, but not to any woman. In *Goluszek*, the court took this categorical logic one step further: it must be treatment that not only could have happened to any man but tends to reflect negatively on men as a group or create an environment hostile to men.³³⁷

Such a standard imposes an inappropriately heavy burden on plaintiffs while encouraging defendants to produce other members of the plaintiff's sex who could testify to the fact that they, as a woman, or as a man—that is, in their capacity as class representatives—did not regard the conduct complained of as offensive. This evidentiary maneuver is already being used as a means of rebutting the plaintiff's claim that the conduct was offensive to "a reasonable woman" or "a reasonable man."

The anti-male or anti-female requirement also raises problems of ripeness, as the court in *Tanner v. Prima Donna Resorts, Inc.*³³⁸ correctly observed:

Title VII creates an individual claim which is ripe before the work environment has been poisoned for all workers of one sex or the other. It does not require that the work environment be hostile to all workers of the plaintiff's sex; it requires that the environment be hostile to the plaintiff.³³⁹

Finally, this requirement has the effect of eliminating a claim for intrasexual gender stereotyping. By regarding each member of a sexual group as a fungible representative of the class of subordinators or subordinated, it eliminates the possibility that men could discriminate against other men, through harassment or other means, because the latter fail to live up to the societal expectations of "proper" masculinity, or that women could engage in the same or similar behavior toward other women who fail to embody a particular standard of femininity. Should Ann Hopkins³⁴⁰ have been barred from Title VII relief if she had been harassed or discriminated against by a sexually heterogeneous group of partners at Price Waterhouse who all preferred that female partners be appropriately feminine? I should hope not.

There is one further logical consequence of reducing the "because of sex" analysis to "but for" causation that should draw into question the integrity of the formal equality account of the wrong of sexual harassment. Just as some courts seek to limit Title VII liability only to those situations where the conduct

337. *Abrams*, *supra* note 218, at 2514.

338. 919 F. Supp. 351 (D. Nev. 1996).

339. *Id.* at 354 (citations omitted); see also *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 273 (D. Utah 1996) (endorsing the *Tanner* court's position rejecting an antimale or antifemale requirement under Title VII). The EEOC's proposed reasonableness standard that would have assessed the offending conduct against the sensibilities of a "reasonable person in the same or similar situation" allows for this more individualized inquiry rather than one based on sex-based group identity.

340. See *Price Waterhouse v. Hopkins, Inc.*, 490 U.S. 228 (1989). Recall that Ann Hopkins was denied partnership at Price Waterhouse because the male partners considered her insufficiently feminine. *Id.* at 235; see also note 301 *supra*.

creates an anti-male or anti-female environment, other courts have developed a related exemption for conduct that is equally offensive to male and female workers. This concept was first expressly articulated by the Eleventh Circuit in *Henson v. City of Dundee*.³⁴¹ The *Henson* court noted the limitations of the "but for" formulation of the wrong of sexual harassment:

[T]here may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is *equally offensive to male and female workers*. In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment.³⁴²

Unfortunately, courts have repeatedly cited *Henson's* "equally offensive" principle to justify denying Title VII liability.³⁴³ Under this view, if the law is designed to address workplace conduct that disparately impacts workers on the basis of their sex,³⁴⁴ then that conduct which offends both men and women might be obnoxious, but it is not sexually discriminatory.³⁴⁵

Feminist advocates of sexual harassment doctrine and judges reluctant to include sexual harassment in Title VII agree on a surprising number of these issues. Catharine MacKinnon's materialist commitments, grounded in the reality of women's subordination by men,³⁴⁶ led her to conclude:

Sexual harassment limits women in a way men are not limited.

. . . .

. . . By no measure does sexual harassment, in general, fall equally upon women and men. If it does, that is a defense. Sexual harassment makes the employment experience as a whole more injurious, more stressful, more insecure, and less economically beneficial for women than for men.³⁴⁷

341. 682 F.2d 897 (11th Cir. 1982).

342. *Id.* at 904 (emphasis added) (citations omitted).

343. *See, e.g.*, *Cross v. Alabama*, 49 F.3d 1490, 1505 (11th Cir. 1995); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986); *Cabaniss v. Coosa Valley Med. Ctr.*, No. CV93-PT-2710-E, 1995 WL 241937, at *5 (N.D. Ala. Mar. 20, 1995); *McKee v. Ram Prods., Inc.*, No. 1:92-CV-481, 1993 U.S. Dist. LEXIS 7346, at *8 (W.D. Mich. Apr. 23, 1993); *Linebaugh v. Sheraton Mich. Corp.*, 198 Mich. App. 335, 341 (1993); *Yukoweic v. IBM*, 643 N.Y.S.2d 747, 748 (N.Y. App. Div. 1996); *see also Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974) (holding conduct not racially discriminatory where supervisor "was equally offensive to members of both races"). *But see Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994); *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1274 (5th Cir. 1989); *EEOC v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 36 (W.D.N.Y. 1994).

344. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

345. *Henson's* "equally offensive" rule is also problematic because it affirmatively discourages men from challenging sexism. Just as we want to encourage white people to both understand our stake in the perpetuation of racism and challenge it where we encounter it, it is a mistake to interpret Title VII's sex discrimination proscriptions as furthering the notion that men have no stake in workplace sex discrimination. *See Childress v. City of Richmond*, 907 F. Supp. 934 (E.D. Va. 1995) (holding white male employees do not have standing under Title VII to challenge workplace environment that was sexually harassing for black female workers on the theory that it undermined teamwork).

346. *See MacKinnon, supra* note 181, at 3-12.

347. *MacKinnon, supra* note 23, at 193-94 (footnote omitted).

Feminist writers such as Kathryn Abrams³⁴⁸ and Susan Estrich,³⁴⁹ together with the Ninth Circuit in *Ellison v. Brady*,³⁵⁰ have agreed that men and women experience sexual conduct in the workplace differently. One can accept this epistemic claim without embracing the view that many courts and the EEOC maintain,³⁵¹ that where conduct is regarded as reasonably offensive to all, regardless of sex, an individual woman is barred from claiming that she experienced that conduct as sexually discriminatory.

Compare, for instance, the workplaces at issue in *McWilliams* and *Polly* on the one hand, and *Robinson v. Jacksonville Shipyards* on the other. In *McWilliams* and *Polly*, male workers objected to the sexual pollution of all-male workplaces, whereas in *Robinson*, the question of a sexually hostile work environment arose only once women began working in the shipyards. In fact, the shipyards were full of pictures of naked women and other materials that sexualized the workplace well before the women began working there.³⁵² In the analysis of the harm that a sexually polluted work environment creates for women workers, the *Robinson* court assumed that no man was or could have been harmed by the hetero-masculine ideology that permeated all aspects of the workplace culture.³⁵³ Without questioning the harm that the female plaintiffs in *Robinson* experienced, in order to regard the women's injury as discrimination "because of sex," must we foreclose the possibility that a man *could also be harmed* by the same or similar conduct?

Martha Chamallas has made a similar suggestion as part of her critique of the latent essentialism underlying the *Robinson* court's use of the reasonable woman standard: "Allowing men to complain of sexually abusive environments could mean, of course, that even all-male workplaces would theoretically be required to maintain an environment that is not hostile to women."³⁵⁴ Chamallas regards the sexual harassment of nonmasculine men by other men as a form of sexism usually directed at women, but displaced on men.³⁵⁵ In this sense, Chamallas employs an analysis developed more fully by Mary Anne Case in her discussion of the role of effeminate men in sex discrimination juris-

348. Abrams has argued that adopting a reasonable person standard in sexual harassment cases belies "a stark denial of a range of social facts that make sexual harassment a distinctly different experience for women than it would be for men." Abrams, *supra* note 51, at 1202. Abrams has revised this view in subsequent writing. Abrams, *supra* note 299.

349. Estrich, *supra* note 34, at 840-41.

350. 924 F.2d 872, 879 (9th Cir. 1991).

351. See Interview with Gail Coleman, Attorney, Equal Employment Opportunity Commission, Office of General Counsel (May 1, 1996).

352. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493 (M.D. Fla. 1991).

353. Kathryn Abrams observed that "[s]exual harassment is a potent reminder that the entry of women into the workplace is the beginning, not the end, of a social transformation." Abrams, *supra* note 51, at 1197. While the entry of women in previously all-male work environments may be a sufficient catalyst to transform those workplaces, it is not, I believe, necessary to spark a reformation of gender norms. The same-sex sexual harassment cases should serve as an additional potent reminder that men and women who do not conform to hetero-patriarchal expectations can provide the impetus for a similar social transformation.

354. Chamallas, *Feminist Constructions of Objectivity*, *supra* note 33, at 130.

355. *Id.* at 124-30.

prudence.³⁵⁶ For Case, the treatment of nonmasculine men is a problem of their feminization, or treatment *as women*.³⁵⁷

This view, I think, is mistaken. Goluszek's and Polly's male coworkers may have regarded them as "failed-men" but that is not the same thing as regarding them as women. Our thinking and our theory must resist the urge to regard maleness and femaleness, and masculinity and femininity, as opposites, rather than as two locations on a spectrum of sexual and gendered identity.³⁵⁸ To label all bias against nonmasculine men as a kind of discrimination against women is to ignore the role that sexism plays in regulating male identity in a way that is related to, but not necessarily the same as, the role it plays in regulating female identity.

According to Chamallas, "Goluszek became feminized and was subjected to sexual harassment usually imposed on women."³⁵⁹ Yet, one need not translate Goluszek into a woman in order to understand his experience of sexual harassment as a form of sex discrimination. He was harassed primarily as a way of policing masculinity, which may or may not have the collateral damage of vilifying femininity. When men like Goluszek are sexually harassed, they experience a kind of gender discipline designed to punish them for their failure to live up to a hetero-masculine norm. To reduce this conduct to misogyny is to miss the stake that hetero-patriarchy has in the defense of a certain brand of masculinity in men. For these reasons, I agree with Chamallas' demand that we consider whether some all-male workplaces have a duty to eliminate sexist practices that are hostile to women even before women integrate the workplaces.³⁶⁰ Yet, I want to push the argument one step further, and consider how these hypermasculine, all-male workplaces can be considered hostile to men *as men*.

While it is sometimes the case that non-masculine men are discriminated against because they are understood as being feminine or womanly, I resist a theory that makes it always the case that this is how they are viewed. If one of the ultimate goals of antidiscrimination laws is, and I believe it should be, to provide all people more options with respect to how they do their gender, then I

356. See Case, *supra* note 301, at 60-61 (arguing that sexual harassment doctrine, which provides women with remedies for "gender discrimination against the feminine," should also protect men who are taunted because they are perceived to behave in a feminine way).

357. See *id.* Kathryn Abrams has taken a similar position with respect to the *Goluszek* case: Goluszek . . . was a biological man who responded to harassment in a socially female manner: he blushed, he stammered, he tried to avoid sexual conversations, and his work performance (at least allegedly) suffered. . . . The district court . . . refused to see the derogation of a socially female response or the attempt to enforce a social role conventionally tailored to one's biological sex.

Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 347 (1996) (footnote omitted).

358. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 70-74 (1995) (describing the transition from the pre-Enlightenment one-sex model, in which men and women were viewed as variations on the same human body, to the contemporary two-sex model viewing men and women as "different kinds of human beings").

359. Chamallas, *Feminist Constructions of Objectivity*, *supra* note 33, at 128.

360. See *id.*

regard it as vital that we resist the urge to reduce a failure of proper masculinity to femininity. Instead, we should make room for subject positions other than socially female³⁶¹ and socially male.³⁶²

Sex discrimination doctrine need not foreclose the possibility that both men and women could find certain sexual conduct in the workplace equally offensive, but not similarly so. Workplace sexual conduct may injure women because it objectifies them as sex objects, and it may injure men because it assumes that all men conform to and join into a kind of sexualized heteromale culture. The doctrine should allow for the possibility that McWilliams and Polly found their sexualized working environment hostile, and that their female coworkers found that environment discriminatorily hostile as well, but for conceivably different reasons. The fact that both men and women can be harmed by the same conduct for different reasons, while failing a test of "but for" causation and falling within the exemption for conduct that is equally offensive to men and women, should not necessarily render the conduct something other than sex discrimination.

Here, as elsewhere, the anomaly at the margin suggests a problem with the doctrine at the center.³⁶³ The over determination of sexual harassment as either something males as a class, do to females as a class, or as conduct motivated by sexual desire, fundamentally misstates the wrong of sexual harassment. Worse, it trivializes the nature of the harm at issue in sex discrimination cases generally, and sexual harassment cases specifically.

C. Critique of Anti-subordination

Finally, the anti-subordination view of sexual harassment, while providing the something more that is lacking in the anti-sex and "but for" paradigms, seems to over determine the nature of the harm as something males do to females. Catharine MacKinnon and Ruth Colker have answered the call to provide a theory of sexual harassment that identifies "what practices are subordinating rather than simply differentiating."³⁶⁴ A theory of sexual differentiation alone is not an adequate theory of discrimination. What is needed, on this account, is an analysis of the structural problem of enforced inferiority of women.³⁶⁵ The structural problem that forms the foundation of MacKinnon's inequality approach is one that takes inequality between "the sexes" as a given: "[A]ll practices which subordinate women to men are prohibited."³⁶⁶ Under

361. I use the term "socially female" to describe a properly feminine woman.

362. I use the term "socially male" to describe a properly masculine man.

363. See, e.g., Franke, *supra* note 358 (examining the legal treatment of discrimination claims brought by transgendered people so as to show how the disaggregation of sex from gender in sex discrimination law is misguided); Susan Sturm & Lani Gunier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 958 (1996) (noting problems with affirmative action, conceived as marginal exceptions to the merit principle, should provoke an examination of flaws in the merit principle more generally).

364. Colker, *supra* note 53, at 1033 n.122.

365. See MacKinnon, *supra* note 23, at 4-5.

366. *Id.* at 4.

the anti-subordination approach, Title VII's application to practices that subordinate some men to other men end up being explained away uneasily.³⁶⁷

Two fundamental questions emerge from the subordination account of sexual harassment. First, should we assume that all or most sexual activity initiated by men in the presence of women reproduces subordinating gender norms? If so, why? Second, what does the theory say about same-sex sexual harassment or harassment by women of men? The power of MacKinnon's insights applies almost exclusively to contexts where women are sexually harassed by men. For MacKinnon, the social and historical construction of male and female sexuality and identity does all the work of transforming sexual harassment into sex discrimination. The hierarchical inequality of the sexes is crucial to this analysis. Similarly, in her analysis of subordination, Ruth Colker argues that "[t]he real issue should be a policy's contribution to, or redress of, subordination."³⁶⁸ But Colker's group-based analysis is limited to intersexual domination based upon a biological definition of group identity.

To my mind, the subordination account conceptualizes the wrong of sexual harassment better than either the anti-sex or "but for" formulations. The anti-subordination principle best conceives sexual harassment as a sexually discriminatory wrong, but it does so by relying too heavily on the premise that this is something that men, as a biological category, do to women, as a biological category. The anti-subordination principle could be greatly improved by conceptualizing the problem as one of gender subordination defined in hetero-patriarchal terms. Thus, sexual harassment is understood as a mechanism by which an orthodoxy regarding masculinity and femininity is enforced, policed, and perpetuated in the workplace. Unwelcome and offensive conduct by men directed at women that has the effect of reducing women's identity to that of a sex object while figuring men's identity as that of a sex subject is one example of gender subordination. But so is the sexual harassment of Goluszek, Polly and McWilliams—men who were insufficiently masculine and as a result were punished by their male coworkers with a campaign of unwelcome, offensive, and hostile conduct of a sexual nature. As such, Goluszek's, Polly's, and McWilliams' male coworkers were policing proper masculinity in men, just as Lois Robinson's coworkers were policing proper femininity in women.

Therefore, the "but for" and the anti-sex formulations of the wrong of sexual harassment require something more in order to make the link to sex discrimination. The subordination theory, while providing something more, does so by regarding sexual harassment as an authentic expression of male identity. As such, the dominant feminist conception of sexism, understood in patriarchal terms, relies too heavily upon the notion that sexism is something men do to

367. "[C]ases that depart from the assumption of discrimination as an intergroup phenomenon are treated as anomalous and are circuitously or unsatisfactorily explained." Abrams, *supra* note 218, at 2523.

368. Colker, *supra* note 53, at 1033.

women.³⁶⁹ Limiting the conception of sexual harassment to those bad acts perpetrated by men against women essentializes women's status as victims and minimizes the degree to which gender harassment is really about the enforcement or perpetuation of oppressive or subordinating gender (not biological) stereotypes. The harassment of nonmasculine, including but not limited to effeminate, men by other men is ignored under these constrained accounts of what type of person has standing to file a Title VII claim.

The underlying logic of this conception of sexism is transitive in nature: Men dominate women. MacKinnon makes this logic abundantly clear: "Man fucks woman; subject verb object."³⁷⁰ Sexism, then, is regarded as a kind of biological warfare, the shrapnel of which is gender:

Stopped as an attribute of a person, sex inequality takes the form of gender; moving as a relation between people, it takes the form of sexuality. Gender emerges as the congealed form of the sexualization of inequality between men and women For the female, subordination is sexualized, in the way that dominance is for the male, as pleasure as well as gender identity, as femininity.³⁷¹

The same-sex cases perhaps best demonstrate how the structural problem MacKinnon identifies is too dependent upon an underlying sexually dimorphic logic. What is wrong with the world MacKinnon describes in her work,³⁷² is not exhausted by the observation that men subordinate women, although that is certainly descriptively true in most cases. Rather, the problem is far more systemic. By reducing sexism to only that which is done to women by men, we lose sight of the underlying ideology that makes sexism so powerful, effective, and harmful. Kathryn Abrams, better than anyone else, appreciates the limitations of the subordination account of sexual harassment, and, in its place, has suggested that in some cases, sexual harassment is

either a form of gender discrimination against women—derision of some of the qualities that make women targets for sexual harassment—or a form of gender discrimination against men that disciplines not the group but a distinct subset for abandoning the qualities associated with men for the more socially stigmatized characteristics associated with women.³⁷³

369. Gerda Lerner defines patriarchy as the "manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general." GERDA LERNER, *THE CREATION OF PATRIARCHY* 239 (1986).

370. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 541 (1982) (arguing that rape is an "abuse[] of sex" and is a "form[] of enforcement . . . [that is] sexualized").

371. MACKINNON, *supra* note 32, at 6-7.

372. *Sexual Harassment of Working Women* represents the first such example. MACKINNON, *supra* note 23. In *Only Words*, MacKinnon's more recent discussion of the law's treatment of pornography, she continues the analysis she began in the sexual harassment area by examining how men subordinate women through the production and consumption of pornography. MACKINNON, *supra* note 151.

373. Abrams, *supra* note 218, at 2516. Again, I question the necessity of understanding the stigmatization of nonmasculine men as a version of the vilification of women. See text accompanying notes 192-194, 302-308 & 356-360 *supra*.

It is upon Abrams' view of sexual harassment as gender discrimination that I want to build. The subordination of women by men is part of a larger social practice that creates gendered bodies—feminine women and masculine men. According to this ideology, sex and gender ultimately collapse in such a way that femininity is understood as the authentic expression of female agency and masculinity is regarded as the authentic expression of male agency.³⁷⁴ This ideology also includes a sexual hierarchy in which women are regarded as inferior to men, and femininity is regarded as inferior to masculinity.³⁷⁵ While I may get no argument from MacKinnon on these observations about what sexism is and does, I want to resist her impulse to collapse sexism with sex: for MacKinnon sexism is something the male sex does to the female sex, and sex (as in “to have sex”) is always, already sexist.

IV. SEXUAL HARASSMENT CONCEIVED OF AS A TECHNOLOGY OF SEXISM

My aspiration in the preceding sections has been to provide two fundamental insights about existing sexual harassment doctrine: (1) the Supreme Court has not offered a theory of why sexual harassment is a form of sex discrimination; and (2) the three dominant accounts of the wrong of sexual harassment advanced by theorists and lower courts trivialize the legal norm against sex discrimination. The same-sex cases merely foreground a dire problem present in more central cases because the inferences that work well in male/female cases are of no aid or comfort in same-sex cases. In the same-sex harassment cases, once denied the ability to rely upon intuition and conclude that sex discrimination is afoot, courts and theorists alike must specify a theory of why we consider sexual harassment a form of sex discrimination. Lest the reader draw the wrong conclusion, allow me to state clearly that I believe it is appropriate, efficient, and legitimate for courts to draw inferences of discrimination in traditional different-sex harassment cases. My purpose here is to both issue and accept an invitation to undertake the hard work of developing a sufficiently nuanced theory of why sexual harassment is a form of sex discrimination. If we are to indulge our intuitions in the form of inferences, then this must take place within the context of a theory that recognizes the role that sexual harassment, at the center and at the margins, plays in constructing the gender of both harasser and harassee, and in reinforcing gender stereotypes.

Like MacKinnon, I agree that the subordination account of sexual harassment provides better purchase on the nature of this problem and avenues for relief than do either the formal equality or sex-equals-sexism approaches. But what is the wrong of sexual subordination? MacKinnon, Colker, and others understand it as a gendered hierarchy based upon the enforced inferiority of women to men.³⁷⁶ Underlying this gendered inferiority is an ideology that is designed to reduce women to victimized, highly sexual, less competent sub-humans who do not enjoy full agency.

374. See Franke, *supra* note 358, at 4.

375. Mary Anne Case recently discussed this hierarchy. See Case, *supra* note 301, at 2-3.

376. See MacKinnon, *supra* note 23, at 4-5; Colker, *supra* note 53, at 1033.

Rather than confine the subordination analysis to the methods by which men oppress women, I want to ask a more systemic question: Does the underlying ideology that feminizes and sexualizes women also have an effect upon who men are or can be? As I see it, the wrong of gender-based subordination lies in its power as an overarching regulatory practice that has as its goal the production of feminine women as (hetero)sexual objects and masculine men as (hetero)sexual subjects. Sexual harassment can be a very effective means of accomplishing these hetero-patriarchal objectives, whether by enacting these norms—as in the case of men harassing female subordinates in the workplace—or by punishing gender nonconformists—as in the cases of Goluszek, Polly, or McWilliams, the women who worked in the Jacksonville Shipyards,³⁷⁷ or who work on highway construction crews.³⁷⁸ It is easy to come away from much of the anti-subordination literature understanding sexism as something that men exclusively visit upon women. Yet sexism, understood in the terms I urge, is something that affects and regulates us all, male and female. This is not to say that it affects us all in the same way, but rather in ways which harm some women and some men in similar fashions. What is more, I want to resist the urge to individualize the injuries men like Goluszek, McWilliams, and Polly experienced. Yes, they were each selected for harassment because of some characteristic they possessed as individual men.³⁷⁹ But the net effect of this kind of conduct extends beyond any particular case in that it solidifies what “real men” and “real women” should be. This dynamic affects all of us, not just people like Goluszek.

Many feminist subordination theorists take it as given that male and female subjects come to the sexually harassing workplace fully constituted: he as subordinator/colonizer, she as subordinated/colonized. Indeed, “[t]he dominant approach posits a world of fully formed beings, who either embrace or are thwarted by opinions of differential capacity. The move toward discrimination as devaluation requires an understanding of the way discrimination helps form the subject.”³⁸⁰ It is upon this insight that I wish to build.

The existing body of feminist work on sexual harassment offers a thorough and thoughtful critique of sexual harassment. Yet, theories that regard sexual harassment as the inevitable or, at least, natural expression of male agency render the dismantling of the male gaze nearly impossible. Only by reversing the collapse of maleness and masculinity can we begin to understand the complexity of sexual harassment as a regulatory practice. Several examples will illustrate this point.

377. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

378. See, e.g., *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

379. See text accompanying notes 228-248 *supra* for descriptions of the harassment experienced by these three men.

380. Abrams, *supra* note 218, at 2529. Judith Butler has explored the epiphenomenal relationship between social practices and human subjectivity in some interesting ways: “[T]he body becomes its gender through a series of acts which are renewed, revised, and consolidated through time.” Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 523 (1988).

In *Steiner v. Showboat Operating Co.*,³⁸¹ Barbara Steiner was the first woman promoted to the position of floor person in defendant's Las Vegas casino. The job of floor person, or floor man, had previously been held only by men. Presumably, prior to Steiner's promotion, female casino employees worked as cocktail waitresses, or the like; jobs that substantially exploited female workers' sexuality as a part of the job. The floor person position was different; sexiness was not an essential aspect of the job. Steiner alleged that her male supervisor called her names such as "'dumb fucking broad,' 'cunt,' and 'fucking cunt.'"³⁸² More importantly, however, he also yelled at her in front of customers and coworkers: "'You are not a fucking floor man [her job]. You are a fucking casino host. . . . Why don't you go in the restaurant and suck their dicks[?]' . . . She claims he repeated this two or three times, laughed, and walked off with a grin on his face."³⁸³

There seems little doubt that this form of harassment was humiliating to Steiner, particularly since it took place in front of customers and coworkers. But what made it sex discrimination, was not, as the court found, the sexual content of the conduct,³⁸⁴ but that he used sexual harassment to put Steiner in her "proper place," thereby diminishing her authority and role as a floor person. In this sense, the sexual harassment feminized Steiner, rendering her less competent and more sexual, while at the same time it masculinized the male supervisor as someone who possessed both the will and the power to render his female subordinate a sex object. In a case such as this, sexual harassment is used both to police and discipline the gender outlaw: the woman who dares to do a man's job is made to pay.³⁸⁵ Sexual harassment is the means by which the male harasser proves himself as properly and effectively masculine, while at the same time inscribes femininity on the female victim. On numerous occasions the Supreme Court has condemned practices that are "practically a brand upon [women and African-Americans] . . . an assertion of their inferiority."³⁸⁶ Sexual harassment operates as both an assertion of women's inferiority and a brand thereof upon them. In cases such as *Steiner*, it is reasonable to infer that when a male supervisor calls a female subordinate a "fucking cunt" and tells her to "go suck the customers' dicks,"³⁸⁷ she has been discriminated against

381. 25 F.3d 1459 (9th Cir. 1994).

382. *Id.* at 1461.

383. *Id.* (parentheticals in original).

384. "While Trenkle may have referred to men as 'assholes,' he referred to women as 'dumb fucking broads' and 'fucking cunts' It is one thing to call a woman 'worthless,' and another to call her a 'worthless broad.'" *Id.* at 1464.

385. It is worth noting that many of the most prominent sexual harassment cases were brought by women who were sexually harassed when they entered nontraditionally female employment: Teresa Harris worked as an equipment manager for Forklift Systems, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); Barbara Henson was a police dispatcher in a local police department, *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); Lois Robinson was one of the first women to work in the Jacksonville Shipyards, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

386. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

387. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1461 (9th Cir. 1994).

"based on her sex." But if we are going to draw such an inference, we must first ground it in a principled theory of sex discrimination.

Next, let us again consider the sexual harassment of Mr. Goluszek. He became a target for sexual harassment by male coworkers because he was a "mama's boy" and was uncomfortable with adult male (hetero)sex talk. The court rejected his Title VII sexual harassment claim, however, reasoning that he did not work in an environment that degraded males.³⁸⁸ In fact, Goluszek worked in an environment where males degraded other males who were insufficiently masculine. Just as Steiner's male supervisor used sexual harassment to punish her for acting out of place, Goluszek's male coworkers sexually harass him because he did not embody a union of maleness and masculinity. By asserting their proper masculinity through the idiom of sexual harassment, Goluszek's male coworkers humiliated him because he held a man's job without acting manly. Thus, Goluszek's case presents the mirror image of Steiner's.

If "to regulate" means "to bring under the control of law or constituted authority,"³⁸⁹ then in both Steiner's and Goluszek's cases sexual harassment was used to regulate their gender. Steiner, as a woman who was not acting sufficiently feminine, and Golezbek, as a man who was not acting sufficiently masculine, were brought under control of a law of gender that insists that femininity is the only acceptable expression of femaleness, and that masculinity is the only acceptable expression of maleness.³⁹⁰ Steiner's male supervisor and Goluszek's male coworkers functioned as the authorities-in-fact who enforced the law of gender in their respective workplaces.

This conception of sexual harassment is disciplinary in nature. Discipline, of course, has two functions, the imposition of punishment³⁹¹ on the one hand,

388. *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

389. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 9, at 1913.

390. Such a conception relies upon the notion that "[f]rom a feminist point of view, one might try to reconceive the gendered body as the legacy of sedimented acts rather than a predetermined or fore-closed structure, essence or fact, whether natural, cultural, or linguistic." Butler, *supra* note 380, at 523. Sedimentation is a concept familiar to phenomenologists, and finds its origins in the late Husserl, EDMUND HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* 52 (John Wild ed. & David Carr trans., 1970), and in Merleau-Ponty, MAURICE MERLEAU-PONTY, *SIGNS* 91-92 (John Wild ed. & Richard C. McCleary trans., 1964).

Steven Winter introduced the concept to legal theory:

[T]he concept expresses the way meanings and assumptions build up within the subject and, once internalized, operate without the subject's conscious awareness. . . .

. . . .

Sedimentation accounts both for intersubjectivity and for community. Because many subjects are situated in the same environment, social experiences such as routine or habitual interactions between subjects give rise to mutual or reciprocal sedimentations. Through such sedimentations, shared social experiences develop into "institutions."

Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1487-88 (1990) (footnote omitted).

"The metaphor connotes the alluvial build-up of categories and conceptions deposited by the flow of our interactions and experiences in the physical and social world." Steven L. Winter, *An Upside/Down View of the Counter-majoritarian Difficulty*, 69 TEX. L. REV. 1881, 1883 n.7 (1991). From his phenomenological stance, gender is the alluvial backwash that, after sufficient repetition, renders us fully and properly gendered subjects. Thus conceived, gender is not something we have, but something that has us.

391. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 9, at 1843.

and the restoration or maintenance of order on the other.³⁹² Punishment and order are central to understanding the power of sexual harassment:

In terms of an explicitly feminist account of gender as performative, it seems clear to me that an account of gender as ritualized, public performance must be combined with an analysis of the political sanctions and taboos under which that performance may and may not occur within the public sphere free of punitive consequence.³⁹³

Accordingly, masculinity and femininity are compulsory aspects of humanity,³⁹⁴ to be performed according to clear and discrete scripts. Those who fail, or refuse, to abide by its rules will be punished; often ruthlessly.³⁹⁵

The circumstances under which Mechelle Vinson was sexually harassed by her male boss illustrate a different way in which sexual harassment operates as a regulatory practice. Vinson worked as a bank teller for defendant Meritor Savings Bank,³⁹⁶ a job traditionally held by women. Rather than policing or punishing Vinson for acting in nonfeminine ways, her supervisor reinforced traditional gender norms by regarding her not as a valued employee, but principally as a sex object who was in the workplace to satisfy his sexual needs. What made the complained of conduct sex discrimination was not the fact that sexual desire motivated her supervisor's actions, but that he both regarded Vinson as a sex object, and forced her into that role by coercing her to have sex with him. In this sense, Vinson's male supervisor was enacting and thereby reinforcing and perpetuating gender norms that positioned him as masculine sexual conqueror and her as feminine sexual conquest. The appropriateness of an inference of discrimination in cases such as *Vinson* is therefore justified by reference to an underlying theory of gender discrimination.

Recall that the same-sex sexual harassment cases fall into three distinct groups: (1) gay quid pro quo or hostile environment cases where the harasser is shown to be gay and his actual sexual desire for the plaintiff is not challenged; (2) nongay hostile environment cases where a man harasses another man in the workplace, though not because he wants to have sex with or desires his victim; and (3) nongay hostile environment cases where a man in the workplace is targeted for harassment of a sexual nature because he fails to conform to hetero-masculine norms.

In the first set of cases, courts have been fairly consistent in holding that this kind of conduct is sex discrimination. Yet what, exactly, is sexist about this behavior, except that it mirrors different-sex harassment in some formal sense? When a man regards another man as a sex object, is that the same kind of discriminatory wrong as when a man regards a woman as a sex object?³⁹⁷

392. *See id.* at 1588.

393. Butler, *supra* note 380, at 526 n.9.

394. "Discrete genders are part of what 'humanizes' individuals within contemporary culture . . ." *Id.* at 522.

395. *See id.*

396. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 59 (1986).

397. Kathryn Abrams has suggested that the "courts are far more sympathetic to male sexual harassment claimants when they present the image of a normative, unambiguously male subject who

These cases fail to fall within my larger theory of why sexual harassment is a form of sex discrimination. When a gay male supervisor requests sexual favors of a male subordinate no larger cultural gender orthodoxy is being policed, perpetuated or enforced. Rather, the supervisor is exploiting a position of power in order to satisfy his carnal desires. Only upon the most meager of theories of sex discrimination, where "but for" causation can be shown, could one say yes, sex discrimination is afoot.

These cases raise that uncomfortable, yet inevitable, intellectual moment when grand theory fails to provide a unifying and totalizing approach to a problem. Yet there is a middle ground between grand and meager theory, one that suggests a practical rather than principled approach to cases of this sort. Because I resist the use of "but for" causation in sexual harassment cases for all the reasons discussed above, I suggest that in cases where the harasser is shown to be gay, and the harassment is an expression of his own personal sexual desire, the plaintiff should make out a Title VII disparate treatment *prima facie* case, not a sexual harassment case. While the disparate treatment method of proof may require a showing of "but for" causation, it does not do so in a manner that introduces all of the problems attendant to "but for" causation in sexual harassment cases. So framed, the thorny issues associated with the sexism in sex, or the subordinating power of sex become irrelevant because the plaintiff can easily argue that he is being treated differently than a female coworker because of his sex.³⁹⁸

The second kind of same-sex harassment, where men engage in "rough housing," "horsing around,"³⁹⁹ or "bagging"⁴⁰⁰ with other men, presents a more difficult question. These cases illustrate the enactment of a kind of masculine sexuality, what one court described as merely "unnecessary juvenile be-

receives unexpected sexual attention from another male in the workplace. This is attributable in part to the straight male fear of the spectral homosexual predator . . ." Abrams, *supra* note 218, at 2515.

398. Some may respond to this compromise by asking why this move cannot be made in all traditional sexual harassment cases as well, thereby reinstalling the "but for" form of the wrong. To this objection I would respond as follows: in gay same-sex harassment cases, disparate treatment is the only discriminatory meaning of the conduct. In contrast, while it may be the case that some sexual harassment of women by men is motivated by the sexual desire of the harasser, going down that road is dangerous as a matter of principle for reasons I discuss fully above. First, the doctrine should not be locked into the position that sexual harassment ultimately reduces to the inappropriate expression of desire, as much of it is about power expressed in sexual terms. Second, even if desire motivates the behavior in part, it does not exhaust the meaning of the conduct. The sexual harassment of women by men is understood to be sex discrimination because of what it does to the harasser and the victim, not because of the harasser's subjective mental state. Finally, not every case of sexual harassment is a case of disparate treatment sex discrimination. I want to leave open the possibility that both men and women could be harmed by the sexually harassing conduct of a supervisor or coworker. See text accompanying notes 341-363 *supra*. Thus, in some cases, like the gay harasser, it may be sufficient to argue that the conduct is disparate treatment discrimination, but such an argument is not necessary, or indeed appropriate, in many other sexual harassment cases in order to make out a violation of Title VII.

399. See *Hart v. Nat'l Mortgage & Land Co.*, 235 Cal. Rptr. 68, 70 (Cal. Ct. App. 1987).

400. "Bagging" is a practice whereby "one man would walk past another and make a feinting motion with his hand toward the other's groin." *Quick v. Donaldson Co.*, 90 F.3d 1372, 1374-75 (8th Cir. 1996) ("Quick alleges that at least twelve different male co-workers bagged him on some 100 occasions," and that when he complained of this behavior, his employer "told him that the next time somebody bagged him 'to turn around and bag the shit out of them.'").

havior by aggressive male co-workers."⁴⁰¹ We might want to say that this type of conduct is inappropriate and offensive, but do we want to call it sex discrimination? If we want to resist the urge to collapse sex and sexism, then the sexual nature of this behavior is not enough to render it discrimination "based on sex."⁴⁰²

These cases present the most difficult challenge to my, or any, theory of sex discrimination. Clearly these men have suffered some harm, but is that harm one of sex discrimination, and is it actionable under Title VII? Like the first set of same-sex cases, these cases are not neatly resolved by resort to grand theory. As I have described it, the paradigmatic case of sexual harassment, and of sex discrimination, is where sexual conduct manifests a performative or disciplinary function within a hetero-patriarchal orthodoxy, either by design or in its effect. This disciplinary or regulatory function is not necessarily present where, for instance, a male employee teases other male employees with plastic penises,⁴⁰³ uses language like "suck my dick,"⁴⁰⁴ or where talk of penis size, sexual conquests, or the touching of crotches take place in all-male workplaces.⁴⁰⁵ True, the fraternity-type culture of these workplaces embodies a normative vision of who men are or should be: characters in the movie *Animal House*. Some men may find this kind of work environment fun, others may find it objectionable. But, do the men who find it objectionable have standing to raise a claim under Title VII? Can they claim that the sexual conduct that surrounds them in the workplace harms them in a way that Title VII prohibits? Clearly there is a gendered orthodoxy at work in these workplaces that reproduce certain norms about male subjectivity, and our "enlightened man" finds them objectionable—that's not the kind of man he wants to be.

A principled approach to this scenario lies not exclusively in an analysis of the workplace norms, but in a theory of standing. At what point has our "enlightened man" suffered a harm that is cognizable under Title VII? Finding the workplace objectionable is not enough. Yet, once this man has indicated his objections and then is targeted for hostile treatment because of his failure to conform to the workplace norms, then he has suffered a harm within Title

401. *Quick v. Donaldson Co., Inc.*, 895 F. Supp. 1288, 1296 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372, 1380 (8th Cir. 1996). This language does beg a rather obvious question: what might "necessary" juvenile behavior be?

402. Absent from the decisions in these cases is any discussion of victim criteria, or victim gender identity. It is probably safe to assume that concealed in many of the second kind of cases are situations belonging to either the first or third category of same-sex harassment: those where the defendant harasser is gay or those where the plaintiff was a target of unwelcome sexual conduct because of his gender. In future litigation, advocates should develop factual records regarding gender norms of the workplaces in question, and the gender identities of harassers and victims alike.

403. *See Hart*, 235 Cal. Rptr. at 70.

404. *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1406 (E.D. Wis. 1996).

405. *See, e.g., Benekritis v. Johnson*, 882 F. Supp. 521, 523-24 (D.S.C. 1995) (describing how the plaintiff, a male teacher, alleged that during an after school basketball game, another male teacher "sexually harassed him 'by placing his genitals against Plaintiff's backside,' and 'by placing his hand on Plaintiff's genitals'" (citations omitted)).

VII.⁴⁰⁶ In these cases, Title VII plaintiffs must show a gender orthodoxy in the workplace, that the plaintiff regarded it as both offensive and unwelcome and that the plaintiff suffered retribution or some form of penalty for making that unwelcomeness known. In this way, the plaintiff can demonstrate that the conduct complained of was "intimidating, hostile or abusive," and that the conduct was undertaken "based on his sex," not simply because of the plaintiff's biological sex ("but for"), but based on his gender. I recognize that this is a higher standard of harm than is currently applied in more paradigmatic cases. But this difference I find acceptable. In more traditional cases, where a woman alleges that she has been sexually harassed by a man, a lower quantum of proof is sufficient to trigger an inference of sex discrimination because larger cultural norms of women as sex objects and men as sex subjects have been reproduced in the offending conduct. In the same-sex context described above, the same intuitions and larger cultural dynamics are not at work, therefore more information is necessary in order to conclude that the conduct complained of is sex discrimination, as opposed to some other form of nonsexist offensive behavior.

Title VII cannot and should not be the vehicle by which we dismantle every hypermasculine or hyperfeminine microculture. If that were the case, then my theory would essentially reduce to the use of Title VII to impose *my orthodoxy* of nonsexist culture on everyone else, and that is not my goal. Instead, I regard the motivating good that lies behind workplace nondiscrimination laws to be gender pluralism in the absence of coercion. By this I mean that at least in the workplace, so long as a person does his or her job competently, that person should be allowed some flexibility in the manner in which he or she expresses his or her gender. Certainly, no one should be punished in the manner in which Goluszek, Polly, and McWilliams were for failure to live up to a hetero-masculine norm in the workplace. And no woman should have to enact hetero-sexist norms of female sexuality as a part of her employment as did Mechelle Vinson.

Simply because I am not willing to regard all unwelcome or obnoxious sexual conduct, ipso facto, as sex discrimination, does not mean that I find such conduct unactionable. Certain types of sexual conduct remain wholly inappropriate in the workplace, even though, in my view, they are not sexually discriminatory. Workplace sexual misconduct that does not play a role in the regulation and enforcement of hetero-patriarchal gender norms, while not actionable under sex discrimination laws should still be actionable under appropriate state tort, contract,⁴⁰⁷ or even racketeering laws.⁴⁰⁸ As a companion to the approach to sexual harassment that I advance, it may make sense for states to enact statutes providing remedies for workplace sexual misconduct that

406. My colleague Toni Massaro has suggested that I call this the "double-bagging" rule. The first bagging may not raise a Title VII violation, but if subsequent baggings are undertaken as part of a play-or-pay form of retribution, then a harm recognized by Title VII has occurred.

407. Possible theories of recovery might include tortious interference with the contractual or employment relationship, intentional infliction of emotional distress, breach of the covenant of good faith and fair dealing, and the tort of outrage.

408. See William H. Kaiser, Note, *Extortion in the Workplace: Using Civil RICO to Combat Sexual Harassment in Employment*, 61 *BROOK. L. REV.* 965 (1995) (arguing "that certain sexual harassment claims fit RICO definitions").

would render both the individual actors as well as the employer liable, given appropriate agency principles.⁴⁰⁹ Of course, these kinds of statutes will be difficult to draft well and enforce responsibly, as the goal would not be to render actionable all workplace expressions of sexuality, but only conduct that exceeded some reasonable threshold. This problem, while difficult, is one with which we must already contend in existing sexual harassment jurisprudence, and therefore should not be regarded as insurmountable. I leave for another day, however, this difficult line-drawing problem.

The third set of same-sex cases demonstrate the degree to which errors in the current jurisprudence of sexual harassment produce problems of underinclusion. The *Goluszek* case, as well as more traditional different-sex harassment cases, demonstrates that the fundamental wrong of sexual harassment lies not in the fact that the conduct would not have been undertaken had Goluszek been a woman, not in the fact that the conduct was sexual in nature, nor in the fact that sexual harassment is a means of affecting the subordination of women to men. Rather, for Goluszek, like Polly and McWilliams, sexual harassment served as punishment meted out by other "real men" because Goluszek failed to perform his gender correctly.⁴¹⁰ In this sense, what occurred in these same-sex cases is similar to what transpired between men and women at the Jacksonville Shipyards and among Hall Construction employees. But discipline does not exhaust the utility and purpose of sexual harassment of men like Goluszek. Just as in the more traditional cases where a man harasses his female secretary, the third kind of same-sex harassment has a performative effect as well: it authenticates the harassers' status as "real men" and exiles Goluszek from the

409. A "knew or should have known" standard could apply here to create employer liability, just as it does under Title VII. See note 29 *supra*.

410. Only one court has appreciated the role that sexual harassment can play in the policing of gender norms. In *Zalewski v. Overlook Hospital*, 692 A.2d 131 (N.J. Super. Ct. Law Div. 1996), the court refused to grant summary judgment for the defendant where the male plaintiff alleged that he had been harassed by his male coworkers because they believed him to be a virgin. Indeed, the harassment Mr. Zalewski suffered was very similar to that endured by Goluszek. His coworkers placed a picture of a kitten on Zalewski's desk and attached a caption that read: "the only pussy that Bill has ever gotten," and left another altered photo of Zalewski holding a penthouse magazine and stating: "Wow, Is this what it looks like? How gross. I'll never touch anything like that. Ughhhh!" *Id.* at 131. Relying in large part upon Mary Anne Case's article on discrimination against effeminate men, *id.* at 131 n.1 (citing Case, *supra* note 301), the *Zalewski* court held:

plaintiff's co-workers harassed plaintiff because they believed him to be a virgin and effeminate. A jury could therefore conclude that plaintiff's co-workers discriminated against him because he was a male who did not behave as they perceived a male should behave, i.e., that they discriminated against him based on gender stereotyping.

.....

There is no rhyme or reason for allowing sexual harassment claims by men against women, women against men, and harassment because of one's sexual orientation and yet permit and condone severe sexual harassment of a person because he is perceived or presumed to be less than someone's definition of masculine.

Id. at 135-36. In *Zalewski*, a state trial court judge in Elizabeth, New Jersey saw what no federal court judge, particularly in the Fourth Circuit, has been able to appreciate: that it is a small step from the sexual stereotyping that Ann Hopkins suffered to the sexual harassment endured by Goluszek, Polly, McWilliams and Zalewski.

domain of men. Sexual harassment, thus, is reflexive, not transitive, normative,⁴¹¹ not ontological.

These examples illustrate the different ways in which sexual harassment, as regulatory practice, inscribes, enforces, and polices a particular view of who women and men should be. As such, it is a technology of gender discrimination, feminizing women and masculinizing men. Our culture is replete with less obviously coercive measures that have the effect of accomplishing the same goal, media images of women and men being the most salient example. What is important about these technologies of gender is that they operate "on us" all the time, constantly reinforcing and creating feminine women and masculine men, thereby normalizing a set of gender roles.⁴¹²

It grossly oversimplifies a complex performative and regulatory practice like sexual harassment to demand that the law provide one formal and symmetrical account of this workplace harm, such as the jurisprudence of "but for" causation. True, it is much easier to say once and for all that such conduct is discriminatory because it is sexual, or to merely apply a "but for" test. But each of these approaches provides a jaundiced account of the wrong of sexual harassment, in both same and different-sex cases, while producing significant doctrinal problems. Conceiving of sexual harassment as a part of and as an instrument in the policing, enforcement, and perpetuation of hetero-patriarchal gender norms requires that we contextualize the conduct in order to understand it as sex discrimination.

V. CONCLUSION

Sexual harassment is something men do to women. This statement, while quite familiar and seemingly uncontroversial, is both descriptively underinclusive and theoretically short-sighted. The link between sexual harassment and sex discrimination is an important one, and it is one that is fair to assume is present in typical different-sex cases. But why? It is the *why*, not the *what*, of sexual harassment that I feel deserves closer theoretical attention. To date, the Supreme Court has been disinclined to do more than summarily conclude that sexual harassment is a form of sex discrimination. If courts are to continue to draw summary inferences and conclusions of sex discrimination in sexual harassment cases, and I believe that they should in most cases, it is imperative that

411. See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 1 (1993) (stating that "[t]he category of 'sex' is, from the start, normative" and it "not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs").

412. Judith Butler, first and foremost, has developed this notion of gender, performativity, and theatricality:

The act that one does, the act that one performs, is, in a sense, an act that has been going on before one arrived on the scene. Hence, gender is an act which has been rehearsed, much as a script survives the particular actors who make use of it, but which requires individual actors in order to be actualized and reproduced as reality once again. The complex components that go into an act must be distinguished in order to understand the kind of acting in concert and acting in accord which acting one's gender invariably is.

Butler, *supra* note 220, at 526; see also BUTLER, *supra* note 411; JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

a careful theory expounding the wrong of sexual harassment provide the context within which these evidentiary short cuts take place.

The wrong of sexual harassment must consist of something more than that the conduct would not have occurred “but for” the sex of the target, that the conduct was sexual in nature, or that it was something men do to women. The “something more” I suggest is that we regard sexual harassment as a tool or instrument of gender regulation. It is a practice, grounded and undertaken in the service of hetero-patriarchal norms. These norms, regulatory, constitutive, and punitive in nature, produce gendered subjects: feminine women as sex objects and masculine men as sex subjects. On this account, sexual harassment is sex discrimination precisely because its use and effect police hetero-patriarchal gender norms in the workplace.

I do not suggest that we reject existing doctrine, but rather that we work to develop a theoretical justification for inferring sex discrimination in traditional different-sex claims. This theoretical work will also provide the tools to consider whether same-sex sexual harassment raises the same kind of concerns as those present in the more central cases. All that I urge is renewed attention to the “based upon sex” element of the plaintiff’s case, such that we view the wrong of sexual harassment in systemic terms, rather than in terms that elevate a method of proof (“but for”) over the nature of the harm itself, or that conflate sex with sexism. To understand sexual harassment as a regulatory practice that constitutes gendered subjects by inscribing, enforcing, and policing hetero-patriarchal gender norms is to provide a better account of what sexual harassment is and what it does—in both different-sex and same-sex cases. Most importantly, this approach better explains why sexual harassment is a kind of sex discrimination.