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Male Same-Sex "Horseplay": The Epicenter of Sexual Harassment?

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MALE SAME-SEX "HORSEPLAY": THE EPICENTER OF
SEXUAL HARASSMENT?

*Kimberly D. Bailey**

Abstract

In *Oncale v. Sundowner Offshore Services, Inc.*, the U.S. Supreme Court recognized same-sex sexual harassment as a cognizable claim of sex discrimination under Title VII of the Civil Rights Act of 1964. At the time, many scholars found this recognition to be significant and important, but some also argued that the Court provided an incomplete analysis regarding the meaning of discrimination "because of sex." Specifically, some scholars argue that the Court's opinion reinforces the sexual desire paradigm in the analysis of sexual harassment cases. Building upon this critique, this Article focuses specifically on the harassment of men who generally are perceived as gender-conforming. In doing so, it uses masculinities theorization to argue that some workplace harassment against these men, which courts have been inclined to treat as mere "horseplay," is actually discrimination based on sex. Examining same-sex harassment cases through this masculinities-modified lens, this Article concludes that this broader understanding of sexual harassment is important because men who are perceived as gender-conforming are entitled to more legal protection than they are currently experiencing. Furthermore, it raises the question of whether the masculinity competition that leads to harassment among gender-conforming men is actually the epicenter of all sexual harassment. If this is the case, it seems that an important step toward stopping the harassment of women (and men who are perceived as gender-nonconforming) is to stop gender-conforming men from harassing gender-conforming men.

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INTRODUCTION

Riana is an associate producer on a team working on Responder, a video game that is currently under development. Her employer is High Voltage. She shares an office with Nick, who is also an associate producer working on Responder. Riana claims that on four separate occasions, Nick touched her inappropriately. On two occasions, she was putting coins into a vending machine, and he poked or slapped her on the buttocks. On another occasion, when she was talking with a co-worker, Nick slapped Riana on the buttocks again. Finally, on an occasion when she was writing on a whiteboard, Nick grabbed her between the legs.

If Riana were to sue High Voltage for sex discrimination, many courts would find it unnecessary to spend much time analyzing whether Nick’s treatment of her was “because of . . . sex” for purposes of Title VII of the Civil Rights Act of 1964 (Title VII).¹ In other words, most courts would

1. Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e–17); *see, e.g.*, *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 467 (6th Cir. 2012) (“An inference of discrimination is ‘easy to draw’ with male-female sexual harassment[,] . . . [and] ‘it is reasonable to assume’ that the harassment would not have been done to members of the same sex.” (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998))); *Perez v. Norwegian-Am. Hosp., Inc.*, 93 F. App’x 910, 914 (7th Cir. 2004) (failing to address whether a slap on the buttocks was because of sex and focusing on whether the conduct was “severe or pervasive” (quoting *Hilt-Dyson v. City of Chi.*, 282 F.3d 456, 462–63 (7th Cir. 2002))); *Worth v. Tyer*, 276 F.3d 249, 267–68 (7th Cir. 2001) (failing to address whether touching plaintiff’s breast was because of sex, but noting that “direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment”); *Brenneman v. Famous Dave’s of Am., Inc.*, 410 F. Supp. 2d 828, 837–40 (S.D. Iowa 2006) (failing to address whether a slap on the buttocks was because of sex, but analyzing whether conduct was “severe or pervasive”), *aff’d*, 507 F.3d 1139 (8th Cir. 2007); *Borrero-Rentero v. W. Auto Supply Co.*, 2 F. Supp. 2d 197, 202–03 (D.P.R. 1998) (failing to address whether a slap on the buttocks was because of sex, but noting isolated incidents are not a violation of law); *Campbell v. Bd. of Regents*, 770 F. Supp. 1479, 1486 (D. Kan. 1991) (“[A] slap on the buttocks in the office setting has yet to replace the hand shake, and the court is confident that such conduct, when directed from a man towards a woman,

conclude that Nick subjected Riana to unwanted touching because she was a woman. However, the actual case that was brought against High Voltage was brought by a man, Ryan Lord (Lord), who was harassed by another man, Nick Reimer (Reimer).² In *Lord v. High Voltage Software, Inc.*,³ the U.S. Court of Appeals for the Seventh Circuit determined that the harassment that he experienced at Reimer's hands was *not* because of his sex.⁴ The Seventh Circuit first noted that there was no evidence that Reimer was gay.⁵ In addition, Reimer's behavior was not indicative of sexual arousal.⁶ Finally, there was no evidence that Reimer had general hostility toward men in the workplace.⁷ For these reasons, Reimer's conduct was "sexual horseplay," which the Seventh Circuit concluded is not discrimination because of sex.⁸

The Seventh Circuit's reasoning is consistent with the analysis in *Oncale v. Sundowner Offshore Services, Inc.*,⁹ the U.S. Supreme Court case that held that same-sex sexual harassment is a cognizable claim of sex discrimination under Title VII.¹⁰ But this analysis provides limited protection for men who generally are perceived as gender-conforming. This reality is problematic for two reasons. First, Reimer's conduct toward Lord was actually gendered and therefore based on sex.¹¹ Second, Reimer's abusive conduct arguably affected the terms and conditions of Lord's employment,¹² just as it would have if Lord were a woman or a man who was perceived as gender-nonconforming.¹³

occurs precisely and only because of the parties' respective gender."); see also Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 717–18 (1997) (arguing that when men engage in sexual conduct toward women, courts infer that it was because of sex). For purposes of this discussion, the Author is focusing solely on the question of whether conduct is "based on sex." It is possible that a court might determine that the conduct that Riana suffered was not severe or pervasive enough to support a sex discrimination claim.

2. *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 560 (7th Cir. 2016).

3. 839 F.3d 556 (7th Cir. 2016).

4. *Id.* at 562.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* (quoting *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663, 666 (7th Cir. 2005)).

9. 523 U.S. 75 (1998).

10. *Id.* at 79–80. For further discussion of the analysis in this case, see *infra* notes 93–110 and accompanying text.

11. See *infra* notes 213–29, 270–308 and accompanying text.

12. See *infra* notes 213–29, 270–308 and accompanying text.

13. See, e.g., *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 872–73 (9th Cir. 2001) (holding that taunts aimed at the male plaintiff for "behaving like a woman," and which made reference to him in the female gender, were "designed to humiliate and anger him, [making the taunts] sufficiently severe and pervasive to alter the terms and conditions of his employment").

Part I of this Article discusses the history of sexual harassment law. Initially, it was not even clear to most courts that sexual harassment was a cognizable form of sex discrimination under Title VII.¹⁴ Eventually, however, courts began to recognize that sexual harassment is unquestionably sex discrimination.¹⁵ This recognition was informed by the theoretical and legal work of Professor Catharine MacKinnon and other feminist scholars and lawyers.¹⁶ It was not until *Oncale*, however, that the Supreme Court confirmed that Title VII covers not only heterosexual sexual harassment, but also same-sex sexual harassment.¹⁷

Part II discusses some of the feminist and queer critiques of *Oncale*'s description of the meaning of "because of sex." While some scholars acknowledge that the recognition of same-sex harassment is a significant and important step in securing gender equality,¹⁸ many still express concerns regarding how much protection *Oncale* realistically provides plaintiffs. Specifically, some scholars find it problematic that many courts have interpreted the opinion in a way that suggests that sexual

14. See, e.g., *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) ("The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions."), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (determining that Title VII "is not intended to provide a federal tort remedy for what amounts to [a] 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"), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163–64 (D. Ariz. 1975) ("[A]n outgrowth 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."), *vacated*, 562 F.2d 55 (9th Cir. 1977) (unpublished table decision).

15. See, e.g., *Garber v. Saxon Bus. Prods., Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977) (per curiam) (determining that compelling female employees to submit to the sexual advances of a male supervisor can be a violation of Title VII); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (determining that plaintiff "became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job"); *Tomkins*, 568 F.2d at 1048–49 (determining that Title VII can be violated when the terms of employment are conditioned upon submission to sexual advances).

16. See generally, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (arguing that sexual harassment is sex discrimination under Title VII); LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978) (documenting the sexual harassment that women experienced in a variety of workplace settings).

17. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

18. See Janet Halley, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 182, 182–83 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Christopher N. Kendall, *Gay Male Liberation Post Oncale: Since When Is Sexualized Violence Our Path to Liberation?*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra*, at 221, 223–24; Marc Spindelman, *Discriminating Pleasures*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra*, at 201–02.

harassment is mainly based on sexual desire.¹⁹ This interpretation leads to an incomplete analysis of the type of conduct that is "because of sex."²⁰ Some have also expressed concern that this type of limited analysis perpetuates homophobia.²¹

Part III builds upon these critiques and argues that courts need to recognize that there is a gendered dynamic that occurs among men that operates in response to, but also somewhat separate from, their relationships with women. The performance of masculinity is often a homosocial performance; men are socialized to prove that they are just as, or even more, masculine than the men around them.²² This gendered hierarchy occurs among men even when women are not present.²³ Furthermore, a man can lose his place in the masculine hierarchy at any moment because the masculine identity is quite fragile and unstable.²⁴ As a result, men are constantly competing with one another to maintain, and even improve, their respective places in the gender hierarchy.²⁵ In other words, sexual harassment is not just a product of men's relationships with women, it is also a product of their gendered relationships with one another.

Under this broader understanding of gender dynamics, Part IV focuses specifically on the harassment of men who generally are perceived as gender-conforming. It argues that some of the harassment of these men, which courts have been inclined to label as "horseplay," is actually discrimination based on sex. A broader understanding of the gendered dynamics among men will allow for greater legal protection for men who

19. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1215–17 (1998); Franke, *supra* note 1, at 730–36; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686–87 (1998).

20. See Katherine M. Franke, *What's Wrong with Sexual Harassment?*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 18, at 169, 173–75; David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1742–43 (2002).

21. See Franke, *supra* note 20, at 177; Halley, *supra* note 18, at 191; Schwartz, *supra* note 20, at 1746–47.

22. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in FEMINISM AND MASCULINITIES 182, 186–87 (Peter F. Murphy ed., 2004).

23. See MICHAEL S. KIMMEL, THE GENDERED SOCIETY 11 (2000); Nancy E. Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, in MASCULINITIES AND THE LAW 25, 29 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

24. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 787–88 (2000); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1332 (2011).

25. Harris, *supra* note 24, at 788; Robinson, *supra* note 24, at 1332.

generally are perceived as gender-conforming. But this broader understanding also leads this Article to raise the following question: Is the masculinity competition that leads to harassment among gender-conforming men actually the epicenter of all sexual harassment? If this is the case, an important step toward stopping the harassment of women (and men who are perceived as gender-nonconforming) is to stop gender-conforming men from harassing gender-conforming men.

I. SEXUAL HARASSMENT IS SEX DISCRIMINATION

Title VII prohibits discrimination in the terms and conditions of employment because of “race, color, religion, sex, or national origin.”²⁶ The addition of “sex” as a protected category was a last-minute addition, and there is very little legislative history regarding what Congress intended “because of sex” to mean.²⁷ Initially, courts determined that sexual harassment was not sex discrimination at all under Title VII.²⁸ Instead, some viewed this as “personal” conduct between two employees.²⁹ After all, they argued, it was not typically an employer’s policy that supervisors ask their subordinates out on dates or that they condition work benefits upon sexual favors.³⁰ While courts often agreed that this conduct was inappropriate in the workplace, they did not agree that it was a violation of Title VII.³¹

Courts also expressed some apprehension about what would happen to workplace conditions if this conduct were deemed illegal. Was there a risk that male supervisors would be the subject of false legal claims from

26. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1)).

27. See 110 CONG. REC. 2, 577–84 (1964); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–64 (1986) (noting that the prohibition of discrimination on the basis of sex was added to Title VII “at the last minute,” leaving courts with “little legislative history to guide” analysis of Title VII claims).

28. *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev’d*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev’d*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163–64 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (unpublished table decision).

29. See, e.g., *Corne*, 390 F. Supp. at 163 (determining that defendant “was satisfying a personal urge”).

30. See, e.g., *Miller*, 418 F. Supp. at 235 (denying plaintiff’s claim because the employer did not have a policy requiring that employment be conditioned upon sexual favors).

31. See, e.g., *Tomkins*, 422 F. Supp. at 556 (“The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience. . . . It is not, however, sex discrimination within the meaning of Title VII.”).

disgruntled employees?³² Would the recognition of sexual harassment be the end of flirting in the workplace?³³ Would everyone now have to be asexual?³⁴ The overriding messages in some of these opinions were that sexual attraction in the workplace is natural and that employers should not be in the business of policing these interactions.³⁵

In 1974, Lin Farley taught a field study course at Cornell University on women and the workplace.³⁶ She taught this class in the feminist consciousness-raising tradition,³⁷ and each student shared her personal employment experiences.³⁸ The class was equally split between black and white students.³⁹ In addition, the socioeconomic status of the students ranged from affluent to poor.⁴⁰ Farley discovered something alarming during this discussion.⁴¹ Every woman, including Farley, had either resigned or been terminated from a job because a male co-worker had made her feel uncomfortable.⁴² Farley later labeled this uncomfortable experience as "sexual harassment."⁴³

Defining sexual harassment as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as [a] worker,"⁴⁴ Farley proceeded to research and document the widespread

32. See, e.g., *Corne*, 390 F. Supp. at 163–64 ("[A]n outgrowth 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.").

33. See *id.*

34. See *id.*

35. See, e.g., *Miller*, 418 F. Supp. at 236; *Tomkins*, 422 F. Supp. at 556; *Corne*, 390 F. Supp. at 163–64.

36. FARLEY, *supra* note 16, at xi.

37. See MACKINNON, *supra* note 16, at 26 (arguing that it is important to understand the experiences of real women so that "the law can begin to address women's experience on women's own terms"). Consciousness-raising was a practice that some feminists engaged in during the 1960s and 1970s. Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1263 (2010). During the practice, participants would talk about their personal experiences. *Id.* These discussions would then allow participants to see commonality among the women. *Id.* Some feminists believed that laws and policies should be based on the actual experiences of women, and consciousness-raising provided important insights for some of these policies. See, e.g., *id.* at 1263–64 (discussing how consciousness-raising groups led to legal reforms in the area of domestic violence).

38. FARLEY, *supra* note 16, at xi.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 14–15.

occurrence of this conduct in a variety of workplace settings.⁴⁵ As part of this work, Farley noted two important factors that allowed sexual harassment to thrive. First, women have historically had limited economic opportunities in the marketplace.⁴⁶ Second, jobs have tended to be segregated based on sex; the more prestigious, interesting, and lucrative jobs tended to be occupied by men, and the monotonous and boring jobs that required lower skills and that provided very little economic power, tended to be occupied by women.⁴⁷

MacKinnon also noted these factors as support for her legal argument that sexual harassment is sex discrimination under Title VII.⁴⁸ She argued that sexual harassment is not just a collection of random “personal” relationships.⁴⁹ Instead, she theorized that sexual exploitation is the tool that men use to oppress women and that sexual harassment is part of the systemic subordination of women by men in the workplace.⁵⁰ In other words, sexual harassment allows men as a class to keep women as a class in lower status, lower paying jobs.

First, MacKinnon highlighted research showing that employers did not shy away from implicitly and explicitly favoring job applicants who were sexually attractive.⁵¹ For this reason, a woman’s sexual attractiveness was a requirement for many job positions, including secretarial work and waitressing.⁵² In other words, to qualify for a particular job, women not only had to be able to perform the duties specifically associated with that job, but they also had to be able to perform the role of sex object.

Further, MacKinnon noted how sexual harassment was used as a tool to keep women within their second-class status.⁵³ Specifically, she emphasized research that showed that jobs tended to be sex-segregated horizontally—a structure that kept women in lower skilled and lower

45. *See generally id.* (explaining the various studies and different actions that oppress women in the workplace).

46. *Id.* at 28–34.

47. *Id.*

48. *See* MACKINNON, *supra* note 16, at 9.

49. *See id.* at 6–7.

50. *See id.* at 7.

51. *Id.* at 18–23; *see also* FARLEY, *supra* note 16, at 92–93 (noting hiring policies that first screen applicants for “sex appeal” regardless of their qualifications).

52. MACKINNON, *supra* note 16, at 18–23, 44; *see also* FARLEY, *supra* note 16, at 92–93 (noting the intersection of racism and sexism for women of color since attractiveness is often based on a white standard).

53. MACKINNON, *supra* note 16, at 4–10.

paying jobs.⁵⁴ Jobs also tended to be sex-segregated vertically, which meant many women worked for male supervisors.⁵⁵ As part of this hierarchy, women often had to take on the role of work wife or seductress.⁵⁶ This role included performing tasks that women often performed at home, such as ego-building, getting coffee, organizing, and tidying up.⁵⁷ The role also required being receptive toward sexual advances to be perceived as a "friendly" and collegial worker.⁵⁸ Limited economic opportunities ensured that women did not want to do anything that might risk termination, including rebuffing a sexual advance from a supervisor.⁵⁹ This reality left women with two choices: tolerate/comply with the harassment or leave their employment.⁶⁰

MacKinnon's and Farley's work demonstrated, however, the great risk that is involved in leaving a job, including losing seniority, salary increases, benefits, and training opportunities.⁶¹ The time it takes to find a new job also involves income loss.⁶² Moreover, given the widespread nature of sexual harassment,⁶³ a job transfer may not necessarily end the harassment.

In addition, Farley's research found that women who tried to enter fields with few or no women were often subjected to extreme hostility and abuse from male co-workers and supervisors.⁶⁴ This behavior often led women to leave these careers completely, and it also discouraged other women from following in their footsteps.⁶⁵ MacKinnon and Farley also noted that limited opportunities in the marketplace necessarily made women more economically dependent upon men at home, which further

54. *Id.* at 9.

55. *Id.*; see also NAT'L ACAD. OF SCIS., SEXUAL HARASSMENT OF WOMEN 3–4 (Paula A. Johnson et al. eds., 2018) (noting that harassment persists in the sciences because men are often administrators and principal investigators and women are more often lower ranking professors, graduate students, and postdocs).

56. MACKINNON, *supra* note 16, at 18–21.

57. *Id.* at 18–19.

58. *Id.* at 22, 44.

59. *Id.* at 9–10.

60. *Id.* at 209–10.

61. FARLEY, *supra* note 16, at 46–48; MACKINNON, *supra* note 16, at 210.

62. FARLEY, *supra* note 16, at 47.

63. See *id.* at 45; MACKINNON, *supra* note 16, at 27.

64. See FARLEY, *supra* note 16, at 52–71.

65. *Id.*; see also NAT'L ACAD. OF SCIS., *supra* note 55, at 83–91 (describing how many women's careers in science, engineering, and medicine are derailed because of rampant sexual harassment).

undermined their autonomy and preserved their subordinated status to men both at work and at home.⁶⁶

Based on this research, MacKinnon provided two theories to support her claim that sexual harassment is discrimination “because of sex” under Title VII. First, she applied a “differences” approach to Title VII.⁶⁷ She argued that when a man harasses a woman, it is *because* she is a woman.⁶⁸ In other words, he would not have sexualized another man in this way.⁶⁹ Because the woman is being treated differently than a similarly situated man, she is suffering discrimination because of her sex.⁷⁰

However, MacKinnon believed her second theory, an inequality approach to discrimination, provided a better basis for her argument that sexual harassment is sex discrimination.⁷¹ According to MacKinnon, women are oftentimes not similarly situated to men because of the historical subordination of women.⁷² For example, there could be a situation where a man might be more qualified than a woman for a job based on stated objective and neutral standards. If he is hired based on these qualifications, the differences approach would lead to the conclusion that there has been no illegal discrimination. The man did not get the job because he was a man; he got the job because he was more “qualified” based on the stated job requirements.

Under the inequality approach, however, the law would seek to address any practices that systemically keep women unequal.⁷³ An inequality approach would acknowledge that “society may tend to create women in its image of their inferior status, as a group largely lacking in skills, experience, sense of self, ‘qualifications.’”⁷⁴ In that case, looking at the neutral and objective qualifications of the male and female candidate would not be enough. An inequality approach would delve deeper and seek to address the systemic forces that have led the female

66. FARLEY, *supra* note 16, at 49 (arguing that the “[d]epression of female earning power reinforces the domestic division of labor, . . . which in its own turn reinforces depressed female wages”); MACKINNON, *supra* note 16, at 216 (“Sexual harassment at work critically undercuts women’s potential for work equality as a means to social equality. . . . A job, no matter how menial, offers the potential for independence from the nuclear family, which makes women dependent upon men for life necessities.”).

67. MACKINNON, *supra* note 16, at 101–02, 192–93.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.* at 126–27.

72. *Id.*

73. *See id.* at 116–18, 174.

74. *Id.* at 121.

candidate to be less “qualified” than the male candidate. With respect to sexual harassment, MacKinnon argued that because this practice systemically keeps women in a second-class status in the workplace, it necessarily creates gender inequality in the terms and conditions of women’s employment.⁷⁵

In *Meritor Savings Bank v. Vinson*,⁷⁶ the Supreme Court ultimately recognized sexual harassment as sex discrimination under Title VII.⁷⁷ Following the guidelines of the Equal Employment Opportunity Commission (EEOC), which were heavily influenced by MacKinnon’s work,⁷⁸ the Court noted that there are two types of sexual harassment claims.⁷⁹ Quid pro quo harassment involves the conditioning of the terms of employment—including hiring, promotion, and benefits—upon sexual favors.⁸⁰

But *Meritor* is most significant because it recognized a viable sexual harassment claim even when tangible economic benefits are not at stake.⁸¹ Specifically, the Court noted that the “phrase ‘terms, conditions, or privileges of employment’ [in Title VII] evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”⁸² For this reason, a hostile work environment claim can exist when the words and actions of a co-worker make a workplace setting so hostile and abusive that it affects the terms or conditions of the plaintiff’s employment.⁸³ While the harassment must be “severe or pervasive,”⁸⁴ the plaintiff does not have to show tangible psychological damage.⁸⁵

75. *Id.* at 174.

76. 477 U.S. 57 (1986).

77. *Id.* at 73.

78. Compare 29 C.F.R. § 1604.11(a) (1985) (describing when sexual harassment is actionable under Title VII), with MACKINNON, *supra* note 16, at 32 (describing the distinction between what she calls “quid pro quo” harassment and harassment as a “persistent condition of work”), and Franke, *supra* note 1, at 703 (noting that MacKinnon’s contributions later led the EEOC to “promulgate[] regulations embodying [MacKinnon’s] conception of quid pro quo sexual harassment as a violation of Title VII”).

79. *Meritor*, 477 U.S. at 65.

80. *Id.* at 68.

81. *Id.* at 66.

82. *Id.* at 64 (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

83. *Id.* at 67.

84. *Id.*

85. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (“Title VII comes into play before the harassing conduct leads to a nervous breakdown.”).

At the time of *Meritor*, many courts had already recognized that racial harassment is a form of race discrimination.⁸⁶ Relying upon these cases the Court argued, “Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”⁸⁷

*Price Waterhouse v. Hopkins*⁸⁸ provided an opportunity for plaintiffs to present sexual harassment cases that are based on sex stereotyping.⁸⁹ In that case, the accounting firm refused to make Ann Hopkins a partner.⁹⁰ Included in the feedback she received after the denial, Hopkins was advised that to improve her chances of making partner at the firm she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁹¹ The plurality held that an employment decision based on the failure of an employee to conform to an employer’s sex stereotypes is discrimination based on sex.⁹²

It was not until *Oncale*, however, that the Court confirmed that Title VII also covers same-sex harassment.⁹³ *Oncale* was “a roustabout on an oil rig in the sea.”⁹⁴ He was harassed by his supervisor and two co-workers.⁹⁵ The men constantly harassed him verbally, saying things like: “You know you got a cute little ass, boy.”⁹⁶ *Oncale*’s supervisor also threatened him with rape on more than one occasion.⁹⁷ On another occasion, one co-worker grabbed *Oncale* and pushed him into a squatting position while his supervisor unzipped his pants, pulled out his penis, and

86. See, e.g., *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514–15 (8th Cir. 1977); *Gray v. Greyhound Lines*, 545 F.2d 169, 176 (D.C. Cir. 1976).

87. *Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

88. 490 U.S. 228 (1998), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075.

89. See *id.* at 231–32; see also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (concluding that discrimination based on a lack of masculinity is covered by Title VII); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001) (holding that an “effeminate” man had a cause of action under Title VII).

90. *Hopkins*, 490 U.S. at 231–32.

91. *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

92. *Id.* at 251.

93. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

94. Catharine A. MacKinnon, Amicus Brief, *Oncale v. Sundowner Offshore Services, Inc.*, 96-568, *Amici Curiae Brief in Support of Petitioner*, 8 UCLA WOMEN’S L.J. 9, 13 (1997).

95. *Id.*

96. *Id.*

97. *Id.*

held it to the back of Oncale's head.⁹⁸ The next day, a co-worker forced Oncale to the ground, and his supervisor pulled out his penis and put it on Oncale's arm.⁹⁹ That same night, Oncale's supervisor and a co-worker attempted to rape Oncale in a shower.¹⁰⁰

In that opinion, Justice Antonin Scalia stressed that by acknowledging that same-sex harassment is an actionable claim, the Court was not turning Title VII into a "general civility code."¹⁰¹ Justice Scalia emphasized that Title VII only covers conduct that is "because of sex."¹⁰² He noted, "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."¹⁰³

Justice Scalia then gave some examples of evidence that would lead a jury to believe that discrimination was because of sex in the same-sex context. He stated that evidence that the alleged harasser was gay could lead to an inference of sex discrimination in the same way an inference could be drawn in a male-on-female situation.¹⁰⁴ He also stated that a valid Title VII claim does not necessarily require evidence of sexual desire.¹⁰⁵ Other examples of plausible evidence include evidence of general hostility to a particular sex or evidence of disparate treatment of the sexes in a mixed-sex workplace.¹⁰⁶ Evidence "tinged with offensive sexual connotations" would not be sufficient, however, unless there was additional evidence that harassment was because of sex.¹⁰⁷

There was a second reason that Justice Scalia gave to refute the notion that same-sex harassment claims would turn Title VII into a general civility code: the harassment must be so severe or pervasive that a reasonable plaintiff would find it hostile and abusive.¹⁰⁸ He explained, "We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the

98. *Id.*

99. *Id.*

100. *Id.*

101. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

102. *Id.*

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

104. *Id.*

105. *Id.*

106. *Id.* at 80–81.

107. *Id.* at 81.

108. *Id.*

workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’”¹⁰⁹ Specifically,

A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.¹¹⁰

Some courts, however, have interpreted *Oncale* in a way that limits the types of claims that tend to be successful. The easiest way to have a successful claim in a same-sex harassment case is if there is evidence that the harasser is gay.¹¹¹ In addition, plaintiffs who do not conform to traditional gender expectations also tend to have some success with their sexual harassment claims under a *Price Waterhouse* sex-stereotype theory.¹¹² The Supreme Court recently held in *Bostock v. Clayton County*¹¹³ that Title VII prohibits sexual orientation discrimination, determining that the biological sexes are treated differently in these cases.¹¹⁴ But prior to *Bostock*, courts rarely extended a sex-stereotype theory to sexual orientation discrimination.¹¹⁵ Furthermore, claims by men who generally conform to gender expectations, but who do not have harassers who are perceived as gay, tend not to have much success in the

109. *Id.*

110. *Id.*

111. See Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 584–85 (2013) (noting how courts tend to automatically infer desire when an alleged harasser is gay or lesbian).

112. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (concluding that discrimination based on a lack of masculinity is covered by Title VII); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001) (holding that an “effeminate” man had a cause of action under Title VII).

113. 140 S. Ct. 1731 (2020).

114. *Id.* at 1741. Specifically, the Court argued that if an individual who is biologically male is attracted to another individual who is biologically male, he is treated differently from a similarly-situated individual who is biologically female. *Id.*

115. See, e.g., *Higgins*, 194 F.3d at 259 (holding that discrimination based on sexual orientation is not a violation of Title VII); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (holding that discrimination based on sexual orientation is not a violation of Title VII), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009) (holding that discrimination based on sexual orientation is not a violation of Title VII). *But see Zarda*, 883 F.3d at 108 (“Title VII prohibits discrimination on the basis of sexual orientation as discrimination ‘because of . . . sex.’”), *aff’d sub nom. Bostock*, 140 S. Ct. 1731; *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (“[D]iscrimination on the basis of sexual orientation is a form of sex discrimination.”).

courts.¹¹⁶ The conduct in these cases is viewed as “horseplay,” which, under *Oncale*, is not covered by Title VII.¹¹⁷

As discussed in Part II, there have been critiques of *Oncale* and the lower court cases that have followed it. Some worry that focusing on the sexual orientation of the harasser encourages homophobia.¹¹⁸ In addition, prior to *Bostock*,¹¹⁹ some argued that lower courts had created an illogical distinction between sex-stereotype and sexual orientation discrimination cases.¹²⁰ Furthermore, other scholars are concerned about how the “horseplay” cases fail to provide much protection for many men who work in all-male settings—where much of this type of harassment exists.¹²¹ All of these critiques are rooted in one central critique: although *Oncale* expressly stated that plaintiffs are not required to provide evidence of sexual desire to have a valid sex discrimination claim,¹²² it still opened the door for the predominance of the sexual desire paradigm in the lower courts by suggesting that the sexual orientation of the alleged harasser is relevant in the analysis of same-sex cases.

II. THE LIMITATIONS OF A SEXUAL DESIRE APPROACH TO SEXUAL HARASSMENT

Prior to *Oncale*, some feminists had already argued that there were gaps in MacKinnon’s inequality theory when it comes to same-sex harassment cases. Professor Katherine Franke specifically critiqued MacKinnon’s argument that sexual exploitation is the tool that men use to subordinate women.¹²³ In doing so, Franke noted that while courts had

116. See, e.g., *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 562 (7th Cir. 2016) (finding no hostile environment claim because there was no evidence that the alleged harasser was gay or motivated by sexual desire); *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 468 (6th Cir. 2012) (finding no hostile environment claim because there was no credible evidence that the alleged harasser was bisexual); *McCown v. St. John’s Health Sys., Inc.*, 349 F.3d 540, 543 (8th Cir. 2003) (finding no hostile environment claim because there was no evidence that the supervisor was gay or was motivated by sexual desire). *But see EEOC v. Boh Brothers Constr. Co.*, 731 F.3d 444, 456–57, 459 (5th Cir. 2013) (finding enough evidence to support a jury’s finding of hostile environment because there was evidence that the alleged harasser subjectively believed that the plaintiff failed to meet masculine stereotypes).

117. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

118. See, e.g., Franke, *supra* note 20, at 173–75; Schwartz, *supra* note 20, at 1746–47.

119. See *supra* note 114 and accompanying text.

120. E.g., Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 MICH. J.L. REFORM 713, 738–44 (2010).

121. See, e.g., *infra* note 153 and accompanying text.

122. *Oncale*, 523 U.S. at 80; see also *supra* note 106 and accompanying text (discussing other types of evidence Justice Scalia suggested might support a valid same-sex discrimination claim).

123. Franke, *supra* note 1, at 760–63.

not fully embraced MacKinnon's anti-subordination view of sexual harassment, her work had seemed to lead courts to view harassment as being driven by sexual desire.¹²⁴ Franke finds this paradigm particularly problematic because it fails to address what she views as the real harm of sexual harassment: gender regulation.¹²⁵ According to Franke, Title VII should prohibit any conduct that either limits the ways an individual may perform gender or that reinforces traditional heterosexual gender scripts.¹²⁶ Notably, Franke's view recognizes that both men and women can be sexual agents and that both men and women can be potential victims of sexual harassment.¹²⁷

Professor Kathryn Abrams agrees with Franke that sexual harassment should address gender regulation and punishment.¹²⁸ In addition, she notes that a desire-based approach does not acknowledge other motivations for sexual harassment, including male camaraderie.¹²⁹ But Abrams further argues that female subordination in the workplace should be the centerpiece to any theory of sexual harassment.¹³⁰ Specifically, she emphasizes the importance of work in women's ability to fully realize economic autonomy and personal fulfillment.¹³¹ According to Abrams, sexual harassment undermines these goals by making it difficult for workers to perform assigned tasks, "compel[ling] choices that trade professional advantage for a more secure or peaceful environment," and "depriving the harassed workers of professionally crucial mentoring and camaraderie."¹³² Under Abrams's theory, "based on sex" means "efforts to preserve male control by undermining women, or efforts to entrench masculine norms" in the workplace.¹³³ But according to Abrams, both men and women can be victims under her theory because gender scripts can be performed in a plurality of ways.¹³⁴

Professor Vicki Schultz also thinks it is essential to understand the importance of work in realizing female empowerment.¹³⁵ Her specific critique of MacKinnon's theory and traditional sexual harassment

124. *Id.* at 703–05, 730.

125. *Id.* at 693.

126. *See id.* at 696, 769.

127. *Id.* at 758–60.

128. Abrams, *supra* note 19, at 1218–19.

129. *See id.* at 1215.

130. *Id.* at 1204–05.

131. *Id.* at 1219–20.

132. *Id.* at 1218.

133. *Id.* at 1223.

134. *Id.* at 1215.

135. *See* Schultz, *supra* note 19, at 1756–60.

caselaw, however, is the emphasis placed on sexual conduct.¹³⁶ Based on her research, Schultz concludes that most of the harassment that women experience in the workplace involves nonsexual conduct, including equipment sabotage, the denial of proper training, and limited access to informal networks.¹³⁷ This nonsexual conduct then leads to a self-fulfilling prophecy: women are not given the necessary tools to thrive at their jobs, which leads to their perceived incompetence.¹³⁸ By ignoring this type of conduct, courts are not acknowledging that this type of conduct undermines women in the workplace just as much as, if not more than, sexual conduct.¹³⁹ In addition, Schultz criticizes the notion that sexual expression *always* oppresses women; instead, she argues that it is possible to have some sexual expression in the workplace that does not create a hostile work environment.¹⁴⁰ For these reasons, Schultz argues that instead of sexual conduct, the focus of sexual harassment law should be on any conduct that reinforces the notions that men are the bastion of competence and that women are incompetent.¹⁴¹

Franke, Abrams, and Schultz have also discussed the implications of their theories for male same-sex harassment cases. For all of these theorists, cases that involve employees who are harassed because they are perceived as failing to meet traditional sex-stereotypes are clear cases of sex discrimination.¹⁴² Franke and Abrams also allow for some claims from men who generally are perceived as gender-conforming under some circumstances.¹⁴³

136. *Id.* at 1686–87.

137. *Id.* at 1687.

138. *Id.* at 1764 & n.429.

139. *Id.* at 1686–91.

140. *Id.* at 1789–96.

141. *Id.* at 1755, 1760, 1762–63.

142. Franke argues that these employees are being punished for not meeting traditional gender norms. Franke, *supra* note 1, at 770–71. In other words, the harassment “inscribes, enforces, and polices a particular view of who women and men should be.” *Id.* at 771. For Abrams, “[s]anctioning men who do not manifest prototypical, (hetero-)sexualized masculinity is an important way of entrenching masculine norms in the workplace.” Abrams, *supra* note 19, at 1226. For Schultz, “sexually oriented conduct may serve as a way of marking . . . nonconforming men as different and less adequate for [their] job.” Schultz, *supra* note 19, at 1802.

143. With respect to gender-conforming employees who experience harassment, Franke argues that to have a valid hostile environment claim, these employees first have to establish standing. Franke, *supra* note 1, at 768–69. Standing can be shown through evidence that the employee objected to the offensive conduct of his co-workers and that he was then harassed because his objection was viewed as gender-nonconforming. *Id.* According to Abrams, this type of showing would not be necessary. Abrams, *supra* note 19, at 1226. Instead, these cases should focus on whether the conduct was severe or pervasive enough to affect the terms and conditions

Oncale expressly stated that plaintiffs are not required to provide evidence of sexual desire to have a valid sex discrimination claim.¹⁴⁴ Nevertheless, the opinion arguably still reinforces the sexual desire paradigm by suggesting that evidence regarding the alleged harasser's sexual orientation is even relevant.¹⁴⁵ Professor Janet Halley argues that this portion of *Oncale* created "a quick and easy route to homophobia via the inference that because the defendant is homosexual, he probably has done this bad sexual thing."¹⁴⁶ Moreover, Professor David Schwartz argues that the fact plaintiffs must prove homosexuality on the part of harassers means that "*Oncale* approves a legal (rebuttable) presumption of heterosexuality . . . [and] thus invites the federal courts to embark on some potentially very ugly lines of factual inquiry."¹⁴⁷ Schwartz further notes that *Oncale*'s focus on potentially gay harassers and its approval of heterosexual "horseplay" means that "heterosexuals can abuse same-sex gay/lesbian co-workers with impunity, openly gay and lesbian employees may be especially vulnerable to harassment claims."¹⁴⁸ Professor Jessica Clarke's post-*Oncale* survey of same-sex sexual harassment cases suggests that these scholars' concerns are valid.¹⁴⁹

In addition to reinforcing a sexual desire paradigm that disadvantages gay and lesbian employees, *Oncale*, at least until *Bostock* was decided, left lower courts in the awkward position of prohibiting discrimination based on sex stereotypes on the one hand, but potentially permitting discrimination based on sexual orientation on the other.¹⁵⁰ Some scholars argued that this line was simply impossible to draw.¹⁵¹ Arguably, failing

of the employee's employment. *Id.* If the conduct was merely annoying, it would not be actionable. *Id.* at 1226–27.

144. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80; *see also supra* note 106 and accompanying text (discussing other types of evidence Justice Scalia suggested might support a valid same-sex discrimination claim).

145. *Oncale*, 523 U.S. at 80.

146. Halley, *supra* note 18, at 191.

147. Schwartz, *supra* note 20, at 1745.

148. *Id.* at 1746.

149. *See* Clarke, *supra* note 111, at 560–69, 584. Specifically, Clarke found that courts usually determined that any sexual conduct from men perceived as heterosexual was not to be based on sex. *Id.* at 560–69. In contrast, conduct from alleged harassers who openly identified as gay or lesbian was often automatically determined to be based on sexual desire, and therefore, based on sex. *Id.* at 584.

150. *See* Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 400 (2004); Sasha Andersen, Comment, *That's What He Said: The Office, (Homo)Sexual Harassment, and Falling Through the Cracks of Title VII*, 47 ARIZ. ST. L.J. 961, 962 (2015).

151. McGinley, *supra* note 150, at 402–03; Andersen, *supra* note 150, at 962–63.

to conform to heterosexual norms *is* a failure to conform to traditional gender stereotypes.¹⁵²

Finally, some argue that *Oncale* does not adequately protect men in all-male work settings, and they propose that courts should deem all sexual conduct as based on sex.¹⁵³ Indeed, if the case had not ultimately settled, it is possible that *Oncale* would not have prevailed on remand,¹⁵⁴ despite the brutal allegations in his case.¹⁵⁵ If it were determined that *Oncale's* harassers were gay, he might have prevailed.¹⁵⁶ In addition, if it were determined that *Oncale* was harassed because he was gender-nonconforming, he potentially could have prevailed under a sex-stereotype theory.¹⁵⁷ If, however, *Oncale* was generally gender-conforming and his harassers were heterosexual, he likely would not have prevailed under current caselaw.¹⁵⁸

152. McGinley, *supra* note 150, at 404–05; Andersen, *supra* note 150, at 963.

153. Chris Diffie, *Going Offshore: Horseplay, Normalization, and Sexual Harassment*, 24 COLUM. J. GENDER & L. 302, 310–11, 364–65 (2013); Schwartz, *supra* note 20, at 1734–35, 1784. Diffie does not specify why sexual conduct in particular is discrimination based on sex. David Schwartz, however, does have a theory as to why sexual conduct is sex discrimination: “[W]e are more acutely aware of the sex and gender identities of others (regardless of whether they are actual or perceived) when we act sexually toward them than at most other times, whether the sexual act is an expression of desire or power.” Schwartz, *supra* note 20, at 1784.

154. *See* Schwartz, *supra* note 20, at 1734.

155. *See supra* notes 94–100 and accompanying text.

156. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *supra* note 145 and accompanying text.

157. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (citing *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075; *supra* note 112 and accompanying text. *But see* Schwartz, *supra* note 20, at 1742–45 (arguing that a sex-stereotype theory may not be viable post-*Oncale* given the fact that the Court did not propose it as a possible evidentiary route for same-sex sexual harassment cases). On remand, *Oncale's* attorneys opted not to pursue a sex-stereotype theory. *Id.* at 1735. Instead, they opted to pursue two of the evidentiary routes that were outlined in *Oncale*: allegations that the alleged harassers were gay and allegations that *Oncale* was treated differently than similarly situated female employees who had been harassed. *Id.*

158. *See supra* note 115 and accompanying text; *see also* *McCown v. St. John’s Health Sys., Inc.*, 349 F.3d 540, 541–42, 544 (8th Cir. 2003) (finding that although a supervisor’s behavior, which included grabbing the plaintiff on the buttocks, grinding his genitals in the plaintiff’s buttocks in simulated intercourse, and attempting to shove a shovel handle and tape measure in the plaintiff’s buttocks, was “inappropriate and vulgar,” there was not sufficient evidence that the conduct was based on sex); *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997) (“Most unfortunately, expressions such as ‘fuck me,’ ‘kiss my ass,’ and ‘suck my dick,’ are commonplace in certain circles, and more often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference—even when they are accompanied, as they sometimes were here, with a crotch-grabbing gesture. Ordinarily, they are simply expressions of animosity or juvenile provocation, and there is no basis in this record to conclude that Hicks’ usage was any different.”). *But see* *EEOC v. Boh Brothers Constr. Co.*, 731 F.3d 444, 456–57 (5th Cir. 2013)

Thus, many theorists have been cognizant of the ways that male victims of sexual harassment can be harmed by courts' hyper-focus on the sexual desire paradigm.¹⁵⁹ Yet, much of the focus of these theorists has been on male victims who are perceived as failing to conform to gender stereotypes.¹⁶⁰ There has been less discussion about the harassment of men who generally are perceived as gender-conforming.¹⁶¹ As Part III discusses further, masculinities literature can help fill this gap in legal scholarship by providing insights on the gendered dynamic that occurs among men.

III. MALE RELATIONSHIPS ARE GENDERED

"Masculinities" is the interdisciplinary study of how men are socialized into being men.¹⁶² Scholars in this area recognize that women as a class are subordinated by men as a class.¹⁶³ These scholars, however, also recognize that not all men are equally powerful.¹⁶⁴ Instead, there is a hierarchy among men that is influenced by race, class, age, physical strength, and a multitude of other factors.¹⁶⁵ In other words, intersectionality is a key aspect of masculinities work.¹⁶⁶ In fact, the term "masculinities" is plural out of the recognition that masculinity can be performed in a variety of ways because of these other forms of identity.¹⁶⁷ Masculinities theorists also recognize that women can sometimes perform masculinity.¹⁶⁸ In American culture, the hegemonic masculine identity is a heterosexual, middle- or upper-class white male.¹⁶⁹ Yet, most men are not able to perform the hegemonic masculine identity.¹⁷⁰ As a

(determining that the plaintiff did not have to "prop up his employer's subjective discriminatory animus by proving that" the plaintiff was objectively "manly").

159. See *supra* notes 142–158 and accompanying text.

160. See *supra* note 142 and accompanying text.

161. But see *supra* note 143 and accompanying text (discussing how there is a possibility for hostile environment claims for some gender-conforming men under Franke's and Abrams' theories); *supra* note 153 and accompanying text (discussing Diffie's and Schwartz's concerns regarding the lack of protection for male heterosexual working-class workers).

162. See Dowd et al., *supra* note 23, at 25.

163. *Id.*

164. *Id.*

165. *Id.*

166. See R.W. CONNELL, *THE MEN AND THE BOYS* 10 (2000); KIMMEL, *supra* note 23, at 11; Harris, *supra* note 24, at 783.

167. CONNELL, *supra* note 166, at 10; KIMMEL, *supra* note 23, at 10–11; Harris, *supra* note 24, at 782–83.

168. CONNELL, *supra* note 166, at 29; Dowd et al., *supra* note 23, at 25.

169. See Don Sabo et al., *Gender and the Politics of Punishment*, in *PRISON MASCULINITIES* 3, 5 (Don Sabo et al. eds., 2001).

170. See Kimmel, *supra* note 22, at 190.

result, many men actually feel powerless, despite the fact that they generally have more power than women.¹⁷¹

Masculinities scholars also view the masculine identity as being quite vulnerable.¹⁷² A man is not necessarily perceived as being adequately masculine just because he is biologically male.¹⁷³ Instead, the masculine identity is unstable;¹⁷⁴ it can change from moment to moment, and a man must constantly "prove" that he is masculine.¹⁷⁵ Under this view, gender is what one does, not what one is.¹⁷⁶ According to masculinities scholars, men in Western society are socialized to believe that the best way to prove that one is masculine is to show that one is not a woman and that one is not gay.¹⁷⁷ Violence and aggression are sometimes used to establish one's masculinity,¹⁷⁸ and the need to prove masculinity is at its greatest in all-male environments.¹⁷⁹ For this reason, scholars have found that in settings such as the military, prisons, and sports teams, some men tend to engage in "hypermasculinity" where masculinity is performed in heightened forms.¹⁸⁰ This hypermasculinity can sometimes lead to violence, rape, and harassment.¹⁸¹ By engaging in this type of violent behavior, each man is proving that he is more masculine than the next.¹⁸²

MacKinnon has argued that when a man is raped by another man, he is essentially made into a woman.¹⁸³ In addition, Franke, Abrams, and Schultz have all argued that men who are perceived as gender-nonconforming are a threat to male masculinity and dominance in the workplace.¹⁸⁴ These theories, however, seem to focus mainly on male masculinity dominating female femininity.

171. *Id.* at 193.

172. Harris, *supra* note 24, at 779–80; Robinson, *supra* note 24, at 1332.

173. Kimberly D. Bailey, *Sex in a Masculinities World: Gender, Undesired Sex, and Rape*, 21 J. GENDER RACE & JUST. 281, 308 (2018).

174. McGinley, *supra* note 120, at 721.

175. Harris, *supra* note 24, at 780; Robinson, *supra* note 24, at 1332.

176. Harris, *supra* note 24, at 782; see CONNELL, *supra* note 166, at 12.

177. KIMMEL, *supra* note 23, at 9; Dowd et al., *supra* note 23, at 29.

178. See Sabo et al., *supra* note 169, at 5.

179. See Harris, *supra* note 24, at 785–86.

180. Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 39–40 (2010).

181. See Bailey, *supra* note 173, at 301–02.

182. *Id.*

183. MacKinnon, *supra* note 94, at 19 ("Men who are sexually assaulted are thereby stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors.").

184. See *supra* note 142 and accompanying text.

In contrast, Professor Ann McGinley uses masculinities theorization to delve more deeply into the gendered dynamic that occurs among men.¹⁸⁵ She notes that male-on-male harassment often takes two different forms: hazing and horseplay.¹⁸⁶ Newcomers to a workplace may be hazed, which forces them to prove their masculinity to the rest of the work group.¹⁸⁷ This hazing often takes the form of the grabbing or touching of the newcomer's genitals, sexual humor, derogatory comments that reference the newcomer as a woman, or other humiliating acts.¹⁸⁸ To the extent that the newcomer can tolerate this behavior, show that he can take a joke and laugh at himself, or otherwise show that he is a "real" man, he is welcomed into the group.¹⁸⁹ As such, hazing is not only a way for the newcomer to prove his own masculinity, but it is also a way to ensure that the workplace remains a masculine zone.¹⁹⁰

Male workers also sometimes maintain the masculinity of a work environment through regular horseplay, which is another way that they can continue to prove their masculinity to one another.¹⁹¹ McGinley notes that hypermasculine horseplay is particularly prevalent in all-male, blue-collar environments.¹⁹² In these environments, men may find their masculinity threatened by the hegemonic masculinity performed by white-collar management.¹⁹³ To reassert their own fragile masculine identity in the masculine hierarchy, some blue-collar workers act hypermasculine to show how "feminine" management really is.¹⁹⁴

McGinley notes that hazing and harassment cause harms for both men and women.¹⁹⁵ This conduct creates masculine work zones that are hostile to women and men who are perceived as gender-nonconforming.¹⁹⁶ This hostility promotes sex-segregation in job duties.¹⁹⁷ These dynamics also

185. See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1229 (2008).

186. *Id.* at 1182–89.

187. *Id.* at 1167, 1184–87.

188. *Id.* at 1186.

189. *Id.* at 1186–87; see, e.g., *Wasek v. Arrow Energy Servs.*, 682 F.3d 463, 465–66 (6th Cir. 2012) (noting that when the plaintiff complained about the sexualized harassment he experienced, his supervisor told him to stop whining, to duke it out, or to find a line of work outside of the oil fields if he could not handle this treatment).

190. McGinley, *supra* note 185, at 1182.

191. *Id.* at 1187–89.

192. *Id.* at 1186.

193. *Id.*

194. *Id.*

195. *Id.* at 1217–19, 1224.

196. *Id.* at 1224.

197. *Id.* at 1217, 1224.

sometimes cause psychological hardship and trauma, which make life difficult for women and men perceived as either gender-conforming or as gender-nonconforming.¹⁹⁸ These difficulties can affect an employee's ability to work effectively.¹⁹⁹ It also can affect an employee's quality of life at home.²⁰⁰ McGinley argues that courts should acknowledge these harms by recognizing that same-sex harassment in the workplace often occurs because of sex.²⁰¹

This Article builds upon McGinley's work by focusing specifically on the harassment of men who generally are perceived as gender-conforming. There is a gendered dynamic that occurs among men that operates both because of, and yet also separately from, their relationships with women. Men are socialized to prove that they are just as masculine as, or even more masculine than, the men around them.²⁰² But this dynamic occurs even when women are not present, which suggests that there is a distinct, even if interrelated, gender dynamic operating that is really just about men.²⁰³ Recognition of this dynamic is important in understanding that rape and sexual harassment are not just products of the gendered relationships between men and women—they are also the products of men's gendered relationships with one another. Specifically, these abuses are often the consequence of the instability of the masculine identity. Simply put, men must constantly prove their masculinity through the evaluation of other men, and this constant appraisal from other men can sometimes lead men to perform their masculinity in extreme and toxic ways.

In another context, I examined how the vulnerable masculine identity can lead to the rape of both men and women.²⁰⁴ Research shows that some men try to engage in a large number of hookups not only to satisfy their own sexual desires, but also to prove their masculinity to other men.²⁰⁵ In

198. *See id.* at 1189–90, 1239; *see also* Christin L. Munsch et al., *Everybody but Me: Pluralistic Ignorance and the Masculinity Contest*, 74 J. SOC. ISSUES 551, 572 (2018) (describing a study that suggests that the pressure to conform to perceived masculinity norms in the workplace, when one does not personally favor those norms, can negatively affect job satisfaction and engagement).

199. *See* McGinley, *supra* note 185, at 1190, 1239.

200. *Id.* at 1189–90; *see* Munsch et al., *supra* note 198, at 572.

201. Ann C. McGinley, Essay, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 109 (2018).

202. *See supra* notes 22–25 and accompanying text.

203. *See supra* notes 179–182 and accompanying text.

204. *See* Bailey, *supra* note 173, at 332.

205. Rachel Kalish & Michael Kimmel, *Hooking Up: Hot Hetero Sex or the New Numb Normative?*, 26 AUSTRALIAN FEMINIST STUD. 137, 144–45 (2011).

fact, some research suggests that men sometimes get more satisfaction out of bragging to their friends about their sexual conquests than from the actual hookups.²⁰⁶ Research also suggests that men sometimes seek multiple hookups out of an inflated view about how much sex other men are having.²⁰⁷ I have argued that the pressure to prove one's masculinity through sexual conquests sometimes pushes men to act aggressively and to push boundaries in trying to obtain sex from women.²⁰⁸ This pressure sometimes leads men to rape women.²⁰⁹ In addition, men sometimes rape men in all-male settings to prove that they are hypermasculine.²¹⁰ These rapists are not simply turning their victims into women; they are affirming that they are hypermasculine because they were able to overcome specifically another man.²¹¹

It is time to examine more deeply whether similar gendered harms are happening in the workplace. In an all-male work setting, the need to prove one's masculinity is particularly acute. As feminist theorists have already noted, men who are perceived as gender-nonconforming are particularly vulnerable in these settings.²¹² This is similar to how men who are perceived as gender-nonconforming are particularly vulnerable to rape in prison.²¹³

But what about the remaining men who are generally perceived as gender-conforming? Not all of these men can be on top of the male gender hierarchy. In fact, most will not be at the top. For some, they will not be on top because others perform hegemonic masculinity better than they do. For others, they will not be on top because they resist participating in some of the most toxic aspects of masculinity norms. In the prison context, this reality leads to men, even those who are generally perceived as gender-conforming, to suffer harassment, violence, and rape.²¹⁴ Similarly, caselaw suggests that men who generally are perceived as gender-conforming can be harassed in the workplace.²¹⁵ This harassment needs to be addressed.

206. *Id.*

207. *Id.*

208. Bailey, *supra* note 173, at 315.

209. *See id.* at 300.

210. *See* Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 141 (2006).

211. Bailey, *supra* note 173, at 301–03.

212. *See supra* note 142 and accompanying text.

213. *See* Bailey, *supra* note 173, at 302.

214. *Id.* at 303, 307–08.

215. *See, e.g.*, *EEOC v. Boh Brothers Constr. Co.*, 731 F.3d 444, 457 & n.12 (5th Cir. 2013) (describing a married heterosexual plaintiff who was called a “pussy,” “princess,” and “faggot” and who experienced simulated anal sex and other humiliating acts from his alleged harasser);

IV. HORSEPLAY CAN BE SEX DISCRIMINATION

This Part argues that some of the harassment that is targeted at men who are perceived as gender-conforming is not merely male "horseplay" that does not merit legal recognition; instead, it sometimes is discrimination based on sex. Masculinities theorization suggests that some men engage in this type of sexual harassment to prove their masculinity to other men.²¹⁶ This desire to prove themselves is most heightened when men are among themselves.²¹⁷ In addition, men often police each other's behavior to make sure that certain work zones remain masculine, which entrenches masculinity supremacy in the workplace.²¹⁸ All of these propositions raise the question of whether this gender dynamic among men is the epicenter of all sexual harassment. If it is, an important step toward addressing sexual harassment in general is to address the gender competition among men that leads them on a perpetual, and often futile, quest to maintain their position in the male gender hierarchy.

A. A Masculinities-Modified Differences Approach

As discussed in the Introduction, the Seventh Circuit in *Lord* determined that the inappropriate touching that Lord experienced at High Voltage, which included one poke on the buttocks, two slaps on the buttocks, and groping between his legs, was not discrimination based on sex.²¹⁹ Concluding that this was simply "sexual horseplay," the court focused on the fact that there was no evidence that Reimer sexually

Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 465 (6th Cir. 2012) (describing a married heterosexual plaintiff who was grabbed by the buttocks, poked in the buttocks with a hammer handle, and poked in the buttocks with a long sucker rod); Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 664–65 (7th Cir. 2005) (describing a married heterosexual plaintiff who was told he had a "cheerleader ass" and that he "would look real nice on my dick"; was forced face down into the alleged harasser's crotch; and whose hand was forced to touch the alleged harasser's crotch while the alleged harasser moaned); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1001–02 (7th Cir. 1999) (describing a married heterosexual plaintiff who was exposed to the penis of the alleged harasser on several occasions and, when plaintiff was lying face down on a bench, was told by the alleged harasser, "[I]f you [don't] turn over, [I'm] liable to crawl up on top of [you] and fuck [you] in the ass" (alterations in original)); Johnson v. Hondo, Inc., 125 F.3d 408, 410–11 & n.1 (7th Cir. 1997) (describing a heterosexual plaintiff who was repeatedly told by his alleged harasser, some variation of "I'm going to make you suck my dick").

216. See *supra* notes 22–25 and accompanying text.

217. See *supra* notes 179–182 and accompanying text.

218. See *supra* notes 193–194 and accompanying text.

219. *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 560, 562 (7th Cir. 2016).

desired Lord.²²⁰ The court also noted that there was no evidence that Reimer had general hostility toward men as a class.²²¹

This analysis, however, fails to consider the gendered relationship that men experience when interacting with one another, which is interrelated with, but distinct from, their relationships with women. In other words, even if Reimer were to engage in similar types of conduct toward both female and male co-workers, the meaning of this conduct would be different based on sex. First, it should be noted that it is possible to read *Lord* as a gender-nonconforming case. Prior to experiencing Reimer's harassment, Lord was teased about potentially being attracted to one of his female co-workers.²²² Specifically, Lord was teased about whether he had caught the "audio bug" (the female co-worker was an audio engineer) and whether he had taken care of the "audio bug."²²³ Lord complained about this harassment, which led to his transfer to the Responder team.²²⁴ During his performance review after the transfer, Lord was informed "that High Voltage is a creative workplace where 'humor is a common method of communication.'"²²⁵ Later, Lord experienced Reimer's highly sexualized harassment.²²⁶

Under the hegemonic version of masculinity, a man can prove his masculinity through his sexual conquests.²²⁷ It could be the case that Lord's discomfort and resistance to the teasing he got about his lack of aggressiveness in pursuing a female co-worker led his co-workers to view him as not really being enough of a man. If so, this teasing and Reimer's sexual harassment were ways for his co-workers to assert their superior masculinity over his inferior, or even failed, masculinity. While female workers at High Voltage might have also been victims of harassment, it is unlikely that they would have been victimized in this specific way. In fact, modern gender expectations seem to be that while a woman should make herself seem somewhat sexually available, she should not be "too" aggressive or sexy.²²⁸ Otherwise, she risks being labeled as a "slut."²²⁹ For these reasons, the harassment that Lord experienced was specifically because he was biologically a man, and his harassment was based on a

220. *Id.* at 562.

221. *Id.*

222. *Id.* at 559.

223. *Id.*

224. *Id.* at 560.

225. *Id.*

226. *Id.*

227. Bailey, *supra* note 173, at 312.

228. *Id.* at 317 (emphasis omitted).

229. *Id.*

gendered hierarchy that valorizes sexual aggression and conquest in men. He arguably experienced this type of harassment specifically because he was a man who did not conform to traditional gender expectations.

Relatedly, if the facts were changed to suggest that Reimer harassed Lord because he believed that Lord was gay, *Bostock* has finally established that the harassment would be sex discrimination.²³⁰ According to *Bostock*, Reimer would be engaging in sex discrimination because he would be treating a biological man who was sexually attracted to men differently than he would have treated a biological woman who was sexually attracted to men.²³¹ While this recognition of the civil rights of LGBTQ workers is historic, laudable, and significant, *Bostock* should have gone further in its analysis to argue that discrimination against gay workers is specifically sex discrimination because it is a form of sex-stereotyping and gender regulation. In addition, it reifies the male gender hierarchy.

Under hegemonic gender norms, one of the best ways to prove that one is a man is to prove that one is not gay.²³² For this reason, some may view actual or perceived gay identity as gender-nonconformance. If Reimer harassed Lord because of Lord's gay identity, it arguably would be because Reimer perceived Lord as either failing in his own masculine identity or threatening the masculine identity of the job that Lord and Reimer shared.

Furthermore, Reimer can prove his superior masculinity by focusing on the fact that while Lord is gay, Reimer is aggressively masculine. The grabbing of Lord's genitals is a way for Reimer to show his aggressive masculinity by objectifying specifically a man. It is also true that Reimer could have engaged in the same type of conduct with a woman. In any event, Reimer would be acting as a sexual subject, and he would be turning his co-worker, Lord, into a sexual object. Importantly, the meaning of the objectification would be somewhat different in each case. For a female co-worker, the objectification could be a way to maintain certain workspaces as women-free zones or to entrench traditional heterosexist gender roles in which women are subordinate to men.

For a male co-worker perceived as gender-nonconforming, however, the meaning of the objectification could be to denigrate perceived failure

230. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

231. See *id.* at 1754.

232. See *supra* note 177 and accompanying text; see also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) ("Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'"), *aff'd sub nom. Bostock*, 140 S. Ct. 1731; *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (holding that "discrimination on the basis of sexual orientation is a form of sex discrimination").

in masculinity, to ensure that male workspaces stay truly “masculine,” or to regulate the way that masculinity is performed in the workplace. For these reasons, Reimer’s interactions with Lord have a distinct meaning because they both are biologically men. In other words, Lord was discriminated against specifically because he was biologically a man.

But most importantly, even if there were no evidence of gender-nonconformance in this case, the sexualized harassment that Lord experienced should be enough to establish that he was discriminated against because he was a man. In a gender-conformance scenario, Reimer’s decision to harass Lord probably would have less to do with Lord’s failed masculinity and more to do with Reimer’s masculine anxiety. In the competitive work environment, some men might try to assert themselves as dominant within the masculine gender hierarchy. The decision to use sexualized conduct in particular suggests that a man is trying to assert his male dominance over the other male. It is one thing to objectify a woman, which is expected within traditional heterosexist scripts. But the ability to objectify a man makes one “hypermasculine” and reasserts one’s superior status in the masculine hierarchy.²³³ This particular need that some men have to assert this masculine superiority is the reason that even gender-conforming men can be vulnerable to sexual abuse.²³⁴ Because of this intragender competition, a man who experiences sexualized harassment at the hands of another man is not necessarily similarly situated to a woman who experiences sexualized harassment from that same man. In other words, regardless of whether Lord was perceived as gender-conforming or not, the harassment he experienced was specifically because he was biologically a man; this harassment was because of his sex.

In *EEOC v. Boh Brothers Construction Co.*,²³⁵ Chuck Wolfe, the superintendent of an all-male construction crew, relentlessly teased Kerry Woods, an iron worker and structural welder.²³⁶ Wolfe referred to Woods as “pussy,” “princess,” and “faggot” as often as “two to three times a day.”²³⁷ About two to three times a week, Wolfe would approach Woods from behind and simulate anal sex.²³⁸ Wolfe exposed his penis to Woods approximately ten times, “sometimes waving at Woods and smiling.”²³⁹

233. Bailey, *supra* note 173, at 301.

234. *See id.* at 303.

235. 731 F.3d 444 (5th Cir. 2013).

236. *Id.* at 449–50.

237. *Id.* at 449.

238. *Id.*

239. *Id.* at 449–50.

On one occasion when Woods was napping in his car, Wolfe approached Woods's car, appeared to be zipping his pants, and said, "[i]f your door wouldn't have been locked, my dick probably would have been in your mouth."²⁴⁰ Woods found this treatment embarrassing and humiliating.²⁴¹

Wolfe claimed that some of his teasing originated from the fact that Woods told some of his co-workers that he used Wet Ones instead of toilet paper at work.²⁴² Wolfe found this behavior "kind of gay" and "feminine."²⁴³ In an interview with the EEOC, Wolfe explained:

It's [not] the kind of thing you'd want to say in front [of] a bunch [of] rough iron workers that they had there. They all picked on him about it. They said that's kind of feminine to bring these, that's for girls. To bring Wet Ones to work to wipe your ass, you damn sure don't sit in front of a bunch of iron workers and tell them about it. You keep that to yourself if in fact that's what you do.²⁴⁴

In her dissenting opinion, Judge Edith Jones noted that in all-male workplaces, "crude sexual epithets are ubiquitous to the point of triviality."²⁴⁵ For this reason, according to Judge Jones, the only way to establish that harassment is based on sex in an all-male environment is through objective evidence that "the victim (or the harasser) visibly [does] not . . . conform to gender stereotype."²⁴⁶ In this case, Judge Jones found no "overt stereotyping" because both Wolfe and Woods were heterosexual.²⁴⁷ For this reason, she did not view Wolfe's harassment as based on sex.²⁴⁸

The majority of the court in *Boh Brothers* determined, however, that the proper inquiry in this type of case is not whether the plaintiff objectively fails to conform to gender stereotypes, but rather whether the

240. *Id.* at 450 (alteration in original).

241. *Id.* at 449.

242. *Id.* at 450.

243. *Id.*

244. *Id.* at 458 (alteration in original).

245. *Id.* at 477 (Jones, J., dissenting); see also *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997) (stating that "expressions such as 'fuck me,' 'kiss my ass,' and 'suck my dick,' are commonplace in certain circles, . . . they are simply expressions of animosity or juvenile provocation"). It is interesting that judges are willing to accept this type of crude conduct in working-class environments when they probably would not accept it in their own workplaces. It raises the question whether judges' class-based assumptions are blinding them somewhat to the gendered dynamics occurring in these settings. For further discussion about the intersectional aspects of masculine behavior, see *infra* Section IV.C.2.

246. *Boh Brothers*, 731 F.3d at 478–79 (Jones, J., dissenting).

247. *Id.* at 476.

248. *Id.*

alleged harasser *subjectively* perceived the plaintiff as failing to conform to gender stereotypes.²⁴⁹ It then determined that a reasonable jury could determine that Wolfe harassed Woods because he perceived Woods as failing to conform to Wolfe’s own subjective view of manliness.²⁵⁰

The majority’s reading of this case as a gender-nonconforming case is a fair one. Wolfe explicitly stated that the use of Wet Ones was “kind of gay” and “feminine.”²⁵¹ In other words, the use of this product is not something that a heterosexual male iron worker does in Wolfe’s eyes, and he admitted targeting Woods in part because Woods chose to behave in this way.²⁵² Presumably, since using Wet Ones is “feminine,” Wolfe believes that it is not problematic for women to use Wet Ones. For this reason, Wolfe is focusing specifically on the fact that Woods is a man who uses Wet Ones.

This is not to suggest that Wolfe would not have harassed Woods for using Wet Ones had Woods been a woman. Under those circumstances, however, Wolfe probably would not have harassed Woods because Wolfe generally had a problem with women using Wet Ones. Instead, Wolfe probably would have harassed Woods because Wolfe generally had a problem with women working as iron workers. In contrast, Wolfe obviously does not generally have a problem with men working as iron workers. He only has a problem with male iron workers who use Wet Ones. Again, Wolfe’s reaction to Woods is driven by the fact that Woods is a *man* who uses Wet Ones.

Judge Jones, however, also raises a plausible alternative reading of the facts in this case. It is possible that Wolfe did generally view Woods as being gender-conforming. After all, Wolfe claimed that “some” of his teasing originated from the Wet Ones conversation.²⁵³ That raises the question of what was the reason for the rest of the teasing? According to the majority opinion in *Boh Brothers*, Wolfe and his crew “regularly used ‘very foul language’ and ‘locker room talk.’”²⁵⁴ In addition, “Wolfe was a primary offender: he was ‘rough’ and ‘mouthy’ with his co-workers and often teased and ‘ribbed on’ them.”²⁵⁵ In addition, Wolfe testified that he did not remember whether Woods was the only worker he called a “faggot,” which raises the possibility that he had used this epithet with

249. *Id.* at 456–57 (majority opinion).

250. *Id.* at 459.

251. *Id.* at 450.

252. *Id.*

253. *Id.*

254. *Id.* at 449.

255. *Id.*

other workers.²⁵⁶ Wolfe also testified that he did not actually believe that Woods was gay.²⁵⁷ "I was just playing with him," he explained.²⁵⁸

Yet, even if Judge Jones is factually correct that *Boh Brothers* is ultimately a gender-conformance case, she is wrong in determining that the behavior was "trivial" just because this type of conduct is "ubiquitous" in an all-male work setting. After all, many years ago Farley and MacKinnon found sexual harassment against women to be ubiquitous, too.²⁵⁹ But they also discovered that this treatment was far from trivial.²⁶⁰ Instead, like many women and men in his position, Woods found his treatment highly embarrassing and humiliating, which affected the terms and conditions of his employment.²⁶¹

Moreover, even in a gender-conformance scenario, it is still the case that Wolfe treated Woods differently because Woods was biologically a man. Masculinities literature suggests that Wolfe and his co-workers might have been engaging in this type of hazing and horseplay to test the masculinities of each other, as well as their own.²⁶² This is specifically homosocial conduct among men.²⁶³ By denigrating the masculinity of Woods, Wolfe was asserting his superior position in the masculine hierarchy among the work crew.²⁶⁴ Because one's place in the male gender hierarchy is not static and can change at any moment,²⁶⁵ any other gender-conforming man is a potential competitor in a workplace's male hierarchy. If Wolfe viewed Woods as generally gender-conforming, Woods was a potential threat to Wolfe's place in this hierarchy.²⁶⁶

Furthermore, Wolfe was also arguably policing Woods's masculinity to ensure that their construction site remained a masculine (and woman-free) zone.²⁶⁷ If men start using Wet Ones at the construction site, might that open the door for other feminine behaviors, and eventually even women, at the construction site? And if women enter the construction

256. *Id.* at 458.

257. *Id.*

258. *Id.*

259. *See supra* notes 36–66 and accompanying text.

260. *See supra* notes 36–66 and accompanying text.

261. *See Boh Brothers*, 731 F.3d at 449.

262. *See supra* notes 185–194 and accompanying text.

263. *See supra* notes 185–194 and accompanying text.

264. *See supra* notes 185–194 and accompanying text.

265. *See supra* notes 172–175 and accompanying text.

266. *See supra* notes 191–194 and accompanying text; *see also* Natalya Alonso, *Playing to Win: Male–Male Sex-Based Harassment and the Masculinity Contest*, 74 J. SOC. ISSUES 477, 486 (2018) (describing a study that found that male-on-male harassment was driven by a desire to reassert threatened masculinity).

267. *See supra* notes 193–194 and accompanying text.

site, might that undermine the masculinity of construction work? And if the masculinity of construction work becomes undermined, might that undermine Wolfe's own masculine identity? As a result, Wolfe was challenging Woods to reassert Woods's own masculinity, the masculinity of the work site, and even Wolfe's own masculine identity, which was tied to the masculinity of the work site.

In response to Wolfe's conduct, Woods's expected script was to either tolerate and laugh off Wolfe's conduct or to engage in his own "masculine" ribbing.²⁶⁸ But note that the performance of this script has a different meaning for Woods as a man than it would have if he were a woman. By tolerating and laughing off the conduct, Woods is still part of the male club, even if he may be conceding that Wolfe is a bit more masculine than he is. Woods's laughter and ability to "take a joke" is a show of male comradery.²⁶⁹ In contrast, when a woman laughs and tolerates similar conduct, she is certainly not treated as part of the male club. Instead, she becomes further entrenched as a subordinated woman.

Furthermore, if Woods engages in masculine ribbing, he becomes even more entrenched in the male club, and he may even merit an increase in his placement in the male hierarchy. If a woman were to engage in this type of ribbing behavior, however, it is possible that some men might accept her as an honorary member of the male club. But it is probably more likely that she might be faced with hostility for failing to adhere to traditional gender scripts.²⁷⁰ For all of these reasons, Woods's treatment as a man was different than if he had been a woman. Therefore, his treatment was based on sex.

Admittedly, one could argue that Woods should not be entitled to Title VII protection precisely *because* his experience was different as a man. Regardless of how uncomfortable Wolfe's conduct might have made him feel, Woods still generally had access to the societal advantages and power that come with being a man in the workplace. Wolfe's behavior was not suggesting that Woods should not be at the construction site because he was a man. If anything, Wolfe was just trying to reaffirm male supremacy in the workplace.

Yet, Wolfe was trying to reaffirm a specific type of male supremacy in the workplace. Wolfe's conduct sought to regulate how Woods and the other men at the worksite performed their maleness through a type of

268. See *supra* note 189 and accompanying text.

269. See *supra* note 189 and accompanying text.

270. See Bailey, *supra* note 173, at 309–26 (discussing the thin line that modern women must walk between masculine and feminine norms).

masculinity competition. But Woods should have the right to perform his masculinity in any way that he chooses; he should not have to constantly prove that he "deserves" his male identity. Even if Woods generally chooses to perform his masculinity consistent with traditional gender scripts, Wolfe's mandate that Woods *always* do so is stereotype discrimination.²⁷¹ In addition, this mandate took the form of abusive and hostile behavior that negatively affected the terms and conditions of Woods's employment.

As Section IV.B discusses further, if the law fails to acknowledge this type of abusive behavior as sex discrimination, it will be difficult to eradicate the toxic aspects of masculine competitiveness that may be the epicenter of all sexual harassment. For this reason, courts should not only focus on whether men and women are treated differently in a particular workplace, but they should also consider how certain workplace conduct systemically creates gendered hierarchies, which leads to discrimination against both men and women.

B. *A Masculinities-Modified Systemic Inequality Approach*

This Section raises the following question: Is the masculinity competition that leads to harassment among gender-conforming men actually the epicenter of all sexual harassment? Feminist theorists have tended to focus on the systemic ways that women (and men who are perceived as gender-nonconforming) are subordinated within gender hierarchies. This Section explores how these hierarchies also sometimes subordinate men who generally are perceived as gender-conforming. It also explores how the subordination of these traditionally gender-conforming men further entrenches the subordination of women and men who are perceived as gender-nonconforming.

As mentioned, some feminist scholars have acknowledged that men perceived as gender-conforming should have a cognizable claim of sexual harassment under some circumstances.²⁷² But McGinley has used masculinities theorization to argue more robustly that gender-conforming men can suffer harms from gender regulation.²⁷³ Because competing masculinities exist, most men at some point find that their masculinities are sublimated to the masculinities of other men.²⁷⁴

271. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075.

272. See *supra* note 143 and accompanying text.

273. McGinley, *supra* note 185, at 1230.

274. *Id.*

One important thing for courts to note is that this dynamic operates in response to, but also somewhat separate from, men's relationships with women. It operates in response to their relationship with women because men are socialized into believing that one of the best ways to prove that they are men is to establish that they are not women.²⁷⁵ They can do this by acting aggressively and by highlighting, or even exaggerating, their heterosexuality.²⁷⁶ Furthermore, in the employment context, men encourage, and sometimes coerce, one another to engage in this type of behavior to ensure that certain job positions remain "male."²⁷⁷

In *Lord*, one explanation for Reimer's hypermasculine conduct could be that he was trying to preserve the masculine identity of the associate producer position at High Voltage. More women tend to gravitate to this type of technology position rather than software engineering and developing, which both tend to be more male dominated.²⁷⁸ For this reason, it could have been the case that Reimer felt it important to reaffirm the masculinity of his job, which was potentially "threatened" by the presence of female colleagues.

Similarly, construction work has traditionally been "male" work. One way to maintain this masculine status is for construction workers to act in hyper-masculine ways. When Woods engaged in behavior that seemed stereotypically more "feminine," Wolfe may have felt resentment and hostility because he perceived this conduct as undermining the masculine identity of the construction site where he and Woods worked.

In addition, it is important for courts to recognize that there are aspects of the gendered dynamic among men that are not really about women at all. When Reimer sexually objectified Lord, it is inaccurate to say that the objectification turned Lord into a woman.²⁷⁹ Rather, it is more accurate to say that Reimer was asserting a higher place than Lord in the masculine

275. See *supra* note 177 and accompanying text.

276. See *supra* notes 177–182 and accompanying text.

277. See *supra* notes 187–194 and accompanying text.

278. Associate producer positions involve project management. See A. Rothstein, *Job Spotlight: Associate Producer Pre-Production, Production & Post*, IPR (Aug. 21, 2018), <https://www.ipr.edu/blogs/digital-video-and-media-production/job-spotlight-associate-producer-pre-production-production-post/> [<https://perma.cc/VY9T-JHRE>]. According to the National Center for Women and Informational Technology, the most dominant technology position for women is project manager. CATHERINE ASHCRAFT ET AL., *WOMEN IN TECH* 14 fig.1.11 (2016). For men, the most dominant position is software engineer, and project manager is the third most dominant position. *Id.*

279. See MacKinnon, *supra* note 94, at 19 ("Men who are sexually assaulted are thereby stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors.").

hierarchy at High Voltage. Because other technological jobs might be deemed more "masculine" than an associate producer position,²⁸⁰ it was probably the case that Reimer's masculinity was being sublimated by other men's masculinities at High Voltage. If this were the case, Reimer needed to sublimate the masculinity of specifically another man to assert his place in the masculine hierarchy. Similarly, in an all-male construction site, Wolfe needed to constantly maintain his position in his workplace's male hierarchy. One way Wolfe could assert that he was more masculine than Woods was by exploiting Woods's "feminine" choice to use Wet Ones.

Without a legal remedy, however, the harassment that Lord experienced left him with few choices: complain, leave his position, tolerate the harassment he was experiencing, or reassert his masculinity over his harassers. Lord complained, but his complaints did not improve his work environment.²⁸¹ Indeed, there is evidence to suggest that after complaining about some of the teasing that he was experiencing, Lord was simply treated like a nonconforming man.²⁸² Specifically, Lord was informed during his performance review that humor was an important part of communication at High Voltage,²⁸³ which implied that he was not meeting employment expectations because of his inability to "take a joke."²⁸⁴ In addition, Lord was sexually harassed by Reimer.²⁸⁵ Overall, Lord's experience demonstrates why many men (and women) believe that complaining about sexual harassment is not a feasible option. His experience is consistent with evidence that suggests that complaints often can lead to retaliation and further harassment.²⁸⁶

280. See *supra* note 278 and accompanying text.

281. *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 560 (7th Cir. 2016).

282. See *supra* notes 219–226. The Seventh Circuit ultimately denied his sex discrimination claim. *Lord*, 839 F.3d at 562.

283. *Lord*, 839 F.3d at 560.

284. *Id.* at 567.

285. *Id.* at 560, 567.

286. See Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCH. 247, 255 (2003). Cortina and Magley found that 66% of employees who complained of workplace mistreatment faced some type of retaliation. *Id.* Most of this retaliation was what the study authors labeled as "[s]ocial retaliation victimization." *Id.* at 248. This type of retaliation affects the victim's social work setting and includes behavior such as "harassment, name-calling, ostracism, blame, threats, or the 'silent treatment.'" *Id.* Approximately 36% of the participants in the study who had complained about workplace treatment experienced "[w]ork retaliation victimization," which involves tangible adverse job actions such as demotions and terminations. *Id.* at 248, 255. The study authors opined that social retaliation might be more common because its illegality is

Leaving one's position is often not a feasible option either for two reasons. First, most people cannot afford to lose a job because they need to be able to provide for themselves and maybe also their family members. Second, even if a male employee were able to find alternative employment, he probably would end up experiencing a new set of masculinity norms with which he would have to contend.

Beyond these pragmatic reasons, it should also be noted that some men may be hesitant to leave their employment because masculinity is often established in American society through economic power and success.²⁸⁷ Heterosexual men are often taught, both explicitly and implicitly, that this type of success can not only help establish a man's place within the male gender hierarchy,²⁸⁸ but it can also establish a man as a "real man" in the eyes of some female sexual partners.²⁸⁹ For these reasons, many men are not willing to leave employment, which some view as a key aspect of their masculine identity.²⁹⁰

Given these realities, Lord's workplace survival required a different approach than the one he took. When teased about whether he had caught that "audio bug," Lord could have laughed and maybe even confirmed that he had indeed taken care of that audio bug. As an alternative, Lord could have teased his co-workers about their attempted and failed sexual conquests. These alternative approaches are consistent with how men are often expected to engage with one another in traditionally male environments.²⁹¹ Perhaps this expectation derives in part from the perception that men are not supposed to whine and complain; instead, men should act as autonomous agents who are capable of fighting their own battles without the assistance of others.²⁹² This expectation also probably derives from some male co-workers' desire to create male

more questionable. *Id.* at 259. Behaviors that are arguably not illegal may be policed less in the workplace. *Id.*

287. See Kimmel, *supra* note 22, at 184.

288. See *id.* at 184–86; Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC'Y 527, 531 (1996).

289. See Pyke, *supra* note 288, at 544 (noting how some wives do not view their husbands as "real" men when the husbands are not ambitious and aggressive in their careers).

290. See Jennifer L. Berdahl et al., *Work as a Masculinity Contest*, 74 J. SOC. ISSUES 422, 429 (2018) (arguing that "the workplace represents the venue in which money—the ultimate resource in modern economies—is to be made, making it a central context for resource acquisition and establishing dominance").

291. See *supra* notes 186–190 and accompanying text.

292. See Bailey, *supra* note 173, at 307.

comradery and female-free zones, which bolsters masculine supremacy in the workplace.²⁹³

Naturally, one might be skeptical of the claim that the banter that can occur in a hyper-masculine environment is sex discrimination against the men in that work environment. After all, the banter is intended to celebrate men as a group, not denigrate them. This Article, however, does not intend to claim that this type of banter is always sex discrimination. Instead, it claims that, at least in Lord's case, it was.

Kang v. U. Lim America, Inc.,²⁹⁴ a national origin case from the U.S. Court of Appeals for the Ninth Circuit, illustrates how intragroup harassment that purports to celebrate the supremacy of that group can still be discrimination.²⁹⁵ In *Kang*, the employees were all of Korean national origin, including Kang's supervisor, Yoon.²⁹⁶ Yoon subjected his employees to "verbal and physical abuse and discriminatorily long work hours."²⁹⁷ In terms of the verbal abuse, Yoon would call Kang "'stupid,' 'cripple,' 'jerk,' 'son of a bitch,' and 'asshole.'"²⁹⁸ The physical abuse included "striking Kang in the head with a metal ruler on approximately 20 occasions, kicking him in the shins, pulling his ears, throwing metal ashtrays, calculators, water bottles, and files at him, and forcing him to do 'jumping jacks.'"²⁹⁹

Yoon subjected Kang and his co-workers to this type of abuse because Yoon believed that "Korean workers were better than the rest" and that Kang and his co-workers failed to live up to those expectations.³⁰⁰ "On numerous occasions, Yoon told Kang that he had to work harder because he was Korean"³⁰¹ Yoon contrasted Korean workers with Mexicans

293. See *supra* notes 190, 193–94, 196 and accompanying text.

294. 296 F.3d 810 (9th Cir. 2002).

295. Drawing analogies between national origin, racial, and sexual harassment cases can be analytically beneficial in helping courts see the discriminatory nature of all of these types of conduct. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65–66 (1986) (analogizing sexual harassment with racial harassment); see also L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 821–48 (1997) (discussing the appropriateness of analogies of race and sex within the scope of Title VII). It should be noted, however, that because there are real differences between race, national origin, and sex, courts should not automatically rely on these analogies in determining the appropriate legal doctrines for each. See *id.* at 848–77.

296. *Kang*, 296 F.3d at 814.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 817.

301. *Id.*

and Americans, whom he viewed as not hard workers.³⁰² In other words, Yoon had views about the superiority of Koreans over individuals of other national origins, and he wanted to bolster that superiority through the performance of his Korean employees.

While it considered this to be an unusual national origin harassment claim, the Ninth Circuit still determined that Kang could survive summary judgment because he alleged that Yoon was engaging in behavior based on stereotyping, “an evil at which [Title VII] is aimed.”³⁰³ In addition, Kang’s allegations suggested abusive conduct that interfered with his work performance.³⁰⁴ In other words, even though Yoon suggested that Kang was actually superior to others because of his national origin, Title VII still prohibited Yoon from abusively regulating Kang’s performance of their shared national origin identity.³⁰⁵

Similarly, it is generally fine that High Voltage had an environment where people liked to tell jokes and keep a sense of humor in the workplace.³⁰⁶ It is also fine if some of the employees performed their masculinity in gender-conforming ways.³⁰⁷ What was not fine, and indeed, what was discriminatory, was the fact that through abusive and humiliating conduct, Reimer (and others) tried to regulate the way that Lord performed his own masculinity. Lord should not have had to tolerate this demeaning treatment as a condition of his employment. Forcing him to do so was discrimination based on his sex.

Workplace harassment against men perceived as gender-conforming should not be minimized simply because they generally have more power than women and men perceived as gender-nonconforming. It is also not necessary to determine that any harms that gender-conforming men suffer are the same or greater than those suffered by women and gender-nonconforming men. At this point, it is only necessary to acknowledge that these harms are based on sex and that they may be affecting the terms or conditions of some men’s employment.³⁰⁸

Although Schultz does not seem to focus on gender-conforming men in her theorization, she still provides some important insights that might

302. *Id.*

303. *Id.*

304. *Id.*

305. *See Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”).

306. *See Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 560 (7th Cir. 2016).

307. *See id.* at 562.

308. *See supra* notes 195–197 and accompanying text.

apply to them. First, like Abrams, Schultz recognizes the significance of sexual harassment occurring in the workplace.³⁰⁹ Work is vital for economic independence and survival.³¹⁰ It can also sometimes be a source of personal fulfillment and identity.³¹¹ Sexual harassment can hinder an individual from obtaining these goals by undermining one's actual or perceived competence at work.³¹² These types of effects apply to men perceived as gender-conforming, just as they apply to women and men who are perceived as gender-nonconforming.

Second, sexual harassment often involves nonsexual conduct.³¹³ This nonsexual conduct should not be disaggregated from sexual conduct in determining whether a work environment was abusive because of sex discrimination.³¹⁴ Lord's experience can illustrate the importance of this point. The four sexual incidents that he suffered at Reimer's hands might not lead a jury to believe that the harassment was "severe or pervasive" enough to create an abusive environment. But what if the facts were changed to show that, in addition to these four incidents, Reimer also sabotaged Lord's work on the software program that they were working on, shoved him on occasion, and was generally hostile toward Lord on a regular basis? Under these circumstances, the combined nonsexual and sexual conduct could show an abusive environment that undermined Lord's actual or perceived competence at work because of his sex.

It is true that Woods was more successful with his sex discrimination claim.³¹⁵ But it is also true that because the U.S. Court of Appeals for the Fifth Circuit viewed his experience narrowly as a gender-nonconformance case,³¹⁶ his victory is a limited one for gender-conforming men. By not appreciating the broader gender dynamics occurring at Woods's workplace,³¹⁷ the court lost an opportunity to provide men who are perceived as gender-conforming with a firmer legal path toward confronting, challenging, and undermining sexual misconduct in the workplace.

Instead, the current status of the law results in some gender-conforming men feeling the need to perpetuate certain masculinity norms

309. See Schultz, *supra* note 19, at 1755–56.

310. *Id.* at 1756.

311. *Id.*

312. See *id.* at 1763–69.

313. *Id.* at 1686–87.

314. *Id.*

315. See *EEOC v. Boh Brothers Constr. Co.*, 731 F.3d 444, 459–60 (5th Cir. 2013).

316. See *supra* notes 249–252 and accompanying text.

317. See *supra* notes 249–271, 273–306 and accompanying text.

to fit into their workplaces, even if they actually would prefer not to have to perpetuate them.³¹⁸ Interestingly, studies have found that some men only engage in heightened masculinity in the workplace, not at home.³¹⁹ It could be that “[t]he pressures exerted by the structural conditions of working-class life may lead some men to juggle a Dr. Jekyll and Mr. Hyde existence in which they produce hypermasculinity in male cliques and on the job and an egalitarian masculinity in their family relations.”³²⁰

Thus, while it is important to acknowledge the harms that men who are perceived as gender-conforming suffer as a result of sex discrimination, it is equally important to recognize that the harassment of these men leads to the discrimination of women and men who are perceived as gender-nonconforming. As McGinley has noted, gender regulation among men goes hand-in-hand with sex segregation in the workplace.³²¹ When a job is marked as “male,” the masculinity of the job holders is confirmed and an implicit message is sent that women (and men perceived as gender-nonconforming) need not apply.³²² The devastating economic, social, and political consequences of sex-segregation cannot be overly stated.³²³ It shuts women and gender-nonconforming men out of certain job positions, many of which could provide greater economic and personal fulfillment.³²⁴

In addition, those men and women who dare to venture into these “male” positions are destined to be harassed. In a world where men are constantly competing with one another to prove who is the most masculine, the easiest way to prove one’s masculinity is to focus on the “femininity” of the female or the gender-nonconforming male. But if men no longer felt the need to maintain their spots in the masculine hierarchy, they would have no reason to harass each other or women to assert their masculinity. In other words, while the gendered relationship among gender-conforming men is often a hidden component of the systemic harassment of women and gender-nonconforming men, it is time to consider whether this competition among gender-conforming men is

318. See McGinley, *supra* note 185, at 1230; see also Munsch et al., *supra* note 198, at 571–72 (describing a study that suggests many workers overestimate the number of their co-workers who are in favor of “dog-eat-dog” and “show-no-weakness” norms, which leads workers to conform with these norms even if they would prefer not to conform, and finding that this “pluralistic ignorance” is greater in jobs with higher percentages of men).

319. David L. Collinson, ‘*Engineering Humour*’: *Masculinity, Joking and Conflict in Shop-Floor Relations*, 9 *ORG. STUD.* 181, 192 (1988); Pyke, *supra* note 288, at 542.

320. Pyke, *supra* note 288, at 542.

321. See McGinley, *supra* note 185, at 1229.

322. See *supra* notes 190, 196–197 and accompanying text.

323. See *supra* notes 53–66 and accompanying text.

324. See Abrams, *supra* note 19, at 1185; Schultz, *supra* note 19, at 1755–56.

actually the epicenter of all sexual harassment. If it is the epicenter, the response to the harassment of women and men perceived as gender-nonconforming men must include a more robust response to the harassment of men perceived as gender-conforming. If respectful treatment is reserved only for those who perform their masculinity the best, masculine supremacy will continue to reign throughout the workplace and beyond.

C. *Further Implications*

The arguments presented in this Article raise additional questions and issues that are worth examining further.³²⁵ This Section briefly discusses a few of them. First, it addresses the concern that some might have that a broader definition of "because of sex" could turn Title VII into a general civility code. Second, it encourages scholars to consider how gender discrimination intersects with other forms of discrimination based on race, disability, and other identities. Finally, it is important to consider further how acknowledging discrimination against men perceived as gender-conforming could ultimately improve the general working conditions of women.

1. A General Civility Code

A potential risk in broadening the meaning of "because of sex" is that Title VII could be turned into a general civility code, which clearly is not the statute's intent. That said, a more nuanced understanding of the gendered nature of interactions among men does not mean that the "because of sex" element disappears. If a supervisor harasses an employee simply because he dislikes him, this harassment is not going to be because of sex. But a masculinities-modified analysis pushes courts to examine the harassment in same-sex cases more closely. Once a court decides that a supervisor is not gay, the tendency in these cases is to summarily dismiss them as "horseplay."³²⁶ In contrast, a masculinities-modified approach asks courts to consider the gendered relationship that men have with one another before automatically making this determination. Furthermore, the fact that plaintiffs have to show that any harassment they experienced was "severe or pervasive" also limits Title VII claims to situations that are abusive enough to affect the terms and conditions of one's employment.³²⁷

325. I intend to explore some of these issues in future scholarship.

326. See *supra* note 148 and accompanying text.

327. Schwartz, *supra* note 20, at 1739.

To the extent that some worry a broader approach will limit nondiscriminatory sexual expression in the workplace, Franke's, Abrams's, and Schultz's theories are helpful in clarifying the harms of sexual harassment in the workplace. It is not the expression of sexuality in and of itself that is problematic. Rather, one important question to ask is whether this expression undermines the actual or perceived competency of a worker because of his gender.³²⁸ This type of expression is also problematic when it tries to regulate how the worker expresses his gender.³²⁹ Even under a masculinities-modified approach, there may be situations where sexual expression does not cause these types of harm. The analysis of these cases will necessarily be context specific.

However, it is also the case that some conduct that traditionally has been treated as "boys just being boys" probably should be re-evaluated. In *Oncale*, Justice Scalia stated that a football player getting swatted on the buttocks by a coach is not the same as a male boss swatting his secretary on the buttocks.³³⁰ It is true that the conduct probably has different meanings in these two scenarios. It also might be the case that this is not the type of conduct that should be actionable for football players as a sex discrimination claim; maybe this conduct actually creates a bond, and not a gendered hierarchy, between coach and player. But it is still worth asking, in general, more questions about male interactions in the workplace that have traditionally been viewed as unproblematic horseplay. Does the conduct make a worker feel somewhat objectified, even though he just tolerates it as part of the male work experience? Is there conduct that reifies a masculine gender hierarchy, which ultimately is harmful for both men and women? Is the conduct regulating gender and undermining the competency of some men who fail to conform to traditional "masculine" norms? After all, there was a time when swatting the female secretary on the buttocks was also considered to be not that problematic. It is time to start examining more deeply various types of male "horseplay" that might actually be sex discrimination.

2. Intersectionality

As discussed, the term "masculinities" is plural because it recognizes that masculinity can be performed in a variety of ways due to the intersectionality of race, class, age, and other identities.³³¹ Through this

328. See Schultz, *supra* note 19, at 1763–69.

329. See Franke, *supra* note 1, at 703–05, 730.

330. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

331. See *supra* notes 165–168 and accompanying text.

lens, Professor Angela Harris has argued that police violence against African American men should not only be analyzed as racial violence, but it should also be analyzed as gender violence.³³² As an explicit example, Harris highlights the case of Abner Louima, who was raped by Brooklyn police officer Justin Volpe with a broomstick in a jail precinct bathroom.³³³ The reported catalyst for this behavior was Volpe mistakenly believing that Louima had assaulted him in a nightclub.³³⁴ This perceived assault was a threat to Volpe's masculinity.³³⁵ "Sodomizing Louima—not using his penis but an even bigger 'stick'—showed Louima who was the bigger man, who ruled the night."³³⁶

But Harris notes that violence does not necessarily have to be sexualized to be gendered.³³⁷ After all, violence is one way that men have been socialized to prove that they are men in American culture.³³⁸ Harris surmises that under this understanding of violence, it could be the case that men suffer more gender violence than women.³³⁹

Harris also notes that Volpe's conduct "showed Louima the superiority of white masculinity, invigorated by a touch of savagery yet retaining the superiority of mastery and control."³⁴⁰ She notes how relations between African American men and white men are complicated.³⁴¹ On the one hand, as a class, white men have better access to the hegemonic masculine ideal of "patriarchal control over women, jobs that permit one to exercise technical mastery and autonomy, and the financial and political power that enables control over others."³⁴² On the other hand, some African American men have responded to the lack of access to this hegemonic ideal by embracing rebellious alternatives that include coolness, physical strength, athleticism, and sexual prowess.³⁴³ "At the cultural level, however, these competing forms of masculinity allow for interracial relations of envy and desire as well as mutual hostility."³⁴⁴ With respect to police interactions, these relationships are

332. Harris, *supra* note 24, at 779.

333. *Id.* at 778–79.

334. *Id.* at 778.

335. *Id.* at 798.

336. *Id.*

337. *Id.* at 779–82.

338. *Id.* at 782.

339. *Id.* at 779.

340. *Id.* at 798.

341. *Id.* at 783–85.

342. *Id.* at 783.

343. *Id.* at 784.

344. *Id.*

further complicated by the fact that, by being working-class, white police officers also have somewhat been denied access to the hegemonic masculine ideal.³⁴⁵

Similarly, it is worth considering whether other types of Title VII claims intersect with a potential gender claim. For example, those who are physically weaker are sometimes harassed because they are perceived as not masculine.³⁴⁶ If someone has a disability, it is possible that he could be discriminated against not only because he is disabled, but also because his disability causes others to see him as gender-nonconforming. In addition, an Asian American man might be discriminated against because of his race and because some perceive Asian American men as less masculine.³⁴⁷ Furthermore, an African American man might be challenged in the workplace not only because he is African American, but also because supermasculinity is sometimes projected onto African American men, and this projection makes other men feel threatened.³⁴⁸

An intersectional analysis is also important in contextualizing behavior in the workplace. While violence is traditionally a way for men to assert their masculinity, middle- and upper-class men are less likely to be violent because it puts their livelihoods at risk.³⁴⁹ Researchers have found that men in some white-collar environments tend to assert their masculinity by engaging in “careerist” behaviors such as “working nonstop, acting aggressively, and engaging in self-promoting behavior.”³⁵⁰ For this reason, further research needs to be done to determine how gender harassment is performed in a variety of environments. It is worth examining the nonviolent and nonsexual ways that men might assert their masculinity over one another or might mark others as not masculine.

3. A Masculinities-Modified Approach Can Benefit Women

One might worry that, by suggesting that male same-sex harassment could be the epicenter of all harassment, the focus of sexual harassment law will move away from addressing the subordination of women. That is not the intention of this Article. While this Article aims to encourage courts to consider more fully the discrimination that men experience in the workplace, it has always been recognized within the study of

345. *Id.* at 794.

346. Bailey, *supra* note 173, at 302.

347. See Kimmel, *supra* note 22, at 192.

348. See Harris, *supra* note 24, at 783; Kimmel, *supra* note 22, at 192.

349. Bailey, *supra* note 173, at 300–01.

350. ANN C. MCGINLEY, MASCULINITY AT WORK 7 (2016).

masculinities that men as a class still have more power than women as a class.³⁵¹ This area of study simply emphasizes that both men and women can perform masculinity, and that men are not equally powerful among each other.³⁵²

The recognition of the gendered harms that men experience is not just valuable for men, however. The "Me Too" Movement has made it clear that despite the fact that more and more women are moving into traditionally male employment and leadership positions, sexual harassment still persists.³⁵³ One potential explanation for this reality is that the masculine competition among men still persists.³⁵⁴ As women continue to move into these traditionally male positions, they will have to start participating in the masculine competition, too.³⁵⁵ Thus, if gender harassment continues to persist among men, it inevitably will continue to be problematic for women.

As a point of comparison, the current hookup culture on college campuses gives the impression that women have truly become sexually liberated.³⁵⁶ Women have been encouraged to embrace their sexuality,

351. See *supra* note 163 and accompanying text.

352. See *supra* notes 165–171 and accompanying text.

353. See, e.g., Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—With Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.e7d7d7c142a0 [<https://perma.cc/GX6G-QQWN>] (detailing allegations of sexual harassment by journalist Charlie Rose, including Rose walking around naked in the presence of female colleagues); Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/J7ET-JZBA>] (detailing decades of sexual harassment at two Ford plants in Chicago); Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/P949-MR8N>] (detailing decades of allegations of sexual assault and harassment by film executive Harvey Weinstein, including forced oral sex and rape); Melena Ryzik et al., *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/S37D-5BJ3>] (detailing allegations of comedian Louis C.K. masturbating in front of several women); Maria Puente, *Kevin Spacey Scandal: A Complete List of the 15 Accusers*, USA TODAY (Nov. 16, 2017, 12:04 AM), <https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001/> [<https://perma.cc/EW7E-9WCX>] (detailing allegations of sexual harassment, assault, and attempted rape by actor Kevin Spacey, including incidents involving minors).

354. See Berdahl et al., *supra* note 290, at 424.

355. *Id.* at 431; Alonso, *supra* note 266, at 495.

356. Bailey, *supra* note 173, at 309, 315.

and some even try to rack up sexual conquests just like men.³⁵⁷ Once one looks more deeply, however, the reality actually seems to be that women must walk a thin line between the masculine and the feminine in the modern world.³⁵⁸ While it generally has become culturally acceptable for women to have sex outside of marriage, they cannot have too much sex.³⁵⁹ Otherwise, they can be labeled as a “slut.”³⁶⁰

Yet, to the extent that they embrace the traditionally more masculine script of sexual freedom and agency, the ways that women can be coerced into having sex become more hidden.³⁶¹ This coercion is hidden probably because the ways that men can be coerced into having sex are also hidden.³⁶² It is assumed that a man will not have sex with another man unless he *wants* to have sex with another man.³⁶³ A “real” man will do whatever he can to fight off another man’s advances.³⁶⁴ This traditional presumption completely ignores the reality that men are not equally physically, economically, or socially powerful; there can be circumstances where fighting another man off may not be feasible, as is sometimes the case for women.³⁶⁵

The same dynamic can happen in the workplace. If a woman works in a predominantly male environment where men engage in coarse and sexually explicit language, she may choose to engage in this same type of language fit in with the group.³⁶⁶ In *Reed v. Shepard*,³⁶⁷ Reed argued that she engaged in sexually explicit language as a civilian jailer because she believed that “tolerating and contributing to the crudeness of the jail was necessary for her career.”³⁶⁸ But her decision to try and fit in led the

357. *Id.* at 315–16.

358. *Id.* at 316–17.

359. *Id.* at 316.

360. *Id.* at 317.

361. *See id.* at 319–26.

362. *Id.* at 307–09.

363. *Id.* at 307.

364. *Id.* at 303.

365. *Id.* at 307–08.

366. *See, e.g.,* *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991), *abrogation recognized* by *Betts v. Container Corp. of Am.*, 114 F.3d 1191 (7th Cir. 1997) (unpublished table decision); *see also* Alonso, *supra* note 266, at 495 (“[W]omen and men who do not strongly identify with traditional male norms may feel pressure to conform to masculinity contest norms . . . to gain and maintain status in an organization.”).

367. 939 F.2d 484 (7th Cir. 1991), *abrogation recognized* by *Betts v. Container Corp. of Am.*, 114 F.3d 1191 (7th Cir. 1997) (unpublished table decision).

368. *Id.* at 492.

Seventh Circuit to determine that the crudeness was not “unwelcome.”³⁶⁹ In other words, Reed’s hostile environment claim failed because of her choice to embrace some of the masculine norms of her colleagues in an effort to fit in and succeed at work.

The Seventh Circuit described the conduct in the jail as resembling “a modern version of TV’s *Barney Miller*,³⁷⁰ with the typically raunchy language and activities of an R-rated movie, and the antics imagined in a high-school locker room.”³⁷¹ The Seventh Circuit later suggested that Reed did not have to make the choice to enthusiastically join in on this behavior because “other female employees testified that the male jail employees did not behave in this manner around women who asked them not to.”³⁷² But the court did not explore whether choosing not to engage in this behavior affected the terms and conditions of the work of these women. The hyper-masculine behavior in this jail marked this as a male-only worksite that necessarily excluded women and men perceived as gender-nonconforming. Notably, the *Reed* court failed to consider whether Reed was trying to make the best out of a highly gendered work situation.³⁷³ One reason that the court did not analyze Reed’s choice more fully is because the gendered dynamic among men themselves has been mostly hidden from both legal and social analyses.

For these reasons, it is time to consider a masculinities-modified approach to sexual harassment. Under this approach, the law will be interpreted in ways that allow both men and women to have more freedom in how they perform their respective gender roles. In addition, this approach will provide employees better opportunities to become competent workers and enjoy all of the benefits of work regardless of their sex.

CONCLUSION

Because of the important theoretical and legal work of feminists, courts now recognize that sexual harassment is sex discrimination. Some feminists have also tried to persuade courts to recognize the various ways

369. *Id.*; *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 966 (8th Cir. 1999) (determining that the conduct at issue was not “unwelcome” when plaintiff engaged in similar conduct as the harassers including yelling, speaking crudely, and telling off-color jokes).

370. *Barney Miller* was a television series that aired between 1975–1982 and portrayed a New York Police Department precinct. See *Barney Miller*, IMDB, <https://www.imdb.com/title/tt0072472/> [<https://perma.cc/J2JE-DPBE>].

371. *Reed*, 939 F.2d at 486.

372. *Id.* at 492.

373. See Alonso, *supra* note 266, at 495 (“[W]omen and men who do not strongly identify with traditional male norms may feel pressure to conform to masculinity contest norms . . . to gain and maintain status in an organization.”).

that men can be sexually harassed, too. A masculinities-modified approach, however, provides a supplemental lens through which to analyze these cases more robustly. Because of the gendered relationship that men have with one another, this approach suggests that some cases that courts treat as mere “horseplay” among men perceived as gender-conforming are actually sex discrimination. In addition, this approach raises the question of whether the masculine competition among men that leads to this type of harassment might be the epicenter of all sexual harassment. Scholars need to examine more fully how sex discrimination cases intersect with race, disability, national origin, and age cases. In addition, they should consider the ways that a masculinities-modified approach can help women attain greater equality in the workplace.