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THE FEMINIST MISSPEAK OF SEXUAL HARASSMENT

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I. INTRODUCTION

Feminism is out of control. I recently attended an academic conference on domestic violence where, as usual, the speakers and the audience were virtually all women. As is to be expected, one woman or another lamented the lack of male interest in matters affecting both sexes. Finally, a well-regarded male academic spoke up. However, he did not offer a fresh perspective. Despite his years of research and scholarship in the field, he cautioned that any comments he made must be considered with great skepticism because of his sex. He apologized for being a man.

With a feminist narrative flourish, such a vignette illustrates that feminism does more than shape and control the debate on gender issues.[1]

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1. For recognition of the power of storytelling by feminists, see, for example, Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 666 (1998) [hereinafter Kelly, *Stories from the Front*]. *See also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 2 (1991); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1190 n.26 (1991); Jane C. Murphy, *Lawyering for Social Change: The Power of Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1245 (1993).

The use of storytelling by feminism is consistent with feminism's preference for qualitative, clinical studies rather than quantitative, empirical studies which are not believed to account for contextual considerations. *See, e.g.*, Linda Kelly, *Disabusing the Definition of Domestic Abuse:*

Feminism silences the debate. No other theories can legitimately address issues identified as "feminist." Feminism is a tautological success story. Feminism defines the issues. Feminism limits the terms. Feminism dictates the outcomes.

Yet despite feminism's hegemonic strength, feminist theory is on the brink of self-annihilation. After waves of liberal, radical, and cultural feminism, we are now riding a "third wave" of feminism that risks crashing into nothingness.[2] The permutations of feminist legal theory have proliferated to the point of endangering feminism's existence. "Anti-essentialist reader[s],"[3] half-finished manifestos,[4] "multiplicative" identity analyses,[5] intersectionality,[6] erotica theory,[7] even the hint of a return to liberalism[8]—all are welcomed.

Yet if feminist theory has reached an amorphous, nearly extinct state, how does it continue to command attention? What remains at the feminist

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How Women Batter Men and the Role of the Feminist State, 30 FLA. ST. U. L. REV. 791, 818-20 (2003) [hereinafter Kelly, *Disabusing the Definition of Domestic Abuse*] (examining feminist criticisms of scientific studies on the female use of domestic violence). At the most abstract level, feminism's support of narrative is also consistent with its criticism of liberalism's neutral quality. For further discussion of feminism's critique of liberal theory, see *infra* Parts II.A., II.C.

2. For a discussion of the developments in feminist theory, see *infra* Part II.

3. FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003) (a collection of discussions devoted to the critique of feminism as "essentialist"). For discussion of the essentialist critique of feminism, see *infra* Part II.D.

4. *See, e.g.*, Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992). The Harvard journal made a controversial decision to publish Professor Frug's unfinished work after she was murdered. Arthur Austin, *The Top Ten Politically Correct Law Review Articles*, 27 FLA. ST. U. L. REV. 233, 237-40 (1999). The circumstances surrounding Professor Frug's death, the content of the article, and the journal's decision to publish it in its unfinished form led to Professor Frug's article being dubbed the most politically correct law review article. *Id.* For further discussion of Frug's work, see *infra* note 58 and accompanying text.

5. This term was coined by Adrien Wing to recognize the various factors (*e.g.*, race, age, wealth, nationality) that shape identity. Adrien Katherine Wing, *Introduction: Global Critical Race Feminism for the Twenty-First Century*, *in* GLOBAL CRITICAL RACE FEMINISM 7 (Adrien Katherine Wing ed., 2000).

6. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243-45 (1991). For further discussion of intersectionality, see *infra* note 56 and accompanying text.

7. *See generally* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (celebrating woman's sexual pleasure and critiquing radical and cultural feminism's respective treatment of sex as an act of oppression or reproduction). For further discussion of Franke's theory, see *infra* notes 125-39 and accompanying text.

8. Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265, 1267 (1993) (reviewing FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katherine T. Bartlett & Rosanne Kennedy eds., 1991)) (stating that the return to liberal feminism "offers law's best hope for justice founded upon true social equality"). For further discussion of Dailey's theory, see *infra* note 59 and accompanying text.

core? What issues does feminism control? How has feminism distorted our understanding of such issues? Who has been harmed by the distortion?

This Article tackles such questions in the context of sexual harassment law and theory.[9] Nearly twenty years ago, the Supreme Court endorsed the feminist definition of sexual harassment in the landmark case of *Meritor Savings Bank, FSB v. Vinson*.[10] Accepting Catharine MacKinnon's design,[11] the Court recognized that sexual harassment occurs not only when the conduct threatens a tangible employment benefit but also when such conduct creates a "hostile working environment" because of a person's sex.[12] *Meritor* raised the sexual harassment claim of a woman in the "quintessential" male aggressor and female victim fact pattern.[13] Yet opposite-sex cases involving male victims and female aggressors, as well as same-sex cases involving either sex, also exist.[14] Today, these nontraditional cases remain unduly challenged by the control feminist theory continues to wield.[15] Feminism defines sexual harassment. Feminism limits the players. Feminism dictates the victors.

The Feminist Misspeak of Sexual Harassment undoes the circle of sexual harassment law and theory. After observing the general trends in feminist theory and the movement's current, potentially self-destructive state in Part I, Part II compares the more particular feminist shape of sexual harassment law. In combination with Part III's examination of recent feminist theory in the sexual harassment area, it makes clear that feminism remains alive and influential as a matter of law and theory. Despite strong postmodern efforts at the highest meta level of theory, feminism cannot abandon its patriarchal core. Notwithstanding the infinite differences between women, feminism maintains that all women are controlled by men. Sexual harassment law and theory is grounded in this basic feminist tenet. Sexual harassment's two critical elements of causation and severity

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9. I have previously written on feminist control of domestic violence law and theory. Kelly, *Disabusing the Definition of Domestic Abuse*, *supra* note 1.

10. 477 U.S. 57 (1986).

11. MacKinnon constructed the two-prong quid pro quo or hostile environment definition of sexual harassment in an important work written several years earlier. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1-2 (1979). For discussion of Catharine MacKinnon's role in *Meritor* and her ongoing influence on sexual harassment law and theory, see *infra* Parts II.A.-B.

12. *Meritor Sav. Bank, FSB*, 477 U.S. at 64. For further discussion of the development of sexual harassment as a form of sex discrimination prohibited by Title VII, see *infra* Part III.

13. *Meritor Sav. Bank, FSB*, 477 U.S. at 59-60; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683,1686 (1998). For further discussion of the feminist influence on *Meritor*, see *infra* Part III.B.

14. For further discussion of the existence and the frequency of such claims, see *infra* notes 336-38 and accompanying text.

15. For further discussion of the legal standard set for "nontraditional" sexual harassment cases, see *infra* Parts IV.A, IV.C, VI.A.

continue to be distorted by the feminist misspeak. Parts IV and V evidence such distortion by respectively reviewing the treatment of causation and severity in law and theory. As Part VI recognizes, feminism challenges men in both the opposite-sex and same-sex context. Yet women are also injured. In the interest of women and men, Part VII urges the recognition and elimination of the feminist misspeak of sexual harassment.

II. DEVELOPMENTS IN FEMINIST THEORY

A. *Liberal Feminism*

Feminist legal theory originated in the 1960s with the feminist movement's effort to achieve formal equality for women.[16] With its reliance on liberal theory, liberal feminism expects women, like men, to be rational beings who want nothing more than individual autonomy.[17] Such liberty can best be achieved by preventing state interference with one's pursuit of self unless such pursuit is in turn interfering with the liberty of another.[18] Combined, these principles of rational behavior, individual autonomy, self interest, and liberty demand state neutrality toward its citizenry.[19] Consequently, any barriers erected by the state that hinder according women the same privileges and rights as men must be removed.

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16. The beginnings of feminist legal theory are associated with the entrance of a large number of women into the legal academy and feminism's "Second Wave." The "Second Wave" is culturally associated with Gloria Steinem. *See* Rachel F. Morah, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 268-69 (2004). The "First Wave" is associated with the women's suffrage movement. Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 209 (1998).

17. *See, e.g.*, CHRIS BEASLEY, WHAT IS FEMINISM?: AN INTRODUCTION TO FEMINIST THEORY 51-53 (1999). For a general review of liberal feminism, see, for example, HILAIRE BARNETT, INTRODUCTION TO FEMINIST JURISPRUDENCE 121-34 (1998); Dailey, *supra* note 8, at 1267-69; Leslie Friedman Goldstein, *Can This Marriage Be Saved? Feminist Public Policy and Feminist Jurisprudence*, *in* FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE 11, 16-23 (Leslie Friedman Goldstein ed., 1992). For more critical examinations, see generally Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (recognizing the liberal strands of feminism); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (discussing the evolution from liberalism to feminism); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (arguing for the integration of feminism and liberalism); Robin L. West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990) (arguing for the integration of feminism and liberalism).

18. BARNETT, *supra* note 17, at 122; Robin West, *Jurisprudence and Gender*, *in* FEMINIST JURISPRUDENCE 493, 495-97 (Patricia Smith ed., 1993).

19. BARNETT, *supra* note 17, at 122-23; West, *supra* note 18, at 496. While I acknowledge the risk of oversimplifying liberal theory by reducing it to such basic principles, any deeper discussion of liberalism is beyond the scope of this Article.

Despite a string of feminist successes credited to liberal theory, the theory also proves divisive for feminism.[20] While liberal feminists demand that women be treated "just like men," where differences between men and women are characterized as a natural or social condition rather than as a product of affirmative state action, liberalism's principle of neutrality prohibits any state corrective effort.

B. *Cultural Feminism*

This formidable sameness/difference challenge led the Supreme Court to reason that protection against sex discrimination does not extend to prevent the disparate treatment of pregnant women.[21] For feminist theory, the response to the sameness/difference question was the creation of two extremes.[22] At one end of the continuum stands the relational or cultural strand which celebrates female "difference." Unlike men, who operate under a liberal standard of autonomy and an "ethic of justice," women behave in a relational manner, adopting an "ethic of care."[23] Such

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20. In the legal arena, liberal feminism has brought significant legislative changes including such achievements as the Equal Pay Act of 1963, the Civil Rights Act of 1964, Title IX in 1972, and the Equal Credit Opportunity Act of 1975. Goldstein, *supra* note 17, at 12. Likewise, in 1971, the Supreme Court rendered a series of important decisions including *Reed v. Reed*, which disavowed the belief that men and women belonged in separate spheres. 404 U.S. 71, 76 (1971). For further discussion of the judicial achievements of liberal feminism, see generally Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 15 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

21. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 134-35 (1976); Geduldig v. Aiello, 417 U.S. 484, 494 (1974). For a sampling from the extensive literature on the treatment of pregnancy within the sameness/difference debate see, for example, RUTH COLKER, PREGNANT MEN: PRACTICE, THEORY, AND THE LAW (1994) (attempting to combine theory and practice on the issue of abortion); Goldstein, *supra* note 17, at 12-15; Scales, *supra* note 17, at 1396-99; Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 128 (D. Kelly Weisberg ed., 1993) (arguing that "equal treatment" of pregnant wage earners is superior to "special treatment").

22. For a collection of perspectives on the debate, see, for example, FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE, *supra* note 17. For the cultural and radical feminist positions respectively, see *infra* notes 23-24 and accompanying text and Part III.C.

23. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 62-63, 164 (1982) (providing a heavy influence for cultural or relational feminism). Yet interestingly, while the beginnings of relational feminism and its promotion of the female as inherent nurturer are invariably traced to Carol Gilligan, Gilligan believed that a woman could achieve real fulfillment only by developing beyond the relational identity, ultimately combining individual rights with responsibilities. For reliance on Carol Gilligan's work to support relational feminism's basic advocacy of care, see, for example, West, *supra* note 18, at 500-04. For acknowledgment of the more developed nuances of Gilligan's theory, see, for example, Kenneth L. Karst, *Woman's Constitution*, DUKE L.J. 447, 480-85 (1984). *See also*, Scales, *supra* note 17 (rejecting the belief that philosophies of justice (right) and care can be combined, and advocating law's

behavioral observations allow relational feminists to argue that special legal accommodations be made for women on account of their caregiving nature.[24]

C. *Radical Feminism*

Declaring "Radical feminism is feminism,"[25] Catharine MacKinnon rejects all other forms of feminism and creates the other extreme. Liberal and cultural feminism are both inherently flawed. For MacKinnon, the two theories simply hold up opposite sides of the sameness/difference debate, and ultimately, each depends upon liberal theory—which is inherently male.[26]

Radical feminism attacks liberalism's central principle of neutrality. Rather than ensuring the law's equal treatment of the sexes, state neutrality

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transformation to a relational approach).

For further discussion of cultural feminism, see, for example, Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605 (2001) (offering a contrasting perspective on the reemergence of care); Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's* Toward a Feminist Theory of the State, 100 YALE L.J. 2247 (1990) (reviewing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989)) (criticizing MacKinnon's program as not fully developed); McClain, *supra* note 17 (looking at the model of "atomistic man" who is claimed to be at the root of liberalism and the legal system); Scales, *supra* note 17 (illustrating the difficulty of seeing solutions to inequality through abstractions); Sherry, *supra* note 17 (contending that modern men and women have distinctly different perspectives on the world); West, *supra* note 18, at 494.

24. This support for "special" accommodations would provide, for example, for workplace accommodations of women's caregiving. *See generally* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, *in* FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER, *supra* note 3, at 200 (arguing for a "theory of collective responsibility for dependency").

Beyond insisting upon the unique legal treatment of women, relational feminists also suggest that the law adopt an ethic of care in a more general fashion. *See, e.g.*, Abrams, *supra* note 23, at 1607-09; Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 59-64 (2002). This position has further divided relational feminists, and some suggest that feminism should supplement existing law, for example, by allowing the notion of care to dictate such changes as the adoption of a duty to rescue in tort. Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 905-07 (discussing application of feminist themes in particular areas of law). Others have argued more aggressively for the law to be transformed entirely, guided wholly by the ethic of care. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 223 (1995) (arguing that the "mother-child dyad" should be emulated by women and men and replace the sexual dyad as the basic family structure); McClain, *supra* note 17, at 1183, 1238-39 (recognizing the two approaches within relational feminism but supporting complete transformation); Scales, *supra* note 17, at 1385-86 (supporting complete transformation). For a further feminist discussion of torts, see *infra* note 310.

25. MACKINNON, *supra* note 23, at 117.

26. *See id.*

instead preserves man's existing dominant position.[27] Because a liberal state can address gender inequality only when the state affirmatively disregards the neutrality principal and acts in favor of male interests, all socially or biologically generated inequalties are justified as beyond the liberal state's reach.[28] The liberal state is thus at its worst when it is most neutral.[29]

Radical feminism eliminates the need for overt state discriminatory action as a condition precedent to state corrective action. The state is expected to respond to both public and private discriminatory acts, as both are by-products of male power, which the state perpetuates through its ongoing advocacy of liberal theory.[30] Radical feminism exposes privacy as a mechanism for protecting "a right of men 'to be let alone' to oppress women one at a time."[31]

Radical feminism boldly takes on the prevalence of male power not only within the legal system but throughout society.[32] It recognizes that such power is achieved through the male control of gender.[33] Distinguished from biological sex, gender is a social construct used to cast women as men's subordinates.[34] "Women and men are divided by gender, made into

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27. *See id.* at 248.

28. *Id.*

29. "When it is most ruthlessly neutral, it is most male; when it is most sex blind, it is most blind to the sex of the standard being applied." *Id.*

30. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 100 (1987). For a sampling from the terrific amount of literature discussing the private/public dichotomy, see generally THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (a collection of essays devoted to eliminating the dismissal of domestic violence as a private harm); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869-77, 1907 (1996) (recognizing the effort to destroy the divide through the aggressive prosecution of domestic violence as a public crime); Mahoney, *supra* note 1, at 11-15 (attributing society's denial of domestic violence to the public/private dichotomy); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 645-48 (1986) (describing the growing characterization of domestic violence as a public crime); Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1070-73 (1996) (recognizing the development of the spousal immunity doctrine within the public/private framework); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119, 2154-55 (1996) (reviewing the historical treatment of domestic violence as a right of privacy and the "modernization" of such arguments which allow for the perpetuation of domestic violence).

31. MACKINNON, *supra* note 30, at 102 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890)).

32. The focus on a sphere of power rather than on a particular institutional system is a critical difference between radical and liberal feminism. BARNETT, *supra* note 17, at 134.

33. MACKINNON, *supra* note 23, at 110-11.

34. Gender is a "learned trait, an acquired characteristic, an assigned status, with qualities that vary independent of biology and an ideology that attributes them to nature." *Id.* at 109. Because

the sexes as we know them, by the social requirements of its dominant form, heterosexuality, which institutionalizes male sexual dominance and female sexual submission."[35] A woman's sexuality is measured only by her ability to arouse desire in a man.[36] The act of sexual intercourse is the original means by which man oppresses women.[37] "[A]natomy is destiny."[38]

Radical feminism irreversibly alters the feminist perspective. If a woman's entire being is controlled by male desire, the female "differences" of nurture and care celebrated by cultural feminism are nothing more than virtues imposed on women by men. Protecting such differences, thus, only perpetuates women's inferiority. "Difference is the velvet glove on the iron fist of domination."[39] Likewise, the "sameness" cries of liberal feminism keep women subordinate to men to the extent that "sameness" translates into an aspiration to imitate male qualities.[40]

Radical feminism demands a shift in the terms of the debate—from terms of sameness and difference to terms of dominance and subordination.[41] Our society's patriarchal infrastructure dictates every aspect of our behavior, including most significantly, the sexes' relations. If the "male pursuit of control over women's sexuality" is "definitive,"[42] the subordination of women is all-pervasive. "[C]onceiving nature, law, the family, and roles as consequences, not as foundations, feminism fundamentally identifies sexuality as the primary social sphere of male power."[43]

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such a characterization effectively makes both sexes society's victims, I use the terms gender and sex interchangeably throughout this Article. For further recognition of the victimization of radical feminism in general critiques of feminism, see *infra* notes 44-49 and accompanying text. For similar criticisms of sexual harassment's victimization of men and women through its adoption of feminist theory, see *infra* notes 326-47 and accompanying text.

35. MACKINNON, *supra* note 23, at 113.

36. *Id.* at 118.

37. *See id.* at 110-11.

38. *Id.* at 54.

39. *Id.* at 219.

40. *Id.* at 220-21. To the extent gender is socially constructed, MacKinnon also recognizes the male gender as a social construct. *Id.* at 112.

41. *Id.* at 242. MacKinnon states:

> In this approach, inequality is a matter not of sameness and difference, but of dominance and subordination. Inequality is about power, its definition, and its maldistribution. Inequality at root is grasped as a question of hierarchy, which—as power succeeds in constructing social perception and social reality—derivatively becomes categorical distinctions, differences.

Id.

42. *Id.* at 112.

43. *Id.* at 109.

D. *The Essentialist Critique of Radical and Cultural Feminism*

Yet while radical feminism is applauded for its "relentless insistence"[44] on the gender hierarchy's ubiquity, critics attack the theory for "essentializing" woman as the perpetual sexual victim.[45] Of course, the essentializing critique is not unique to radical feminism. While radical feminism characterizes all gender connections and their physical origins as oppressive, cultural feminism's celebration of exactly those ties renders it vulnerable to the charge of denying women an identity beyond motherhood.[46]

Yet while the essentializing nature of radical and cultural feminism is quite different, with the radical strain repressing all women into victimhood and the cultural strain elevating all women into motherhood, they strike a similar chord. Radical and cultural feminism share a preoccupation with sex, reducing it either to a point of "danger" or "dependency."[47] In one way or another, women's bodies are being used against them. Intercourse is either a product of coercion or a means of achieving children.[48] It is never simply an act of intimacy—of human pleasure.[49] Moreover, neither theory recognizes the many other factors that shape a woman's identity. The woman of radical or cultural theory does not represent all women but rather those women who have assumed all the advantages of being part of the white middle class.[50] Radical and cultural feminist theories are called upon to account for other life-defining distinctions such as race, ethnicity, class, and age.[51] Such combined factors

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44. Cornell, *supra* note 23, at 2248.

45. *See* BARNETT, *supra* note 17, at 173; Abrams, *supra* note 23, at 1611; Cornell, *supra* note 23, at 2248; Franke, *supra* note 7, at 199; West, *supra* note 18, at 499-500.

46. BARNETT, *supra* note 17, at 148-57; Franke, *supra* note 7, at 183; McClain, *supra* note 17, at 1184-86. For further discussion of cultural feminism, see *supra* Part II.B. For further discussion of radical feminism, see *supra* Part II.C.

47. Franke, *supra* note 7, at 182. Yet even Franke's essentialist criticism maintains a degree of essentialism as it presumes a woman's heterosexuality. *See id.* at 183. For a discussion of the essentialism challenge posed to feminism by lesbianism and bisexuality, see, for example, BARNETT, *supra* note 17, at 189-94; Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, BERKELEY WOMEN'S L.J. 191, 213 (1989-90).

48. *See* Franke, *supra* note 7, at 199.

49. *See id.*

50. BARNETT, *supra* note 17, at 189-94; Goldstein, *supra* note 17, at 26-31.

51. Kimberle Crenshaw powerfully explains how women of color are marginalized at the intersection of gender with race, class, and immigration status. Crenshaw, *supra* note 6, at 1246-48; *see* DRUCILLA CORNELL, THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT 6 (1995); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT IX (1988); Cornell, *supra* note 23, at 2263; Kelly, *Stories from the Front*, *supra* note 1, at 672-82.

provide the complete understanding of the discrimination women face.[52] "[F]emininity . . . must always be modified."[53]

E. *Postmodern Feminism*

On the crest of such criticisms, feminism has now entered its "Third Wave," where postmodern existentialism thrives.[54] Rejecting the "meta theory" or single truth approach, postmodern feminism denies that gender (and whatever positive or negative images society conjures from it) constitutes the single axis on which society revolves.[55] Like women, their lives, their interaction with society and the state, their relations with men and with each other, and their sources of power and disempowerment are multidimensional.[56]

Yet pushing postmodern feminism's anti-essentialist critique to its limits threatens self-destruction. We are left standing at the edge of an "epistemological abyss," where the infinity of difference defies defining woman, thereby rendering feminism an intellectual impossibility.[57] Postmodern purists, following the example of Mary Joe Frug, embrace such chaos. "Only when sex means more than male or female, only when the word 'woman' cannot be coherently understood, will oppression by sex be fatally undermined."[58] At the other postmodern extreme are those who seem ready to abandon legal feminism and return full-circle to liberal

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52. For more on the postmodern critique, see *infra* Part II.E.

53. Cornell, *supra* note 23, at 2263.

54. Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug's Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 3 (2001) (discussing feminism's "Third Wave"). For the distinctions between the "First" and "Second" Waves of feminism, see *supra* note 16 and accompanying text.

55. *See, e.g.*, BEASLEY, *supra* note 17, at 81. In this regard, postmodern feminism fits well within the general postmodern movement's rejection of such theories as liberalism and marxism for their respective assertions that human rationality or economic power are single organizing principles around which society is formed. For further discussion of the general postmodern movement and feminism, see, for example, BARNETT, *supra* note 17, at 182-87; BEASLEY, *supra* note 17, at 81-89.

56. For a general discussion of postmodern feminism, see, for example, BARNETT, *supra* note 17, at 177-207; BEASLEY, *supra* note 17, at 81-116; FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER, *supra* note 3 (providing a collection of postmodern feminist essays); Crenshaw, *supra* note 6, at 1243 (arguing that violence against women of color is often caused by intersecting patterns of racism and feminism); Goldstein, *supra* note 17, at 27-29; Deborah L. Rhode, *Feminist Critical Theories*, *in* FEMINIST JURISPRUDENCE 594, 595 (Patricia Smith ed., 1993) (examining the relationship between feminist critical theory and other forms of critical legal theory).

57. Dailey, *supra* note 8, at 1273. For further recognition of postmodernism as the "grand theory of non-theory," see also BARNETT, *supra* note 17, at 187.

58. Frug, *supra* note 4, at 1075.

theory, thereby following the path of many women outside the academy who reject any identification with feminism.[59]

F. *Maintaining the Feminist Core*

Today, postmoderns and liberals alike seem poised to explode feminism. Feminism has over-essentialized. It has homogenized, victimized, and maternalized. And yet, despite the endless permutations of feminism and the promises of the extremes, a center holds. A "relentless insistence"[60] to retain legal feminism's most central tenet remains. "The gender hierarchy is omnipresent."[61] Women are always the victims. Men are always the aggressors. The law must recognize and eliminate this all-pervasive power that men everywhere wield. These binding feminist principles are evident in the development and current state of sexual harassment law and theory. Feminism conceived both sexual harassment law and theory. And in the twenty-five years since sexual harassment's conception, feminism remains its guiding force.

III. THE FEMINIST CONCEPTION OF SEXUAL HARASSMENT

A. *Catharine MacKinnon: Feminist Theory*

While sexual harassment is housed within Title VII of the Civil Rights Act of 1964 as an act of sex discrimination, Congress did not originally contemplate prohibiting any form of sex discrimination.[62] Protecting "sex" was a strategic afterthought, added to the protected classes of race, color,

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59. *See, e.g.*, Austin & Schneider, *supra* note 54, at 7 (recognizing and cautioning against the postmodern feminist's rejection of any association with feminism); Dailey, *supra* note 8, at 1285 (arguing that feminism and liberalism share so many principles that feminism is in effect just "[e]mpathetic liberalism"); Cynthia V. Ward, *The Radical Feminist Defense of Individualism*, 89 NW. U. L. REV. 871 (1995) (suggesting liberalism and feminism's common goals of equality, respect, and self-development renders feminist theory unnecessary).

60. Drucilla Cornell characterizes MacKinnon's recognition of the pervasiveness of the gender hierarchy in this manner. Cornell, *supra* note 23, at 2248.

61. Kelly, *Disabusing the Definition of Domestic Abuse*, *supra* note 1, at 818 (recognizing how the patriarchal understanding of law and society has determined domestic violence law and theory).

62. Pursuant to Title VII:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a) (2000).

religion, and national origin in an effort to defeat the entire measure one day before the legislation passed the House.[63] Not surprisingly then, the concept of sexual harassment law is also not a legislative brainchild. The term is credited to Working Women United, a feminist group, which defined sexual harassment as "'the treatment of women workers as sexual objects.'"[64] From such beginnings, the term has remained under feminist control.[65] The development of sexual harassment as a legal theory and its placement within Title VII are credited entirely to Catharine A. MacKinnon.[66]

With her 1979 release of *Sexual Harassment of Working Women*, Catharine MacKinnon shaped the feminist contours of harassment as a legal theory and provided the necessary legal link between harassment and discrimination.[67] "Sexual harassment, most broadly defined . . . [is] the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[68] Against this backdrop of disparate distribution of power, sexual harassment took on the discriminatory quality necessary to be anchored in Title VII. Yet the use and misuse of power, even under MacKinnon's broadest definition, always remains controlled by gender. Every aspect of our lives—our social, familial, employment, education, and legal settings—is built upon a patriarchal framework. "Intimate violation of women by men is sufficiently pervasive in American society as to be nearly invisible."[69] Because men control the workforce, it follows that only women are vulnerable to sexual harassment.[70]

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63. On the lack of legislative history in support of prohibiting sex discrimination, see *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986) (recognizing, because of the last minute addition of sex and the legislative opposition, that "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'"). *See also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 474 & n.171 (1997); Susan Estrich, *Sex at Work*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES 755, 756 (D. Kelly Weisberg ed., 1996).

64. Schultz, *supra* note 13, at 1685 n.2 (quoting Dierdre Silverman, *Sexual Harassment: Working Women's Dilemma*, QUEST: FEMINIST Q., Winter 1976-1977, at 15).

65. Noting the influence of feminists generally, see, for example, Bernstein, *supra* note 63, at 446; Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997).

66. On the characterization of Catharine MacKinnon as the mastermind of sexual harassment, see, for example, *Sexual Harassment: Introduction*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES, *supra* note 63, at 725, 729 (finding MacKinnon to be "probably the most famous scholar" on sexual harassment and the notable "exception" in terms of providing a legal theory); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 717-18 (1998).

67. *See generally* MACKINNON, *supra* note 11 (describing the pervasiveness of sexual harassment in the work place and the expectation that women will not speak up in their own defense).

68. *Id.* at 1.

69. *Id.* (footnote call number omitted).

70. *Id.*

With this feminist model, MacKinnon designed the now fully accepted, dual-parameter definition of sexual harassment: that it may take the obvious form of a quid pro quo direct exchange of sex for economic benefit or the less apparent but equally objectionable form of a hostile work environment.[71]

MacKinnon's work clearly advanced the legal theory of sexual discrimination by forcing the inclusion of the reality of sexual harassment. However, beyond characterizing sexual harassment as a means of disempowerment, MacKinnon's sexual harassment theory also relies on her fundamental message: power and its most basic weapon, sex, are controlled and misused exclusively by men.[72] Sexual harassment merely imitates "the inequitable social structure of male supremacy and female subordination."[73]

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71. As MacKinnon described:

> Sexual harassment may occur as a single encounter or as a series of incidents at work. It may place a sexual condition upon employment opportunities at a clearly defined threshhold, such as hiring, retention, or advancement; or it may occur as a pervasive or continuing condition of the work environment.

Id. at 2. Subsequently, the EEOC regulations similarly stated:

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

29 C.F.R. § 1604.11(a) (2004).

For the Supreme Court's adoption of the twofold definition of sexual harassment, see *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). For discussion of *Meritor* and the courts' adoption of this definition, see *infra* Part III.B.

72. MacKinnon states:

> Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of its dominant form, heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality.

MACKINNON, *supra* note 23, at 113.

73. MACKINNON, *supra* note 11, at 235.

B. Meritor Savings Bank, FSB v. Vinson: *Feminist Law*

MacKinnon presented such arguments as plaintiff's co-counsel in the seminal case of *Meritor Savings Bank, FSB v. Vinson*.[74] In a unanimous decision, the Supreme Court rejected the employer's defense that Title VII contemplated only quid pro quo actions, and it extended Title VII to recognize MacKinnon's hostile work environment theory.[75]

Notwithstanding the lack of economic injury, the Court reasoned that sexual harassment occurs when the harasser's conduct is both "unwelcome"[76] and "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[77] Being forcibly raped, being fondled in front of other employees, having to witness the harasser exposing himself, as well as having sex forty to fifty times with the harasser were amongst the

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74. MacKinnon also wrote the brief. *Meritor Sav. Bank, FSB*, 477 U.S. at 58. For further discussion of *Meritor* and MacKinnon's work on the case, see *Sexual Harassment: Introduction*, *supra* note 66, at 730.

75. While the *Meritor* Court acknowledged that sex was added to Title VII immediately before its passage, thus precluding any real legislative history on sex discrimination, the Court dismissed the employer's argument that Congress intended harassment claims to be limited to claims of economic injury and proceeded to infer that the statute was intended to extend beyond tangible injury cases. *Meritor Sav. Bank, FSB*, 477 U.S. at 63-64. For discussion of Title VII's lack of legislative history on sex discrimination, see *supra* notes 62-63 and accompanying text.

The Court also took note of the previous recognition of hostile environment claims in the instance of race and national origin claims and drew an analogy between such cases and sexual harassment. *Meritor Sav. Bank, FSB*, 477 U.S. at 65-67 (relying on Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (marking the first case of hostile environment by recognizing hostility directed at employee as a result of employer's discriminatory treatment of business's hispanic clientele)); *id.* at 66-67 (relying on Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (stating that to "run a gauntlet" of abusive sexual conduct at work is as bad as racial abuse)).

76. Unwelcome is distinct from involuntary. "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Meritor Sav. Bank, FSB*, 477 U.S. at 68.

77. *Id.* at 67 (alteration in original) (quoting *Henson*, 682 F.2d at 904). *Meritor* also set a general standard necessitating notice and internal grievance procedures, thereby effectively limiting employer liability to instances of actual or constructive knowledge. *See id.* at 72; *cf. id.* at 75-76 (Marshall, J., concurring in the judgment) (setting a strict liability standard that does not consider notice for sexual harassment committed by a supervisory employee). For more recent Supreme Court treatment of employer liability, see generally *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (examining whether an employee who suffers sexual harassment but does not suffer tangible job consequences can recover against an employer without showing that the employer is at fault for the supervisor's actions), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (defining the circumstances under which an employer may be held liable for sexual harassment by a supervisor). For regulatory treatment of employer liability, see 29 C.F.R. § 1604.11(d)-(g) (2004). *See also* Storrow, *supra* note 66, at 683 n.30 (discussing variety of employer liability cases). For confirmation of unwelcomeness, severity, causation, and employer liability as the principal four elements of sexual harassment, see *infra* note 98 and accompanying text (discussing the circuits' adoption of these elements).

conditions existing in *Meritor* that could give rise to a hostile environment claim.[78] Concluding "[w]ithout question" that both quid pro quo and hostile environment claims constitute sexual discrimination, the Supreme Court endorsed one of the most fundamental aspects of MacKinnon's work.[79] But what position did the Court take on sexual harassment's feminist underpinnings, that harassment was both a *cause* and *effect* of our patriarchal society?

According to MacKinnon, sexual harassment simultaneously subordinates women "by using her employment position to coerce her sexually, while using her sexual position to coerce her economically."[80] *Meritor* thus presented the "quintessential" feminist case—male supervisor coercing female subordinate into sexual relations.[81] Consequently, without a case outside the classic feminist model, it is difficult to know what influence, if any, the feminist subordination theme had upon the *Meritor* Court.[82] *Meritor* just might not have presented the best opportunity for the Supreme Court to definitively state the boundaries of its own sexual harassment theory.

These questions about the law's direction naturally point us back to looking at the development of legal theory. In the nearly twenty years since *Meritor* and the twenty-five years since the creation of sexual harassment as a legal theory, there have been numerous opportunities for both law and theory to clearly reject the original sexist position. While law and theory influence one another, each is independently capable of recognizing sexual harassment as power-wielding by both sexes against either sex, unrestrained by the feminist-described social and biological forces, which make only men capable of sexual aggression and then only to maintain the gender hierarchy. Staking out such a substantive position should be welcomed, as it would be consistent with modern theoretical critiques of feminism and purported efforts to advance the theory.[83] Yet, the legacy of patriarchy remains clearly evident in sexual harassment theory.[84] And

78. *Meritor Sav. Bank, FSB*, 477 U.S. at 60.

79. *See id.* at 64.

80. MACKINNON, *supra* note 11, at 7.

81. Schultz, *supra* note 13, at 1686.

82. The lack of *Meritor*'s discussion of the theory used to support it's recognition of sexual harassment under Title VII also has led others to attempt to fill the gap. *See, e.g.*, Franke, *supra* note 65, at 692 (suggesting two explanations for the *Meritor* decision: that either the Court engaged in "an avoidance technique" because it was unable to admit to acceptance of MacKinnon's conflation of sex with subordination, or the Court intuitively recognized such sexual conduct as discrimination without needing to articulate a theory).

83. For a discussion of such criticisms of radical feminism, see *infra* notes 340-60 and accompanying text.

84. *Sexual Harassment: Introduction*, *supra* note 66, at 726 (acknowledging the recognition of the women's movement of sexual harassment as a feminist issue); Franke, *supra* note 65, at 763

despite the law's theoretical freedom, feminist control over sexual harassment has allowed feminist themes to continue to resonate in sexual harassment law.

IV. THE FEMINIST GROWTH OF SEXUAL HARASSMENT LAW AND THEORY: THE CAUSATION ELEMENT

In the late 1990s, sexual harassment gained renewed attention in law and theory. In both cases, the increased attention was sparked by growing confusion as to the meaning of sexual harassment.[85] Dubbed sexual harassment's "second generation,"[86] four leading feminist scholars responded by attempting to develop a "new jurisprudence,"[87] address the "wrong,"[88] "reconceptualize,"[89] or come up with yet another language of "treatment."[90] Initially, none of these well-regarded scholars seems solidly aligned with MacKinnon's "first generation" of sexual harassment theory. Yet ultimately, each scholar reaffirms and broadens the original feminist theme that sexual harassment law is intended to dismantle the patriarchal structure governing the workplace.

The publication of the second generation's theories virtually coincided with the announcement of three major Supreme Court decisions on sexual harassment. Although *Burlington Industries, Inc. v. Ellerth*[91] and *Faragher v. City of Boca Raton*[92] focused on the standard for employer liability,

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(recognizing sexual harassment's patriarchal undercurrent, male sexuality); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2078 (2003) (recognizing feminist emphasis on the connection of male power and sexuality in both quid pro quo and hostile environment case law); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1776 n.336 (2002) (conceding that Title VII has been used on occasion to reach "seemingly benign, but paternalistic differential treatment").

85. *See* Schwartz, *supra* note 84, at 1703.

86. The "first" and "second" generation of sexual harassment is a characterization of the Fifth Circuit's Judge Patrick E. Higginbotham. Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 267-68 (5th Cir. 1998). The "second generation" of sexual harassment scholars is identified with four principal works. *See* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Bernstein, *supra* note 63; Franke, *supra* note 65; Schultz, *supra* note 13. I am grateful to David Schwartz for bringing these scholars and the *Butler* case to my attention. Schwartz, *supra* note 84, at 1700 n.13, 1701 n.19. I ultimately, however, do not agree with Schwartz's minimization of the influence of these particular works or feminist theories on sexual harassment law. For my examination of Schwartz's work, see *infra* note 118 and accompanying text.

87. Abrams, *supra* note 86, at 1171.

88. Franke, *supra* note 65, at 693.

89. Schultz, *supra* note 13, at 1769-74.

90. *See generally* Bernstein, *supra* note 63 (criticizing the use of the reasonable person standard in sexual harassment cases and proposing the "respectful person standard").

91. 524 U.S. 742 (1998).

92. 524 U.S. 775 (1998).

Oncale v. Sundowner Offshore Services, Inc.[93] addressed the theoretical concerns of the second generation. And in so doing, *Oncale* confirms the Court's own feminist stance.

At first, *Oncale* may seem an odd case to evidence the feminist hold. *Oncale* recognizes that Title VII's prohibition against sexual discrimination includes the protection of an individual subjected to harassment by a person of the same sex.[94] By deeming same-sex sexual harassment claims actionable, one might deduce that the Supreme Court had rejected feminists' patriarchal theme. Indeed, previous decisions of lower courts had rejected similar same-sex claims based upon the assertion that Title VII's protection was *solely* intended to protect women.[95] *Oncale* conceded that the congressional purpose behind Title VII "was assuredly not" the prevention of "male-on-male sexual harassment."[96] However, it reasoned that the statutory language could be extended to include such claims.[97]

Like the second generation theories, *Oncale* was an effort to respond to unanswered questions regarding the purpose of sexual harassment. Yet despite its general emphasis on the gender-neutral nature of Title VII, the Court's particular emphasis on both the "causation" and "severity" elements of hostile environment claims implicitly endorsed the feminist permutation urged by the second generation: support gender neutrality in theory, but demand patriarchal particulars in fact.[98] A review of the case

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93. 523 U.S. 75 (1998).

94. *Id.* at 79.

95. *Id.* (noting the disagreement in the circuits regarding the intended group protected by Title VII's "because of . . . sex" provision) (omission in original). In denying the actionability of same-sex claims prior to *Oncale*, several courts clearly accepted MacKinnon's position that Title VII's sexual discrimination provision was intended soley to protect women. *See, e.g.*, Garcia v. Elf Atochem N. Am., 28 F.3d. 446, 451-52 (5th Cir. 1994) (denying same-sex claims by limiting Title VII to "gender discrimination"). For a fuller discussion of the influence of feminism's patriarchal theory on the Seventh Circuit prior to *Oncale*, see Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) ("The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."); Storrow, *supra* note 66, at 705-15.

Of course, it should be remembered that the *Meritor* Court had earlier acknowledged the difficulty in discerning a feminist legislative intent or any intent in Title VII given the last minute addition of "because of . . . sex" in Title VII. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986); *see also supra* notes 62-63, 65 and accompanying text (discussing the political motivations and history behind Title VII).

96. *Oncale*, 523 U.S. at 79.

97. *Id.* at 79-80.

98. The "causation" and "severity" elements are two of the four elements typically associated with sexual harassment cases based on hostile environment. A plaintiff must prove that 1) the conduct was "unwelcome"; 2) such conduct occurred "because of . . . sex"; 3) the conduct was sufficiently severe or pervasive to alter the condition of employment; and 4) the employer bears

law and theories leading up to *Oncale*, as well as cases decided after *Oncale*, evidences the ongoing feminist misspeak of sexual harassment.

A. *The Circuits and the "Sex Per Se" Standard of Causation*

The causation element or "because of . . . sex" requirement of sexual harassment was not a focus of the Supreme Court prior to *Oncale*. *Meritor* had offered no clear guidance, although its facts supported the original expectation that causation requires the conduct to be sexual in nature and motivated by sexual desire.[99] But as the reasoning in *Meritor* further supported, the presumptively female victims in opposite-sex cases are not expected to go to great evidentiary lengths to meet the causation burden. If such a traditional, male-on-female case involves sexual conduct, it is "[w]ithout question" an instance of sexual discrimination.[100]

Encouraged by *Meritor*'s lack of explicit direction, several courts eventually eliminated the sexual desire or intent prong, thereby narrowing the causation element to a question of whether the conduct was sexual in nature.[101] With the development of this "sex per se" standard, a variety of

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liability. *See, e.g.*, Pavon v. Swift Transp. Co., 192 F.3d 902, 908 (9th Cir. 1999); Spicer v. Va. Dep't of Corr., 66 F.3d 705, 710 (4th Cir. 1995) (en banc). Other courts include a somewhat redundant fifth element of having to prove membership in a protected class. *See, e.g.*, Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1122-23 (D.C. Cir. 2002); Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 965 (8th Cir. 1999); Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 445 (6th Cir. 1997); Bohen v. City of E. Chi., 799 F.2d 1180, 1187 (7th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982); *see also* Abrams, *supra* note 86, at 1221 & n.261; Storrow, *supra* note 66, at 685 & n.36-40. While all the elements have been subject to feminist interpretation, given the more objective nature of causation and severity, the legal currency of *Oncale* and its emphasis on these two elements, and the practical necessity of article brevity, I am focusing solely on causation and severity. For feminist discussion of the five elements, see Abrams, *supra* note 86, at 1220-25.

99. *See Meritor Sav. Bank, FSB*, 477 U.S. at 59-61; *see also* Schwartz, *supra* note 84, at 1719 (stating that early sexual harassment case law relied on a "sexual-desire-based notion of causation").

100. *See Meritor Sav. Bank, FSB*, 477 U.S. at 64. While in theory, the reference to "opposite-sex" cases should recognize both male-on-female and female-on-male cases, because the discussion of "opposite-sex" sexual discrimination is almost completely limited to cases of the male-on-female variety, I will consistently use the term to refer only to male-on-female cases. For discussion of the existence of female sexual harassers, see *infra* Part VII.C.

101. The "sex per se" rule had been adopted by the Third, Fifth, Seventh, and Ninth Circuits. *See, e.g*, Doe v. City of Belleville, 119 F.3d 563, 576 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998); Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 805-06 & n.2 (5th Cir. 1996); Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) ("[S]exual harassment is *ordinarily* based on sex. What else could it be based on?"); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990). Such interpretation is seen as consistent with EEOC guidelines which define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" without any consideration of intent. *See* 29 C.F.R. § 1604.11(a) (2004); *see also* Schwartz, *supra* note 84, at 1723-24 (describing the causation of sexual harassment's chronological development from desire-based to sex-based).

nontraditional cases became actionable.[102] The Seventh Circuit's *Doe v. City of Belleville* is the most prominent.[103] *Doe* presented the case of twin sixteen-year-old boys who were routinely targeted by their cemetery co-workers.[104] After enduring threats of assault and insults such as "queer," "fag," and "bitch" for the duration of their two months of employment, the two finally quit when one of the brothers had his testicles grabbed by a fellow employee.[105] While *Doe* presented a case of same-sex harassment, the court reasoned that "so long as the environment itself is hostile," the outcome should be no different than if the case had involved parties of the opposite sex.[106] "Frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender."[107] "[W]hy the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point."[108]

Admittedly, the deletion of intent may have been premised on a valid observation in harassment cases. Harassment is unlike other forms of employment discrimination in which evidence of discriminatory intent is necessary to rebut a valid presumption that conduct having a discriminatory impact may be the product of legitimate and rational business decisions.[109] Because grabbing a co-worker's genitals fails to serve any legitimate business function, the *Doe* court saw questioning intent as superfluous.[110] Likewise, in *Robinson v. Jacksonville Shipyards, Inc.*, it did not matter that Lois Robinson's male colleagues did not show any sexual interest in her.[111] It was sufficient that she was subjected to a

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102. For extensive discussion and support of the sex per se standard, see generally Schwartz, *supra* note 84 (discussing the evolution from sexual harassment claims that required a sexual-desire based notion of causation to those that now only require a sex-based notion of causation).

103. *See* 119 F.3d 563. For further discussion of *Doe*, see Jennifer A. Drobac, *The* Oncale *Opinion: A Pansexual Response*, 30 MCGEORGE L. REV. 1269, 1277 (1999). *See also* Schwartz, *supra* note 84, at 1699-1700, 1725-28; Storrow, *supra* note 66, at 713-15. For interpretation of the Supreme Court's decision to vacate *Doe*, see *infra* notes 166-70 and accompanying text.

104. *Doe*, 119 F.3d at 566.

105. *Id.* at 566-67. Because the two boys did not want to tell their parents why they were quitting, they initially gave two weeks notice. *Id.* at 567. However, the boys were unable to complete their final two weeks. *Id.* Following the tendering of their resignation, the harassment escalated. *Id.* With two days left, the boys finally had to quit when a firecracker was thrown at and exploded in front of one of them. *Id.*

106. *Id.* at 578.

107. *Id.* at 580.

108. *Id.* at 578.

109. Schwartz, *supra* note 84, at 1717-18.

110. *Id.*

111. 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) ("[S]exual behavior directed at women will raise the inference that the harassment is based on their sex."). For further discussion of the sex per se analysis, see Drobac, *supra* note 103, at 1274-77; Schwartz, *supra* note 84, at 1699-1703, 1729-

work environment in which she was surrounded by pornographic pictures and lewd commentary.[112] The sex per se rule was not oversimplified, but simply a basic insight.[113] "'[S]exual harassment is ordinarily based on sex. What else could it be based on?'"[114]

B. *Causation and the Feminists*

The leading feminists of sexual harassment's second generation did not welcome the effective elimination of cause.[115] With varying emphatic stress points, each theorist rejects the focus on sexual behavior to the exclusion of nonsexual behavior, notes the risk of female essentialism implicitly lurking behind equating male sexual conduct with sexism, and hopes a new standard will provide greater potential for same-sex cases.[116] Notwithstanding such common concerns, each work is inevitably distinctly nuanced and offers a unique paradigm upon which cases of sexual harassment should be determined.[117] Yet, despite the shared motivation to

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112. *Robinson*, 760 F. Supp. at 1522.

113. *See* Schwartz, *supra* note 84, at 1724-25. Swartz writes that

> [I]t would be a mistake to write off the sex per se rule as sloppy thinking or judicial "laziness." The rule seems to be an advance over a sexual-desire-based "but for" causation theory. There is a connection between the sex per se rule and the conclusion, stated by many courts, that the specific motivation of a sexual harasser should not matter. The worst that can be said is that the courts failed to articulate a theoretical rationale for an important—and surely correct—insight.

Id. (footnote call numbers omitted).

114. *Id.* at 1724 & n.104 (quoting Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994)).

115. As noted earlier, the second generation of sexual harassment academics is identified with Kathyrn Abrams, Anita Bernstein, Katherine M. Franke and Vicki Schultz. *See supra* note 86 and accompanying text. Unlike Abrams, Franke, and Schultz, Bernstein's thesis of replacing the "reasonable person" with a standard of respect links her work more closely with the severity element than the causation element. Consequently, I reserve discussion of her work for treatment of the severity element. *See infra* Part VI.B (discussing Bernstein's work).

116. Abrams, *supra* note 86, at 1172 (trying to avoid essentialism by focusing on the "gendered context and meaning of the conduct" of sexual harassment); Franke, *supra* note 65, at 696 (recognizing that both sexual and nonsexual behavior can be sexist and visited upon a victim of the same or different sex in order to maintain the existing gender norms); Schultz, *supra* note 13, at 1689-90 (rejecting the "sexual desire-dominance paradigm" due to its incapacity to recognize all forms of gender harassment because of its foundation in patriarchy); *see also* Schwartz, *supra* note 84, at 1702, 1749-58 (synthesizing the three works' treatment of sexual conduct and essentialism).

117. Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 267-68 (5th Cir. 1998) ("While the nuances of these writers' approaches to sexual harassment differ, all emphasize that sexual harassment is discrimination based on sex, not merely workplace behavior with sexual overtones."). For discussion of each of the four theories, see *infra* Part IV.B.1 (discussing Abrams); *infra* Part IV.B.2 (discussing Franke); *infra* Part IV.B.3 (discussing Schultz); *infra* Part VI.B (discussing Bernstein).

broaden the reach of sexual harassment law and the differing prescriptions advanced, each work, either explicitly or implicitly, steadfastly reaffirms that sexual harassment law must primarily focus on the subordination of women.[118] The second generation of theorists successfully perpetuates the feminist misspeak of the first.

1. Kathryn Abrams

Emphasizing the need to return to the "why" of sexual harassment, Kathryn Abrams most explicitly rejects the causation elimination trend and argues that sexual harassment law must maintain the feminist focus.[119] Her reasoning is no less ambiguous. After years of being mired in defining "what" acts or other behavior constitute harassment and "how" the *Meritor* elements should be interpreted, sexual harassment law must recenter on the motivation: "the institutionalization of women's subordination."[120] With a near-fatalistic dedication to subordination theory, Abrams defines sexual harassment as a means of entrenching male norms, not only by directly subordinating women by limiting their employment opportunities but also by asserting "the primacy of male prerogatives" through less direct means such as placing greater value on a "traditional" male work ethic and accepting behavior between male employees such as trading sexual jokes, pornography, or descriptions of personal sexual encounters in graphic detail.[121] Sexual harassment is thus defined as part of an "agonistic workplace dynamic . . . [which] functions as a means of establishing male control and expressing or perpetuating masculine norms in the workplace."[122] In emphasizing these less direct means of subordinating women, Abrams hopes to appeal to staunch MacKinnonists by maintaining a focus on subordination while increasing the means to include nonsexual and less direct male behavior.[123] And in so expanding the theoretical base, Abrams believes her account will strengthen the claims of female victims while creating actionable same-sex cases for men who fail to personify

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118. David Schwartz comes to a somewhat similar conclusion, at least in his review of the works of Kathyrn Abrams, Katherine M. Franke, and Vicki Schultz. Schwartz, *supra* note 84, at 1704. However, despite recognizing the significance of feminism in the development of sexual harassment law and *Butler*'s official crowning of the four as the second generation, Schwartz denies feminism's ongoing influence, believing the courts to be pursuing a "formal equality" approach. *Id.* at 1700-02, 1775-76. Because I believe that feminism persists in its control of sexual harassment law, as well as theory, I differ from Schwartz in my analysis of *Oncale* and subsequent cases as well as to how sexual harassment law should ultimately develop.

119. *See* Abrams, *supra* note 86, at 1170-72, 1223.

120. *See id.* at 1171-72.

121. *Id.* at 1205-14.

122. *Id.* at 1205.

123. *Id.* at 1213-14.

traditional masculinity and are targeted as part of the effort to maintain the gender hierarchy.[124]

2. Katherine Franke

Although for Abrams, making same-sex cases actionable seems to be a positive, but somewhat unintended, consequence of her work, providing a theory to expressly support *male* same-sex cases is clearly the stated primary motivation for Katherine Franke.[125] Her theory, however, remains unmistakably tied to defining sexual harassment in terms of female subordination. Like Abrams, the trick is to expand our understanding of the gender hierarchy and how it operates. So rather than limiting the gender hierarchy's purpose solely to maintaining female inferiority, Franke describes the social paradigm as designed to serve a dual purpose: to produce "masculine men as (hetero)sexual subjects" and "feminine women as (hetero)sexual objects."[126] Recast in terms of such "hetero-patriarchal objectives," the gender hierarchy victimizes both women and men.[127] Sexual harassment thus becomes a tool or a "technology of sexism" used to implement such goals.[128] Yet Franke acknowledges that the technology is not evenly applied.[129] In male-on-female cases, harassment may be experienced either as subordination or punishment for gender nonconformity.[130] In *Meritor Savings Bank, FSB v. Vinson*, sexual desire and abuse of power are understood as efforts to subordinate through demands that a female employee serve at a man's pleasure.[131] In *Steiner v. Showboat Operating Co.*, a male supervisor's hostile behavior toward a female employee promoted to a job where sexiness was not a qualification[132] is explained as an effort to punish and restore our

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124. *Id.* at 1212.

125. Franke hopes that her theory can respond to two concerns: 1) explaining why sexual harassment constitutes sex discrimination; and 2) recognizing *male* same-sex harassment cases. Franke, *supra* note 65, at 694. That Franke's theory is contemplated only to extend to male same-sex cases and not female cases is consistent with my general thesis that sexual harassment theory remains confined to cases which can support a feminist subordination theme.

126. *Id.* at 763.

127. *Id.*

128. *Id.* at 693.

129. *Id.* at 769.

130. *Id.* at 763.

131. *Id.* at 766 (discussing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

132. 25 F.3d 1459, 1461, 1464 (9th Cir. 1994) (holding that a woman working the gender-neutral job of casino "floor person" was sexually harassed by a male supervisor through his referring to the woman as a "'dumb fucking broad'" and "'fucking cunt,'" and telling her, "'You are not a fucking floor man . . . . You are a fucking casino host . . . . Why don't you go in the restaurant and suck their dicks . . . ?'").

patriarchal norms.[133] But in male-on-male cases, the hetero-patriarchal paradigm permits only cases of sexual conduct directed at gender nonconformity. Thus, a sexual harassment case does not exist for a male victim who is the object of his gay supervisor's desire.[134] Regardless of how extensive the supervisor's abuse of power or how extensive the victim's injuries, there is no sexual harassment. The case simply does not fit the paradigm. The gay boss has not "policed, perpetuated or enforced" the hetero-patriarchal norms; he has only evidenced his "carnal desires."[135]

In a similar vein, but even more candidly, Franke affirms that the evidentiary standard in male-on-female and male-on-male cases can and should be different. After eliminating the possibility of same-sex sexual desire cases from the definition of sexual harassment, she then eliminates same-sex cases of the "fraternity-type culture" because in such cases sexual behavior, regardless of severity, is "merely" an instance of men acting like boys.[136] To be "based on sex" in same-sex cases, a victim must prove that the conduct was aimed at punishing gender nonconformity.[137] Male-on-female cases require no such evidence. "Lest the reader draw the wrong conclusion, allow me to state clearly that I believe it is appropriate, efficient, and legitimate for courts to draw inferences of discrimination in traditional different-sex harassment cases."[138] It is these twin admissions of theory and evidence which reveal that Franke's interest in same-sex cases is overshadowed by feminist paradigmatic might. Male-on-female cases (the effective extent of Franke's "different-sex" case definition) are advantaged by recognizing that male behavior toward women, be it described in terms of sexual desire or otherwise, is *always* dictated by the hetero-patriarchal norms. Male-on-male cases begin with no such presumption but must ultimately meet the same expectation by proving the

133. *See* Franke, *supra* note 65, at 764 (discussing *Steiner*, 25 F.3d at 1459).

134. *Id.* at 767-69. Recognizing this gap in her sexual harassment theory as an "inevitable, intellectual moment when grand theory fails to provide a unifying and totalizing approach," Franke suggests such cases may be actionable under Title VII as disparate treatment. *Id.* at 767. She also later suggests general claims under tort, contract, and racketeering law for all cases which are omitted from her theory. *Id.* at 769.

135. *Id.* at 767.

136. *Id.* at 767-68.

137. In the instance of straight harassers not motivated by a sexual interest in the victim, Franke further divides this group into cases where the conduct complained of is not at first directed at the victim but is just part of a fraternity-like male environment and cases where the conduct is initially motivated by the male victim's failure to meet the masculine profile. *Id.* at 757-68. While the second category of cases would immediately be recognizable as sexual harassment, the "Animal House" scenario would become actionable only when the "enlightened man" indicated his displeasure with the conduct, and the conduct, if continuing thereafter, could now be explained as having a punitive dimension. *Id.* at 768-69.

138. *Id.* at 762.

conduct is directed at maintaining traditional masculine norms.[139] Or, put another way, male-on-male harassment is acknowledged only to the extent that it serves a model designed first and foremost to recognize the institutionalization of female inferiority. Franke's model is upended, its female subordination roots exposed.

3. Vicki Schultz

Like Franke's hetero-patriarchal norms, the "competence-centered" paradigm built by Vicki Schultz claims to reframe the theory of sexual harassment, but ultimately it remains built to suit the feminist agenda.[140] Schultz claims she is ready to move beyond the male sexuality as power theme at the heart of the "sexual desire-dominance paradigm" that early feminists built and successfully marketed to define the issues critical to feminists.[141] Schultz characterizes prevailing feminist theory as having both an "under" and "over" inclusive effect on sexual harassment—underinclusive to the extent nonsexual conduct is not considered in evaluating sexual harassment claims and overinclusive to the extent sexual expression is always equated with oppression.[142] For Schultz, "the core of the problem" is not the sexual nature of the conduct but its intended discriminatory purpose and effect.[143] Consequently, a shift in perspective is necessary to meet the true purpose of Title VII: "to empower everyone—*whatever their sex or gender*—to pursue their life's work on equal terms."[144]

Yet despite such egalitarian introductions, Schultz's competence-centered theory is designed to serve women first and men as an

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139. *Id.* at 769. Franke states:

> [W]here a woman alleges that she has been sexually harassed by a man, a lower quantum of proof is sufficient to trigger an inference of sex discrimination because larger cultural norms of women as sex objects and men as sex subjects have been reproduced in the offending conduct. In the same-sex context . . . the same intuitions and larger cultural dynamics are not at work, therefore more information is necessary in order to conclude that the conduct complained of is sex discrimination, as opposed to some other form of nonsexist offensive behavior.

Id.

140. *See* Schultz, *supra* note 13, at 1692.

141. *Id.* at 1688.

142. *Id.* at 1689. While Schultz primarily focuses on the "underinclusive" criticism of prevailing sexual harassment theory in *Reconceptualizing Sexual Harassment*, *see generally id.*, her later article is devoted to the "overinclusive" observation. *See generally* Schultz, *supra* note 84 (arguing that the sexual model is too broad and leads companies to prohibit a broad range of relatively harmless sexual conduct).

143. Schultz, *supra* note 13, at 1688-89.

144. *Id.* at 1692 (emphasis added).

unintentional and occasional second. While women have made significant advances in the workplace, the workplace remains central to male identity and superiority. For men, harassment fills a void left by equal opportunity laws. "[H]arassment is not driven by a need for sexual domination but by a desire to preserve favored lines of work as masculine."[145] Schultz's competence-centered paradigm intends to respond. It recognizes harassment that "has the form and function of denigrating women's competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers."[146] As additional evidence of the benefits of the competence-centered approach and its commitment to women, Schultz further remarks that her theory allows the employment positions of a man and woman involved in a sexual harassment suit to be ignored, as, despite a woman's position of authority, she may be undermined by men in an effort to preserve the workplace as male sacrosanct.[147]

Schultz's theory does not completely dismiss the possibility of male victims. Yet, like Abrams, such a possibility is merely an afterthought.[148] As Schultz describes, male claims that qualify pursuant to the competence-centered approach are the "additional advantages."[149] And like Franke, the success of a male claim is predicated on its ability to conform to a paradigm designed around the gender hierarchy of feminism.[150] This expectation is set despite Schultz observing the theoretical possibility of a male claim against a woman and cautioning against relying upon published case statistics as evidence of the type of male cases filed.[151] Schultz maintains that "the most prevalent" male cases arise because of the victim's failure to meet the traditional masculine image.[152] Like opposite-sex cases involving female victims, in same-sex cases involving male victims, harassment directed at unmanliness can be manifested by either sexual or nonsexual conduct.[153] Yet predictably, male cases brought against men or women based upon sexual desire rather than gender conformity

145. *Id.* at 1690.

146. *Id.* at 1755.

147. *Id.* ("This account provides a more comprehensive understanding of the customary cases of male-female harassment by supervisors and coworkers and also allows us to understand some less conventional forms of harassment, such as harassment of female supervisors by their male subordinates.").

148. *See supra* notes 122-24 and accompanying text (discussing Abrams's treatment of male victims).

149. Schultz, *supra* note 13, at 1774.

150. *See supra* Part IV.B.2 (discussing Franke's sexual harassment theory).

151. Schultz, *supra* note 13, at 1774 n.469. For further discussion of the limited probative value of published statistics on sexual harassment and domestic violence, see *infra* Part VII.C.

152. Schultz, *supra* note 13, at 1774.

153. *Id.* at 1786-87.

fail.[154] Like Franke, this limitation for male victims is in clear contrast with the recognition of similar cases involving female victims and male offenders.[155]

In her conclusion, Schultz maintains that her competence-centered approach ends the "two-tiered structure of causation" by acknowledging the relevance of both sexual and nonsexual conduct.[156] However, despite the progress of recognizing that both sexual and nonsexual conduct may be "based on . . . sex," Schultz's competence-centered approach has not completely jettisoned a two-tier model. Instead, it has replaced the clear emphasis on sexual conduct and minimization of nonsexual conduct with an emphasis on female claims and the minimization of male claims. Schultz responds to the workplace of male privilege with a theory of female privilege.

C. *Causation and the Supreme Court*

Like the second generation, the *Oncale* Court saw the need to respond to and explicitly reject the emerging sex per se standard.[157] "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[158] Yet beyond simply agreeing with the second generation's emphasis on causation, *Oncale* endorsed a much more fundamental feminist position. Despite recognizing the potential of same-sex discrimination and the necessity of substantiating the charge of harassment "even" in cases between men and women, the Supreme Court also accepted a presumption of heterosexuality.[159] In so doing, the Court lessened the evidentiary burden in the traditional opposite-sex cases, while simultaneously demanding a much higher standard of proof in same-sex cases.[160] In this respect, while *Oncale* affirms the second generation emphasis on causation, it also reaffirms the much more fundamental feminist presumption that sexual harassment theory is founded on male sexual power.

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154. *See id.* at 1786 ("Thus, accusations of and antagonism toward homosexuality are relevant, but not because such actions signal anything about whether sexual desire is present between harassers and harassees. They are relevant because antigay harassment frequently evidences gender stereotyping.").

155. *See supra* notes 134-35 and accompanying text (discussing Franke's exclusion of a same-sex/sexual desire argument for men).

156. Schultz, *supra* note 13, at 1801.

157. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998).

158. *Id.* at 80.

159. *See id.*

160. The immediately ensuing discussion relates to the unequal evidentiary burden on the causation element for opposite-sex versus same-sex cases. For an examination of the evidentiary burden's similar disparity on the severity element, see *infra* Part VI.A.

Like *Meritor*'s "[w]ithout question" acknowledgment that sexual advances by men toward women are instances of sexual harassment,[161] the *Oncale* Court accepted that it is "easy" to find causation in male-female sexual harassment cases, as sexual activity in such cases is assumed to be motivated by heterosexual desire.[162] By contrast, in same-sex cases, the aggressor's homosexuality has to be proven before the "same chain of inference" will be drawn between the aggressor's sexual orientation and the motivation for causing injury.[163]

The Court explained that, in addition to sexual desire, same-sex cases also could be based on sexual conduct caused by a "general hostility" toward a particular sex or specifically directed at one sex in a mixed-sex environment.[164] Initially, such suggestions of sexual desire, gender hostility, or disparate treatment could have been interpreted as an instructive discussion of causation, rather than as an exhaustive listing.[165] Yet, whatever *Oncale*'s theoretical potential, the disappointing end to Joseph Oncale's case as well as subsequent actions taken by the Supreme Court and lower courts have destroyed any real hope for same-sex cases.

The Supreme Court acted immediately on its decision in *Oncale*, vacating the Seventh Circuit's opinion in *Doe* on the same day it issued *Oncale*.[166] Such a decision could be regarded as further emphasizing that "because of . . . sex"

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161. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

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

163. *Id.*

164. *Id.* at 80-81. The basic causation tests of sexual desire, gender hostility, or disparate treatment presumably also apply to opposite-sex cases, as the *Oncale* Court did not explicitly create any distinctly opposite-sex criteria.

165. Several circuits have interpreted *Oncale*'s suggestions as instructive. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066-67 (9th Cir. 2002) (en banc) (extending the *Price Waterhouse* causation theory to same-sex cases), *cert. denied*, 538 U.S. 922 (2003); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001) (same); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 & n.5 (3d Cir. 2001) (extending the *Price Waterhouse* causation theory to same-sex cases, despite *Doe* being vacated); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) (recognizing *Oncale* as instructive); Shermer v. Ill. Dep't of Transp., 171 F.3d 475, 477 (7th Cir. 1999) (same).

Other circuit courts clearly have acknowledged *Oncale* as an exhaustive listing of causation possibilities. *See, e.g.*, McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 543 (8th Cir. 2003); La Day v. Catalyst Tech., Inc., 302 F.3d 474, 478 (5th Cir. 2002); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 520 (6th Cir. 2001) (Guy, J., concurring in part and dissenting in part); Simonton v. Runyon, 232 F.3d 33, 36-37 (2d Cir. 2000).

For support of the exhaustive interpretation at the district level, see *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1278-79 (D. Utah 2003). *See also* Bundenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261, 1273-74 (D. Kan. 2002); Ernesto v. Rubin, No. 97-4683, 1999 U.S. Dist. LEXIS 21501, at *31-32 (D.N.J. Aug. 31, 1999).

166. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998). For discussion of the Seventh Circuit's decision, see *supra* notes 103-08 and accompanying text.

demands more than simply having sexual conduct.[167] Yet it has more commonly been understood as an implicit rejection of the second generation's theory that *Doe* and cases like it were successful because they were recognized as instances of effeminate men being harassed for failing to personify our "hetero-patriarchal objectives."[168] This less generous interpretation of the Supreme Court's action in *Doe* is also consistent with the *Oncale* Court's failure to extend *Price Waterhouse v. Hopkins*'s recognition of Title VII claims based upon gender stereotyping in the opposite sex context to same-sex cases.[169] Reading *Price Waterhouse* in combination with *Oncale*, one can only conclude that an actionable harassment claim can be made by a woman for not embodying the feminine mystique á là *Price Waterhouse*, but a man cannot similarly claim harassment caused by his nonmasculinity.[170]

Faced with such judicial limitations, *Oncale* came to a predictable finish. Oncale's harassers were not homosexual, nor were they motivated by a hostility toward all men or in a position to disparately treat men, given

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167. Despite this common interpretation that the Supreme Court's treatment of *Doe* effectively ended the sex per se standard, some circuits have continued to suggest that causation can be established in certain cases if the sexual conduct is of a severe, physical nature. *See, e.g.*, *Rene*, 305 F.3d at 1063-64; Nguyen v. Buchart-Horn, Inc., No. 02-1998 section "C" (2), 2003 U.S. Dist. LEXIS 12398, at *10 (E.D. La. July 15, 2003); Parrish v. Sollecito, 249 F. Supp. 2d 342, 349 (S.D.N.Y. 2003), *reh'g denied*, 253 F. Supp. 2d 713 (S.D.N.Y. Mar. 27, 2003).

168. *See* Franke, *supra* note 65, at 763. For review of the second generation's interpretation of the Seventh Circuit's decision in *Doe*, see *supra* Part IV.B. As discussed by Franke, at least three male-on-male cases underwent an analysis similar to that imputed to the Seventh Circuit *Doe* decision. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (involving harassment by male co-workers of a man with a learning disability and arrested cognitive and emotional development); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993) (involving a man harassed because would not engage in profane conversations), Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988) (involving a shy man constantly teased about sex); *see* Franke, *supra* note 65, at 763. For a recognition of the Supreme Court's decision to vacate *Doe* as a rejection of the second generation's theory supporting the earlier Seventh Circuit's decision, see Drobac, *supra* note 103, at 1277; Schwartz, *supra* note 84, at 1702-03, 1725.

169. *See Oncale*, 523 U.S. at 80-81 (holding that the plaintiff always must show that the conduct constitutes "'*discriminat[ion]* . . . because of . . . sex'") (alteration and omissions in original); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (recognizing a Title VII claim for a woman denied promotion based upon sex stereotyping but remanding to determine employer liability based upon a preponderance standard that the employment decision would have been the same without the gender consideration). Departing from the Supreme Court's implied position in vacating *Doe*, several circuits have extended the *Price Waterhouse* rationale to same-sex cases. *See, e.g.*, Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 262-63 n.5 (3d Cir. 2001) (extending the *Price Waterhouse* causation theory to same-sex cases, despite *Doe* being vacated); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001).

170. *See Price Waterhouse*, 490 U.S. at 250 (recognizing a woman's claim based on gender when an employer "acts on the basis of a belief that a woman cannot be aggressive"). For various individuals who have recognized a shortcoming in the Supreme Court's failure to extend *Price Waterhouse* to the same-sex context, see, for example, Drobac, *supra* note 103, at 1282-84; Schultz, *supra* note 13, at 1777; Schwartz, *supra* note 84, at 1742-43.

the all-male make-up of the oil rig crew.[171] Upon remand, Oncale's employer moved for summary judgement for lack of cause, and the case was quietly settled.[172] Since *Oncale*, the majority of the courts have similarly articulated a preference for staying within *Oncale*'s "suggested" boundaries.[173] Consequently, the *Oncale* standard poses a difficult challenge to establishing cause in same-sex cases.[174]

The restoration of cause and the development of a same-sex theory had been urged by the second generation feminists primarily as a means of extending feminist theory through the argument that men as well as women could be harassed for failing to conform to hetero-patriarchal objectives.[175] While recognizing the actionability of same-sex cases, *Oncale* did not follow the newly minted feminist course. Yet *Oncale* did set a clear double standard in favor of opposite-sex, male-on-female cases of harassment over same-sex cases involving either gender. In that respect, it resounded with the basic feminist theme, which the second generation had maintained. Women are the true targets of sexual harassment. Male superiority is the ultimate objective. And so the Court returned (if it ever left) to the original feminist understanding of sexual harassment. Sexual harassment is the means by which men exercise their sexual power against women in the workplace in order to perpetuate and reinforce their social dominance. The feminist misspeak of sexual harassment is enforced by each of *Oncale*'s three evidentiary routes.[176]

V. THE FEMINIST MISSPEAK OF CAUSATION

A. *Sexual Desire*—Rizzo v. Sheahan

Of the three *Oncale* causation possibilities, the courts have most openly followed *Oncale*'s cue toward recognizing a bias in favor of opposite-sex cases when cause is established by sexual desire. With *Oncale*'s presumption that sexual desire in male-on-female cases is "easy to draw,"[177] it is conversely understood that "without this presumption, a same-sex harassment plaintiff needs other methods to prove that the

171. *See Oncale*, 523 U.S. at 77.

172. Schwartz, *supra* note 84, at 1735.

173. *See supra* note 165 and accompanying text (discussing the courts' interpretation of *Oncale*'s causation discussion as exhaustive or instructive).

174. *See infra* Part V (examining the circuits' application of *Oncale*'s causation standard).

175. *See* Franke, *supra* note 65, at 763.

176. In reviewing only the sexual desire, gender hostility, and disparate treatment tests of causation, I am adhering to the prevailing exhaustive interpretation of *Oncale*. For a comparison of the exhaustive versus instructive treatment by the various circuits, see *supra* note 165 and accompanying text.

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

conduct was based on sex."[178] Such proof is demanded in same-sex cases which involve either men[179] or women,[180] regardless of how physically extreme the conduct. Struggling with the proof required to establish homosexuality, two possibilities suggested in *La Day v. Catalyst Technology, Inc.* are to recognize 1) the conduct as a sexual advance rather than simply demeaning by looking at the nature of the specific acts, or 2) the harasser as a homosexual based upon a history of making sexual advances toward others of the same sex.[181] Such evidentiary routes are not "easy,"[182]as proven by the Ninth Circuit's unwillingness to find sexual desire even when the male harasser's conduct included numerous incidents of physically touching the male victim's crotch and anus.[183] The difficulty in proving sexual desire in same-sex cases becomes even more clear when comparing how difficult it is to disprove sexual desire in male-on-female cases.

Relying on three specific incidents of harassment, the female plaintiff in *Rizzo v. Sheahan* claimed that she had been sexually harassed by her immediate supervisor, a male assistant chief at the Illinois Cook County Sheriff's Department.[184] On two occasions, Rizzo's supervisor had told Rizzo he would "like to fuck" Rizzo's fifteen-year-old daughter who he

178. McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 543 (8th Cir. 2003).

179. For proof of the aggressor's homosexuality in the male-on-male case, see, for example, *Oncale*, 523 U.S. at 80.

180. For proof of the aggressor's homosexuality in the female-on-female case, see, for example, *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1276-84 (D. Utah 2003) (granting employer's motion for summary judgement based upon claimant's failure to prove her harassers' homosexuality or that they were motivated by sexual desire, although the employer conceded the "unusually raucous and vulgar" nature of the female harassers' conduct which included the principle harasser pinching the breasts of the claimant and others, "bodily butt humping" women in the workplace, and rubbing her foot in the crotch of female employees while making sexual comments).

181. 302 F.3d 474, 480 (5th Cir. 2002). Similarly, the Seventh Circuit has allowed "the connotations of sexual interest" to suggest homosexuality when the conduct included numerous comments suggesting a desire to have sexual contact with the plaintiff. Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009-10 (7th Cir. 1999); *see also Dick*, 265 F. Supp. 2d at 1279-80 (recognizing standards of same-sex/sexual desire set by the Fifth, Seventh, and Ninth Circuits but not by its own Tenth Circuit and choosing to follow the Fifth Circuit *La Day* test for same-sex cases).

182. *Oncale*, 523 U.S. at 80 (acknowledging the ease of inferring sexual desire in opposite-sex cases).

183. Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1207-09 (9th Cir. 2001), *rev'd en banc*, 305 F.3d 1061 (9th Cir. 2002). Of course, on rehearing *Rene* ultimately followed a simpler path which did not require proof of sexual desire as it allowed causation to be proven per se by the sexual nature of the conduct. *Rene*, 305 F.3d at 1068. For further discussion of *Rene* and the ongoing use of a sex per se standard, see *supra* note 167 and accompanying text.

184. Rizzo v. Sheahan, 266 F.3d 705, 708 (7th Cir. 2001) (raising both a hostile environment and retaliation claim).

had seen and thought attractive.[185] The final time, the supervisor "looked Rizzo over" and suggestively told her he wished he was her husband.[186] The court easily acknowledged that sexual comments made to a mother regarding her daughter surpassed the severity of any comments that could be personally directed at a plaintiff.[187] However, despite the ease in finding severity, no causation could be established.[188] While it was generally acceptable to "deduce" causation in opposite-sex cases, "even where the harassing behavior is not overtly gender based,"[189] *Rizzo* presented a "unique situation."[190] Working against her own interests, the plaintiff had inadvertently disproved causation by heavily documenting that the conduct directed at her was a product of her supervisor's dislike for her husband.[191]

Rather than seeing the sexual desire test of causation as evidence of feminist bias, one might simply conclude it is a presumption based on a nonfeminist societal observation. We are a predominantly heterosexual society.[192] Given our heterosexual predisposition, it is arguably another valid judicial "insight" to perceive male-on-female sexual conduct as motivated by sexual desire.[193] Yet no matter how overwhelming the statistical evidence of our heterosexual inclination, why allow such a presumption to favor one group of plaintiffs while clearly disfavoring the other? Moreover, in assuming the greater likelihood that a person is heterosexual, wouldn't proving a harasser's heterosexuality be an easy burden—easier than proving his homosexuality? Considered as a relative question, the judicial presumption seems to be more than innocuous "laziness."[194] It would not be difficult to set a standard that requires the aggressor's heterosexuality or homosexuality to be shown by similar indicia. For example, the *La Day* standard—allowing consideration of the specific nature of the acts or recognition of the gender that is generally the object of the aggressor's sexual advances—seems easily applicable to

185. *Id.* at 709.

186. *Id.*

187. *Id.* at 712.

188. *Id.*

189. *Id.* at 713 (relying on the opposite sex/male-on-female case of *Haugerud v. Amery School District*, 259 F.3d 678, 693-94 (7th Cir. 2001)).

190. *Id.*

191. *Id.* at 712-13.

192. Contrary to the apparently common belief that one in ten people are homosexual, Time Magazine reported that during its survey year only 2.7% of men and 1.3% of women had engaged in homosexual sex. Philip Elmer-DeWitt, *Now for the Truth About Americans and Sex*, TIME, Oct. 17, 1994, at 62.

193. David Schwartz similarly justifies the sex per se rule as judicial "insight." Schwartz, *supra* note 84, at 1724-25.

194. *Id.* at 1724 (quoting Franke, *supra* note 65, at 694 (discussing the sex per se rule)).

proving heterosexual desire.[195] Adhering to a common standard for sexual desire would right a legal imbalance, end the underlying favoritism for opposite-sex cases, and reduce legitimate criticisms that proving sexual desire in same-sex cases while not in opposite-sex cases perpetuates a stigma of homosexuality, producing more negative legal consequences.[196]

B. *Gender Hostility*

1. *Ocheltree v. Scollon Productions, Inc.*

In pursuing *Oncale*'s causation route of gender hostility, the presumption in favor of opposite-sex cases is also evident. Two Fourth Circuit opinions well illustrate this double standard. Sitting en banc in 2003, the Fourth Circuit held in *Ocheltree v. Scollon Productions, Inc.* that the female plaintiff had been an individual target of harassment by her male co-workers because of her sex.[197] Finding for the female plaintiff, the court relied upon the theory of gender hostility.[198] For her eighteen-month tenure, Lisa Ocheltree was the lone woman amongst twelve employees making shoes in Scollon's production shop.[199] Reading *Ocheltree*, one senses a workplace so permeated with obnoxious, highly offensive sexual conduct that it could not be described without reference to such behavior. Ocheltree was subjected to a "daily stream" of sexual discussion and conduct, consisting of the male employees reporting on their sexual activity and directing sexual insults or gestures at one another.[200] Men would describe how their wives and girlfriends "liked it from behind," "'gave good head," and "[let] it run down the side of her face.'"[201] They talked in graphic detail of anal sex, sex with dogs, and sex with young boys.[202] Ocheltree witnessed male employees using a female mannequin to simulate sexual acts by pinching the mannequin's nipples, pretending to engage in oral sex, or otherwise fondling it in a sexual manner.[203] While there was some factual dispute as to whether Ocheltree witnessed the male

195. La Day v. Catalyst Tech., Inc., 302 F.3d 474, 480 (5th Cir. 2002). For earlier discussion of the *La Day* standard, see *supra* note 181 and accompanying text.

196. For discussion of the stigmatization of homosexuality by limiting proof of sexual orientation to same-sex cases, see, for example, Drobac, *supra* note 103, at 1280-81; Storrow, *supra* note 66, at 718-21.

197. Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 332-33 (4th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1177 (2004).

198. *Id.* at 331-33.

199. *Id.* at 328.

200. *Id.* at 328-29.

201. *Id.* at 329.

202. *Id.*

203. *Id.* at 328.

employees' sex simulation with the mannequin on one or more occasions, it was assumed that at least on one occasion, the conduct was prompted by Ocheltree's presence.[204] On two other occasions, Ocheltree was also believed to be individually targeted. In one incident, a male co-worker approached Ocheltree singing, "Come to me, oh, baby come to me, your breath smells like c[o]m[e] to me."[205] On another occasion, when the men were looking at a book with pictures of men with pierced genitalia, one man brought the book over to Ocheltree's work station and opened it to the centerfold, asking her, "'[W]hat do you think?'"[206] Throughout her employment, Ocheltree repeatedly made clear that such behavior was unwelcomed and attempted to notify her employer.[207]

As the *Ocheltree* court reminded the parties, causation still must be proven even if the hostile work environment elements of unwelcome conduct, sufficiently severe or pervasive conduct, and employer liability are satisfied.[208] However, rather than following the *Oncale* Court's gender hostility instruction mandating both a general need to show "'one sex . . . exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed'"[209] and a specific need to "make it clear" that the conduct was motivated or caused by gender hostility,[210] nine members of the Fourth Circuit concluded that the causation element was met without citing to any particular incidents.[211] In the majority's determination, it could simply be presumed that the sexual conduct at Ocheltree's production shop was "particularly offensive to women," and was therefore intended to target Ocheltree "as a woman."[212] The court reached this conclusion despite complaints made by three male employees who were also offended by the conduct and despite men often being the subject of the sexual behavior.[213] The court characterized the

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204. While the majority accepted that Ocheltree was present for such conduct "[m]any times," pursuant to the testimony of a male shop employee, the dissent reported that Ocheltree personally reported witnessing conduct with the mannequin on only one occasion. *Compare id.* at 328, *with id.* at 339-40 (Williams, J., dissenting in part and concurring in the judgment in part).

205. *Id.* at 328 (alteration in original).

206. *Id.*

207. *Id.* at 328, 330.

208. *Id.* at 331 (citing the four elements of sexual harassment based on hostile work environment (relying on Spicer v. Virginia, 66 F.3d 705, 710 (4th Cir. 1995) (en banc))). For further discussion of the basic sexual harassment elements, see *supra* note 98 and accompanying text.

209. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993)).

210. *Id.* at 80-81.

211. Disagreeing with the majority, one judge concurred specifically because he felt causation could be evidenced only through reliance on the three particular incidents directed at the plaintiff. *Ocheltree*, 335 F.3d at 336 (Niemeyer, J., concurring in the judgment).

212. *Id.* at 332.

213. *Id.* at 339 (Williams, J., dissenting in part and concurring in the judgment in part).

male harassers' personal sexual conduct reports as intended solely to be "demeaning" towards women because the discussed wives and girlfriends (who had engaged in consensual sexual behavior) were portrayed as "sexually subordinate."[214] As recognized by the lone dissenting judge, such a characterization clearly demonstrates a level of paternalism and prudery toward women, their sexual desires, and their freedom.[215]

2. *Lack v. Wal-Mart Stores, Inc.*

The Fourth Circuit's ease in finding causation and its favoritism for opposite-sex cases becomes even more telling when comparing *Ocheltree* to the court's earlier decision in the same-sex case of *Lack v. Wal-Mart Stores, Inc.*[216] Again, causation was principally based upon the theory of gender hostility.[217] Yet, unlike the treatment of Ocheltree, the burden of proving causation was placed squarely on the same-sex plaintiff.[218] Predictably, the *Lack* plaintiff was unable to meet his burden.[219]

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214. *Id.* at 332. In so doing, the court neatly avoided having to grapple with the equal opportunity harasser defense. However, in the same-sex context, the Fourth Circuit had previously recognized that the harassment of both sexes does not preclude either sex from raising a valid sexual harassment claim but simply presents "an imposing obstacle." Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001). For further discussion of the equal opportunity harasser defense, see, for example, Drobac, *supra* note 103, at 1279; Schwartz, *supra* note 84, at 1739-42.

215. In *Ocheltree*, the lone dissenter stated:

> [I]n modern times, there is nothing particularly derogatory, demeaning, or subservient about a woman participating in consensual heterosexual sex. As women have sought and achieved sexual equality in this society, and as moral beliefs and taboos about oral sex have broken down, it seems illogical to assert that comments about consensual sex between adults necessarily imply male dominance or power.
>
> . . . To conclude that these conversations portray women in derogatory terms simply because they depict women engaging in consensual heterosexual sex would be, I believe, to misapply the Supreme Court's teaching on the relationship between sexual conversations and sexual harassment and to misunderstand modern societal views regarding women's sexuality.

335 F.3d at 342 (Williams, J., dissenting in part and concurring in the judgment in part).

216. 240 F.3d at 255. Rather than relying directly on Title VII, Lack's claim was brought under the sexual harassment provisions of the West Virginia Human Rights Act. *Id.* at 257 (citing W. VA. CODE §§ 5-11-1 to -5-11-20 (2000)). The development of such legislation is recognized to be dependent upon its federal counterpart, as evidenced by the court's reliance on *Oncale* to find the state statute's protection against same-sex harassment. *Id.* at 257, 260. In addition to raising hostile environment, Lack also raised a version of Title VII's quid pro quo claim through West Virginia's analogous retaliation sexual harassment provision. *Id.* at 259 n.5. However, each claim was denied for failure to prove causation based on sex. *Id.* at 260.

217. *Id.* at 257. An effort to base the case on sexual desire was also denied. *Id.* at 261.

218. *Id.* at 257, 261.

219. *Id.* at 261.

Like *Ocheltree*, Lack's case was based upon general workplace conditions created by his male supervisor as well as specific incidents in which Lack was individually targeted.[220] Lack was derisively charged by his supervisor with "'F-ing the cashiers;'" told in front of a customer "'I need a small bag, and not the one between your legs, please;'" made to endure his supervisor saying "'I'm coming' or 'I'm coming for you' in a 'real sexual' tone" whenever Lack called him for customer assistance; and subjected to his supervisor making motions as if to unzip his pants to engage in sex with Lack.[221] On one occasion the supervisor grabbed his crotch and said "'[H]ey, Chris, here is your Christmas present.'"[222] The Wal-Mart supervisor also liked to make sexual comments and jokes; engage in "juvenile wordplay" through such verbal turns as "'penis butter and jelly sandwiches,'" "'oh my rod,'" and "'spank me very much;'" and stand behind customers when he "'liked what he saw . . . and act like he was just going to grab their behind right there.'"[223]

Again, as in *Ocheltree*, causation was the deciding element.[224] Yet, rather than drawing presumptions of gender hostility as in the male-on-female context, the *Lack* court stressed "the causation element poses an especially formidable obstacle in same-sex harassment cases."[225] The same-sex plaintiff could not simply rely on the sex-specific nature of the conduct, even though the conduct was directed at him personally.[226] Instead, Lack was expected to produce "plausible evidence that such comments were animated by [his supervisor's] hostility to Lack as a man."[227] *Ocheltree* assumed that talk of consensual sexual acts between men and women subordinates women and thereby maligned the female plaintiff.[228] In same-sex cases, "[f]acially sexual remarks must be evaluated according to their common usage."[229] In stark contrast to the opposite-sex context, when such sexual remarks are made between men they do not carry a sexual connotation, even if accompanied by crotch-grabbing or some other sexual gesture.[230]

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220. *Id.* at 258.

221. *Id.*

222. *Id.* (alterations in original).

223. *Id.*

224. *Id.* at 260 n.6. While Wal-Mart conceded both employer liability and that the conduct was unwelcome, it contested both the causation and severity elements. *Id.* at 260. By finding lack of causation, the court did not have to reach the element of severity. *Id.* at 260 n.6. For general discussion of the four sexual harassment elements, see *supra* note 98 and accompanying text.

225. *Lack*, 240 F.3d at 260.

226. *Id.* at 261.

227. *Id.*

228. Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 332 (4th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1177 (2004).

229. *Lack*, 240 F.3d at 261 n.8.

230. *Id.* (relying on Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997)).

A comparison of *Ocheltree*'s and *Lack*'s treatment of gender hostility causation openly reveals a version of female as sexual victim learned from traditional feminist teachings.[231] By contrast, men and women in the same-sex context must overcome the "formidable obstacle"[232] of causation. The inconsistency and underlying presumptions are problematic for both same-sex and opposite-sex cases. Same-sex cases are viewed with a presumptive suspicion that male-on-male sexual behavior is never directed at the plaintiff's sex in either a sexual or hostile manner. Such resistance is exacerbated by the ease in establishing the opposite-sex case. And while the feminist presumptions may assist an individual female plaintiff in her opposite-sex case, they are loaded with all the belittling attitudes of women for which feminism has been attacked.[233]

C. *Disparate Treatment*—EEOC v. Harbert-Yeargin, Inc.

In a similar manner, *Oncale*'s prescription of causation based on disparate treatment of the genders has been distorted by feminist theory in favor of establishing causation in male-on-female cases. As the *Oncale* case itself made clear, a disparate treatment claim necessitates "a mixed-sex workplace."[234] Consequently, Oncale was precluded from relying upon this causation claim, as he worked on an all-male oil rig.[235] Yet, beyond such practical limitations, through creative judicial interpretation of what comprises the "workplace" and who works there, courts have also been able to theoretically eliminate male victims from raising a disparate treatment claim. By contrast, no such judicial contortions occur in opposite-sex cases.

EEOC v. Harbert-Yeargin, Inc. is an interesting illustration.[236] The case presented the claims of two men, Joseph Carlton and Cedric Woods, who were employed by Harbert-Yeargin, a company providing maintenance services to construction sites.[237] Each man alleged to have been subjected to "unwanted touching, poking, and prodding in their genital areas."[238] While the Sixth Circuit upheld a grant in favor of the employer's motion

231. For a discussion of the persisting victimization theme of feminism, see *supra* Parts II.D.-F.

232. *Lack*, 240 F.3d at 260.

233. For a discussion of such traditional criticisms of feminism, see *supra* Parts II.D.-E. For a further discussion of the harms of current sexual harassment theory for men and women, see *infra* Part VII.

234. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998).

235. *Id.* at 77. For further discussion of *Oncale* and its treatment on remand, see *supra* Part IV.C.

236. 266 F.3d 498 (6th Cir. 2001).

237. *Id.* at 500-01.

238. *Id.* at 501.

for judgment as a matter of law in Woods's case due to lack of employer notice, in Carlton's case, the district court's decision to deny the company's motion for judgment as a matter of law was reversed on appeal due to the victim's failure to prove causation.[239] Cartlon's causation argument was premised on the existence of a mixed-sex workplace.[240] Of the 292 people employed at the Harbert-Yeargin facility during the relevant timeframe, only three were women.[241] Each of these women testified that she had daily contact with the construction workers, and none of the men, including Louis Davis, who was Carlton's primary harasser, ever acted in a sexually offensive manner toward her.[242] Yet, despite a company policy against "unwelcome physical contact of a sexual nature," Louis Davis and "various [other] supervisors" engaged in the daily practice of "goosing" male employees.[243] In addition to Carlton and Woods, who testified to personally having Davis grab their crotches on numerous occasions,[244] at least three other male employees confirmed the practice generally and testified that Davis would "grab various employees' buttocks and crotches" and "even twisted [one employee's] nipples."[245] The practice of goosing men, but not women, was apparently such a workplace standard that Davis and another supervisor came forward and admitted to grabbing male employees in intimate areas while adamantly denying they acted in any remotely similar manner toward the female employees.[246]

For the district court and the EEOC, the strictly male focus of the sexual behavior combined with the company's employment of both sexes, regardless of the proportions or manner in which they were employed, was sufficient to establish disparate treatment.[247] Reversing the lower holdings, the Sixth Circuit instead chose to reason in rhyme, relying on Mother Goose's authority:

> Georgie Porgie pudding and pie
> Goosed the men and made them cry

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239. In a somewhat confusing set of opinions caused by a split concurring opinion, the opinion of Judge Gilman affirming the district court's decision to grant the company's motion in Woods's case is the majority opinion, *id.* at 500-01, 517-18, while the opinion of Judge Guy reversing the district court's decision to deny the company's motion in Carlton's case controls. *Id.* at 519 n.1, 519-23 (Guy, J.,concurring in part and dissenting in part).

240. *Id.* at 520 (Guy, J., concurring in part and dissenting in part).

241. *Id.* at 503.

242. *Id.* (recognizing no offensive verbal or physical conduct directed at the female employees).

243. *Id.* As the case described, "'[g]oosing' consisted of getting grabbed, patted, or prodded in the buttocks or genitals." *Id.*

244. *Id.* at 501-03 (summarizing the testimony of Carlton and Woods).

245. *Id.* at 503.

246. *Id.*

247. *Id.* at 505-06.

Upon the women he laid no hand
So it cost his employer 300 grand.[248]

Harbert-Yeargin simply presented the Sixth Circuit with the "classic example of men behaving badly."[249] Such behavior is not actionable under Title VII.[250] Noting that harassment was a form of discrimination, the court emphasized that the establishment of causation in same-sex cases was made by showing "predatory homosexual conduct"[251] or that the harasser was "motivated by a general hostility to men in the workplace."[252] Such an emphasis on *Oncale*'s first two causation routes implied a de-emphasis on disparate treatment in same-sex cases. The Sixth Circuit's definition of the workplace furthered this limitation of the disparate treatment option. Regardless of the existence of women and a sexually-offensive practice geared solely toward men, the disproportionate presence of men to women made it a single sex workplace where, by definition, disparate treatment simply could not occur.[253] If such efforts did not make the court's reservations regarding same-sex cases clear enough, its last comment was succinctly revealing: "Same-sex sexual harassment cases of this nature present a slippery slope, and this case either goes over the edge or comes so close to it that a line needs to be drawn. If not, what's next—towel snapping in the locker room?"[254]

Like the Supreme Court's assurance in *Oncale* that allowing same-sex cases would not lead to actionable harassment charges when a coach smacks a professional football player on the buttocks,[255] the Sixth Circuit's towel-snapping comment went to the heart of its concern. In each case, the examples raised were for the purpose of acknowledging that such behavior is not offensive when perpetrated by a man against a man. Consequently, in each case, the comments were more directly relevant to the question of severity than to the question of causation.[256] Yet, by reversing the denial of the company's motion for judgment as a matter of law on the basis of failure to prove causation,[257] the *Harbert-Yeargin* decision has a more

248. *Id.* at 520 (Guy, J., concurring in part and dissenting in part).

249. *Id.* at 522 (Guy, J., concurring in part and dissenting in part). Such comments are reminiscent of Franke's "boys will be boys" dismissal of male-on-male sexual conduct. Franke, *supra* note 65, at 767-68. For further discussion of Franke, see *supra* Part IV.B.2.

250. *Harbert-Yeargin, Inc.*, 266 F.3d at 522 (Guy, J., concurring in part and dissenting in part) (suggesting forms of relief beyond Title VII).

251. *See id.* at 519 (Guy, J., concurring in part and dissenting in part).

252. *Id.* at 521 (Guy, J., concurring in part and dissenting in part).

253. *Id.* at 520 (Guy, J., concurring in part and dissenting in part).

254. *Id.* at 522 (Guy, J., concurring in part and dissenting in part).

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

256. For my discussion of the severity element of sexual harassment, see *infra* Part VI.A.

257. *Harbert-Yeargin, Inc.*, 266 F.3d at 520-23.

lasting and detrimental impact on same-sex cases. *Harbert-Yeargin* circumscribes the disparate treatment classification in same-sex cases, making no effort to draw similar limits on opposite-sex cases.

Certainly in many opposite-sex cases, the question of a mixed-sex workplace will never arise, as the sex of the two parties to the case alone satisfies the standard. Yet, what if rather than goosing any of Harbert-Yeargin's 288 men, Davis had goosed one or all of the three female employees?[258] Certainly, the disparate treatment claim would be pursued unimpeded by any arguments that the workplace was not mixed-sex. The Sixth Circuit conceded as much through its rhyming on the equal opportunity gooser, noting that the case would fail due to the lack of disparate treatment rather than the lack of a mixed-sex workplace.[259] By restricting disparate treatment only in the instance of same-sex plaintiffs, causation is once again perverted.

VI. THE FEMINIST MISSPEAK OF SEVERITY

A. *The Reasonable Woman and the Courts*

As it had done with causation, *Meritor* acknowledged but did little to develop the severity element. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[260] Such limited instruction predictably provided a terrific opportunity for circuit deviation. In many circuits, the result was the development of the "reasonable woman."[261] The reasonable woman of severity is feminism personified. Yet, despite her controversial nature, the Supreme Court, through *Harris v. Forklift Systems, Inc.*[262] and *Oncale*,[263] has accepted and possibly endorsed her existence.[264]

Originally, *Meritor*'s limited severity discussion raised the question of whether the test of severity focused on the nature of the harasser's conduct or on the nature of the victim's harm. While *Harris* replied that the conduct, not the harm, is the critical focus (at least to the extent that no severe psychological harm is necessary), it left a critical question

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258. In total, of Harbert-Yeargin's 292 employees, only three were women. *Id.* at 503.

259. *Id.* at 520 (Guy, J., concurring in part and dissenting in part). For further discussion of the equal opportunity defense, see *supra* note 214 and accompanying text.

260. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (alterations in original).

261. *See infra* note 290 and accompanying text.

262. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

263. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

264. *See Harris*, 510 U.S. at 22-23; *Oncale*, 523 U.S. at 75; *infra* text accompanying notes 282-83.

unanswered: what conduct meets the test of "severe or pervasive?"[265] Or, more precisely, *who* decides what conduct meets the test of "severe or pervasive?"

In *Ellison v. Brady*, the Ninth Circuit responded with the "reasonable woman."[266] Justifying her creation, the Ninth Circuit relied upon a legislative intent rationale. The inclusion of "sex" in Title VII was intended to "prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women."[267] With the male cast as aggressor and the female as victim, the feminist conclusion was inevitable. Because women are the *only* victims, only their perspective on harassment is relevant.[268] The aggressor's view, or more accurately, the man's view, is not acceptable.[269] Men and women simply differ in their views of what conduct is offensive.[270] Without a female viewpoint enforced by law, men will continue to make "'great figure'" or "'nice legs'" comments, and no offense to women would ever be legally acknowledged.[271] By adhering to a male standard, "the prevailing level of discrimination" would simply be reinforced.[272] Likewise, the "sex-blind reasonable person standard" is also indefensible, given its tendency toward male bias and systematic failure to recognize the experiences of women.[273]

Envisioning the reasonable woman, the Ninth Circuit bestowed upon her all the traditional feminist beliefs. The workplace, an extension of our patriarchal society, is under male control.[274] Sexual harassment is the means by which men reinforce their control.[275] The reasonable person

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265. *See Harris*, 510 U.S. at 22-23. For further discussion of the non-necessity of establishing severe psychological harm, see *infra* notes 282 and accompanying text.

266. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

267. *Id.* at 881 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990)). Of course, what common legislative intent, if any, Congress had in passing Title VII with its inclusion of sex is questionable, given its last minute nature and the motivations surrounding its inclusion. *See supra* notes 63, 75 and accompanying text (discussing Title VII's legislative history).

268. *Ellison*, 924 F.2d at 878-79.

269. *Id.* at 879.

270. *Id.* at 878.

271. *Id.* (quoting Lipsett v. Univ. of P.R., 864 F.2d 881, 898 (1st Cir. 1988)).

272. *Id.*

273. *Id.* at 879. For further discussion of gender neutrality, see *supra* notes 21-29 and accompanying text. For further discussion of the reasonable person standard and its criticism by feminists, see *infra* notes 291-93 and accompanying text (discussing Bernstein's criticism of the reasonable person standard in sexual harassment law).

274. For the feminist depiction of the workplace, see *supra* notes 69-70 and accompanying text.

275. For the feminist definition of sexual harassment, see *supra* notes 67-73 and accompanying text.

standard further protects the status quo by masking a male perspective.[276] Following feminist theory, *Ellison* supports the basic feminist assertion that to truly protect women, the entire patriarchal model and all its deceptively neutral, self-perpetuating devices, including those operating in sexual harassment law, must be rejected.[277]

Ellison insists that core differences between men and women and the "common concerns" women share justify adopting a feminist standard.[278] Yet, in trying to avoid the inevitable essentialism critique,[279] the court exposed its acceptance of the woman as sexual victim tenet of feminism.[280] "We realize that there is a broad range of viewpoints among women as a group, but . . . because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior."[281]

While *Harris* discussed "severity" in terms of a reasonable person, its emphasis on answering the limited question of whether severity requires a showing of severe psychological harm has allowed the reasonable

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276. For the feminist discovery of the reasonable man lurking behind the reasonable person, see, for example, Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 211-12 (2001); *supra* notes 21-29 and accompanying text.

277. For discussion of feminism's patriarchal theme, see *supra* Part II.

278. *Ellison*, 924 F.2d at 879 ("We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share."). For explicit feminist support of the reasonable woman standard, see, for example, Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1415 (1992) (supporting the reasonable woman standard as it "centers and values women's experiences"); Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1175-82 (1995) (adopting a "rational woman" standard based on a victim's economic assessment of her employment choices); Kerns, *supra* note 276, at 196-97 (arguing for the reasonable woman standard because victims of sexual harassment are predominantly female, women are injured more than men, and sexual harassment is not a gender-neutral problem).

279. *See, e.g.*, Cahn, *supra* note 278, at 1415-16 (ultimately accepting the reasonable woman standard despite its reminiscence of "earlier dominant images of white middle class women" and its failure to account for the experiences of all women); Kerns, *supra* note 276, at 225 ("Even if feminists celebrate the individual differences between women, feminists cannot turn a blind eye to the societal factors that bond women."). For general discussion of the essentialist critique of feminism, see *supra* Part II.D.

280. For clear support of the reasonable woman standard because of a belief that women are "under a constant threat of sex-related violence," see, for example, Kerns, *supra* note 276, at 215. For recognition of this as a weakness in the reasonable woman standard, see, for example, Sharon J. Bittner, Note, *The Reasonable Woman Standard After* Harris v. Forklift Systems, Inc.*: The Debate Rages On*, 16 WOMEN'S RTS. L. REP. 127, 135-36 (1994) (charging that the reasonable woman standard treats women as "sensitive, delicate, and in need of protection in the workplace"). For general recognition of feminism's woman as a sexual victim, see *supra* Part II.D.

281. *Ellison*, 924 F.2d at 879.

woman to endure.[282] *Oncale* also implicitly encourages its use. In turning its attention from the causation element of Title VII, the *Oncale* Court emphasized severity as a "crucial" element intended to prevent Title VII from becoming a "general civility code."[283] Yet despite this reassurance, *Oncale*'s review of harassment in its "social context"[284] protects and perhaps endorses the reasonable woman. *Oncale* stressed reviewing the "constellation of surrounding circumstances, expectations, and relationships" instead of focusing simply on "the words used or the physical acts performed."[285] *Oncale* also further refined *Harris*'s reasonable person, requiring her to be placed in the "plaintiff's position" before the question of severity could be answered.[286] However, because it is only after recognizing women's "common concerns"[287] and their distinction from male interests that a female plaintiff's position can truly be understood, *Oncale* implicitly transformed the reasonable person into the reasonable woman.

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282. While the *Ellison* decision preceded *Harris*'s rejection of a test of harm, it is noted that *Harris* also spoke of the severity test from the perspective of the "reasonable person":

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

Yet, because *Harris* also emphasized that its decision was not intended to answer all questions raised regarding severity, *Harris* is understood as limited to rejecting the harm focus, at least to the extent of holding that no severe psychological harm is necessary. *Id.* at 22-23 ("This [test] is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises . . . ."). For support of this narrow interpretation of *Harris*, see, for example, Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 582 (2001). *See also* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW: 1997 SUPPLEMENT 48 (1997); Kerns, *supra* note 276, at 206-08. For support of a broader interpretation of *Harris*, see, for example, Gillming v. Simmons Industries, 91 F.3d 1168, 1172 (8th Cir. 1996) (relying on *Harris* to support a jury instruction regarding use of the reasonable person, not reasonable woman perspective for determining hostile environment).

283. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) ("We have always regarded [severity] as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'").

284. *Id.*

285. *Id.* at 81-82.

286. *Id.* at 82.

287. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

Such a transformation has occurred before. In the Sixth Circuit, a similar social context test[288] was clarified within a year to encompass the reasonable woman.[289] Moreover, since *Harris* and *Oncale*, the feminist reasonable woman continues to be accepted.[290] Despite feminist protestations and postmodern posturing, feminists continue to advance a severity standard deferential to the reasonable woman.

B. *The Reasonable Woman and Anita Bernstein*

Anita Bernstein's *Treating Sexual Harassment with Respect*[291] follows such a course. Bernstein's work is motivated by her frustration with the limits of reason. For Bernstein, reason rightly can be applied to questions regarding rational behavior that surround acts of waste, imprudence, negligence, recklessness, excessiveness, or inadequacy.[292] Yet reason is of little assistance in answering the more aesthetic question of offensiveness raised in cases of harassment.[293] Respect is the offered alternative.[294]

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288. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (evaluating the actionability of sexual harassment based upon "the personality of the plaintiff and the prevailing work environment").

289. Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) ("In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman . . . .'"). For further comparison of *Rabidue* and *Yates*, see Juliano & Schwab, *supra* note 282, at 585 n.144.

290. Apart from the Ninth Circuit, the Second, Third, Sixth, Seventh, and Federal Circuits allow or at least have not clearly rejected the reasonable woman since *Harris* was decided. As noted below, the Supreme Court has denied certiorari in several of these cases, thereby arguably condoning the use of the reasonable woman. *See, e.g.*, Little v. Windermere Relocation, Inc., 301 F.3d 958, 967 (9th Cir. 2002); Torres v. Pisano, 116 F.3d 625, 632 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997); Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 718 (3d Cir. 1997), *cert. denied*, 522 U.S. 1128 (1998); Hixson v. Norfolk S. Ry., No. 94-5832, 1996 U.S. App. LEXIS 15421, at *10 (6th Cir. 1996); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) ("*Ellison* unequivocally directs us to consider what is offensive and hostile to a reasonable woman."); King v. Hillen, 21 F.3d 1572, 1582-83 (Fed. Cir. 1994). For discussion of the circuits which have clearly rejected the reasonable *woman* standard, see *infra* note 324 and accompanying text.

For further discussion of circuit support for the reasonable woman, see, for example, LINDEMANN & KADUE, *supra* note 282, at 46 n.82; Kerns, *supra* note 276, at 206 & n.53; *Sexual Harassment: Introduction*, *supra* note 66, at 730 & n.83; Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U.J. GENDER SOC. POL'Y & L. 633, 637-38 (2002).

291. Bernstein, *supra* note 63.

292. *Id.* at 450.

293. In making this point and in coming to her standard of respect, Professor Bernstein relies upon Justice Scalia's inability to define "abusive" or "hostile" in terms of reason in the sexual harassment and obscenity contexts and his suggested "man of tolerably good taste" in the obscenity context. *Id.* at 448-50 (discussing Scalia's concurring opinion in *Harris v. Forklift Systems, Inc.*,

Unlike reason, Bernstein argues that respect can be used to evaluate both the conduct of the harasser and the reaction of the complainant.[295] For Bernstein, the respectful person has many attractive features. As an initial matter, Bernstein recognizes respect's origin in reason and thus hopes that the adoption of respect will not be viewed as a quantum judicial leap.[296] In conformance with the liberal state, Bernstein adds to respect's acceptability quotient by characterizing respect as a negative duty.[297] The potential harasser or agent is commanded to "forbear"[298] if the act would (1) treat the would-be victim or object solely as a means to an end, (2) humiliate the object,[299] or (3) violate the object's personhood.[300]

So framed, Bernstein argues that treating sexual harassment with respect also protects the "equality and autonomy" of the harasser, as his actions are limited only by the "equality and autonomy" of the other.[301] Yet, as is so often remarked of liberalism, the harmonic balance of equality and autonomy is impossible to achieve.[302] Resonating in feminist theory, such criticisms are the basis for destroying liberalism's claim of neutrality and exposing liberalism as a paradigm geared to protect power-wielding men at the expense of powerless women.[303] Bernstein's theory of respect meets the same tragic fate. A balance of respect for both the freedom of the *agent* and the freedom of the *object* can not be had. Yet, rather than building a theory to serve the *agent* or the harasser as liberalism is charged with doing under the guise of neutrality, Bernstein's theory serves the *object* or the victim when conflict arises between the parties' interests.[304]

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510 U.S. 17, 24 (1993)).

294. *Id.* at 450.

295. *Id.*

296. *Id.* at 482-83 (discussing respect as defined by the work of Immanuel Kant).

297. *Id.* at 486-87.

298. *Id.* at 486.

299. *Id.* at 489-91.

300. *Id.* at 491-92.

301. *Id.* at 492.

302. *See, e.g.*, ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 126 (1969) ("[I]t remains true that the freedom of some must at times be curtailed to secure the freedom of others. Upon what principle should this be done? If freedom is a sacred, untouchable value, there can be no such principle."); *see also* JOHN GRAY, ISAIAH BERLIN 43 (1996) (recognizing Berlin's conflict between liberty and equality); F. A. HAYEK, THE CONSTITUTION OF LIBERTY 424 n.21 (Henry Regnery Co. 1972) (1960) (quoting John Dewey's remark, "[i]f freedom is combined with a reasonable amount of equality and security is taken to mean cultural and moral security and also material safety, I do not think that security is compatible with anything but freedom"); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 503-06 (George Lawrence trans., J.P. Mayer ed., Doubleday & Co. 1969) (1835, 1840) (explaining democratic nations' preference for equality over liberty when the choice must inevitably be made).

303. For further discussion of feminism's general critique of liberalism's neutrality, see *supra* notes 20-29 and accompanying text.

304. For the reasonable man lurking behind the reasonable person, see *supra* notes 21-29 and

Such an imbalance is clear from the victim's perspective, which is taken to define respect. Respect is defined in terms of using the victim, humiliating the victim, or violating the victim's personhood.[305] Put more succinctly, respect "originates in a trait of the *object*, respect makes its own demands."[306]

Although Bernstein defends her respectful person standard as gender-neutral,[307] it is her skepticism about the plausibility of such neutrality that is key to her dismissal of the reasonable person and raises further questions about how neutral the respectful person truly is. Consistent with other feminist critics, Bernstein observes there is likely not now, nor has there ever been, a reasonable person.[308] While in his best moments the reasonable person may be a "cipher,"[309] Bernstein stresses that "legal scholars agree that the reasonable person began life as the reasonable man and retains some of his masculine aspect."[310] Apart from only thinly masking the reasonable man, Bernstein's other principal argument is that the reasonable person is at best a superficially universalist standard subject to such "particularistic and oppressive" ideologies[311] as "pluralism,"[312] "isolation and depoliticization,"[313] and "assumption of risk and consensus."[314] While pluralism's tolerance prevents attaching any real definition to sexual harassment, Bernstein's criticism of the remaining ideologies is premised on the finding that men are the dominant group.[315]

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accompanying text (discussion of general feminist theory) and *infra* notes 309-16 and accompanying text (Bernstein's acknowledgment of the reasonable man's use in neutral standards).

305. *See supra* notes 291-301 and accompanying text (discussing the standard of respect).

306. Bernstein, *supra* note 63, at 485 (emphasis added).

307. *Id.* at 455 ("In contrast to the gendered pedigree of the reasonable person and the gendered slant of both 'reasonableness' and 'reasonable woman,' the respectful person comes close to gender neutrality.").

308. *Id.* at 466.

309. *Id.* at 467.

310. *Id.* at 466 (relying on GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 22-23 (1985)); *see also* Hilary Allen, *One Law for All Reasonable Persons?*, 16 INT'L J. SOC. L. 419, 422-24 (1988); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22-23 (1988); Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUT.-CAM. L.J. 311, 317-20, 323 (1976); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 846 (1991); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57-63 (1989); Caroline Forell, *Essentialism, Empathy, and the Reasonable Women*, 1994 ILL. L. REV. 769, 773-74; Wendy Parker, *The Reasonable Person: A Gendered Concept?*, 23 VICT. U. WELLINGTON L. REV. 105, 105-06, 110 (1993).

For further feminist criticism of the reasonable person, see *supra* notes 21-29 and accompanying text.

311. Bernstein, *supra* note 63, at 467.

312. *Id.* at 467-68.

313. *Id.* at 468-69.

314. *Id.* at 469-70.

315. *Id.* at 467-68.

Because men impose their majority view, women are effectively isolated or forced to surrender to the consensus.[316] Consequently, male control of the reasonable person is pervasive throughout her arguments.

Compare such remarks with Bernstein's sympathy for the reasonable woman. Bernstein sees the reasonable woman for all her essentialist flaws,[317] her inability to be applied in practice by male judges or male jurors,[318] her reinforcement of macho men and weak women stereotypes,[319] and her overly subjective nature.[320] Yet for all her faults, Bernstein remains attracted to the reasonable woman's victim-oriented perspective. Given that objectivity or a reasonable person can not be achieved, Bernstein suggests that use of the subjective reasonable woman standard may be the lesser of two evils when the evaluation is limited to determining which standard more accurately defines sexual harassment.[321] It is outside concerns, such as the objective "traditions" of the United States legal system and the predicted, over-exaggerated public ridicule of the reasonable woman, that ultimately force Bernstein to concede her infeasibility.[322] So rather than attempting to fine-tune the reasonable woman and having to confront her admitted weaknesses, Bernstein salvages her redeeming attributes and makes a fresh start, giving her respectful person the reasonable woman's victim-oriented perspective.[323] Bernstein's theory thus becomes another means to mount the feminist campaign in sexual harassment theory.

Certainly, many jurisdictions[324] and feminists[325] have rejected the reasonable woman standard, citing Bernstein's concerns of victimization,

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316. *Id.* at 468-70.

317. *See id.* at 473.

318. *Id.* at 474-75.

319. *Id.* at 475-77.

320. *Id.* at 477.

321. *Id.* at 481-82.

322. *Id.* at 482.

323. In reviewing the efforts of others to "tinker" with the reasonable woman, Bernstein's principal concern is that such efforts further the subjectivity critiques. *Id.* at 477-80.

324. The Fourth, Fifth, and Eleventh Circuits have sufficiently compared the reasonable woman with the reasonable person standard to evidence a clear rejection of the reasonable woman. *See, e.g.*, Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999); Bunch v. Shalala, No. 94-2269, 1995 U.S. App. LEXIS 27275, at *25 (4th Cir. Sept. 25, 1995); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995). For circuit support of the reasonable woman, see *supra* note 290 and accompanying text.

In a systematic review of every federal district and appellate court decision on sexual harassment for the 1986-1996 period, two individuals concluded that the reasonable woman standard is receiving little court application. Juliano & Schwab, *supra* note 282, at 582-85.

325. *See, e.g.*, Bittner, *supra* note 280, at 135-37 (arguing against the reasonable woman standard as it exculpates male behavior, is paternalistic toward women, perpetuates negative female stereotypes, complicates the law, takes the focus away from the harasser's conduct, and is unnecessary to providing a remedy).

essentialism, and judicial neutrality. Yet, the reasonable woman's rejection by some does not discount her continuing influence or her tolerated acceptance by the Supreme Court. Moreover, the influence of the reasonable woman on the question of severity must be considered in combination with the feminist biases underlying the interpretation of causation. It is only in taking this broader perspective, rather than maintaining a more myopic focus on any particular element of sexual harassment, that feminism's pervasive influence on sexual harassment comes into full view.

VII. THE IMPACT OF THE FEMINIST MISSPEAK

A. *The Injury to Women*

As both whispered and shouted by sexual harassment law and theory, the implications of the feminist misspeak are far-reaching. Women are perhaps the most visibly impacted. As core feminist principles persist in legal decisions and in the writings of rising generations of feminist scholars, so do the dangers of feminism.[326] The patriarchal premise of feminism continues to essentialize and victimize women, preventing women from achieving an equal rank in the workplace and perpetuating the general state of disparity that feminism strives to end.[327]

Post-*Harris* and post-*Oncale*, these traditional critiques of feminism are magnified. Having spoken directly on causation and severity, the Supreme Court has endorsed a favoritism for female claimants, at least to the extent that their claims are against men. It is reasonable to assume that such a condoned bias has naturally spread, for it is impossible to conceive of a test or a judge that could allow feminist teachings to influence one element while pursuing a standard of neutrality otherwise.

The feminist misspeak also negatively affects both men and women who are raising same-sex claims. Application of *Oncale*'s causation options of sexual desire, gender animus, or disparate treatment began with the Supreme Court's direction to presume sexual desire in opposite-sex cases, thus immediately putting same-sex cases in a less favorable position.[328] Such regard has translated into a suspicion of same-sex cases

326. For discussion of feminist's influence on recent sexual harassment case law, see *supra* notes 74-114, 145-63, 244-72 and accompanying text. For discussion of feminist's influence on recent sexual harassment theory, see *supra* Parts III.A, IV.B, VI.B (discussing the works of MacKinnon, Abrams, Franke, Schultz, and Bernstein).

327. For discussion of such criticisms within general feminist theory, see *supra* notes 45-53 and accompanying text. For discussion of such criticisms within feminist sexual harassment theory, see *supra* notes 68-70 and accompanying text.

328. For discussion of the disparate treatment of same-sex and opposite-sex cases on the sexual

throughout the causation elements. Like the challenge posed to a same-sex claimant by the difficulty of proving a harasser's homosexuality or sexual desire, he is required to prove gender hostility while such is presumed for the opposite-sex claimant.[329] The Supreme Court's decision to vacate and remand *Doe* upon deciding *Oncale*[330] is consistent with this biased direction. While *Price Waterhouse* accepted the nonconformity with traditional gender roles theory for a female claimant harassed by men, the Supreme Court's failure to see the parallel argument for male claimants harassed by men curtails the gender hostility theory in the same-sex context.[331] In a similar fashion, same-sex claimants are often foreclosed from arguing disparate treatment to the extent that the workplace does not employ in actuality or is not judicially defined as employing both sexes.[332] Whether by factual or legal definition, no such disadvantage restricts the opposite-sex claimant.

The severity element is also less generous to men and women in the same-sex context. Once one acknowledges the continuing influence of the reasonable woman, it is easy to appreciate how same-sex claimants are placed at a comparable disadvantage.[333] The reasonable woman is shaped by her fear of the male sex and her recognition of his power over her. Judicial sensitivity towards such feelings naturally helps a woman charging sexual harassment by a man. Since such presumptive sympathies have no relevance in same-sex cases, a same-sex claimant is implicitly held to a higher severity standard.

B. *The Injury to Men*

Yet the negative impact of the feminist bias extends to affect all male victims, regardless of whether they are raising same-sex or opposite-sex complaints. This is a result of the reasonable woman's complementary partner, the reasonable man. In contrast to the weak woman who demands protection, the reasonable man is strong, incapable of feeling pain.[334] The reasonable woman, thus, forces the severity threshhold to be set much

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desire element of causation, see *supra* Part V.A.

329. For discussion of the disparate treatment of same-sex and opposite-sex cases on the causation element of gender hostility, see *supra* Part V.B.

330. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998). For further discussion of *Doe*, see *supra* notes 103-10, 155-57 and accompanying text.

331. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-51 (1989). For further discussion of *Price Waterhouse*, see *supra* notes 169-70 and accompanying text.

332. For discussion of the disparate treatment of same-sex and opposite-sex cases on the causation element of disparate treatment, see *supra* Part V.C.

333. For discussion of the reasonable woman standard and its varying degrees of acceptance, see *supra* Part VI.A.

334. Bernstein, *supra* note 63, at 476-77.

higher for the male victim. At least one court has admitted to this thinking, characterizing a male claimant as "hypersensitive" for reacting when his supervisor told him he should take a Coca-Cola bottle and "'stick it up [his] ass.'"[335]

C. *The Significance of Male Injury to Men and to Women*

Such arguments may seem persuasive in theory. However, raising a concern about male sexual harassment victims, particularly in the opposite-sex context, may also appear insignificant as a practical matter. In 2002, approximately eighty-five percent of the sexual harassment charges filed with the EEOC were made by women.[336] Moreover, only one percent of sexual harassment claims involved male victims and female aggressors.[337] Consequently, one might conclude that any feminist bias in the legal standard does little, if any, actual harm. Of course, such an argument ignores the injury done to women generally by the feminist bias.[338] But focusing solely on the concern raised on behalf of men is not inconsequential. Sexual harassment victims, regardless of their sex, are reluctant to come forward.[339] Fear of further retaliation and stigma, shame, company loyalty, and the costs of public litigation challenge any victim, no matter how strong the claim. Such difficulties are compounded for the male victim. Aware of a prejudicial standard and the even greater likelihood of incredulous treatment and stigmatization, men are even less likely than women to come forward. Real men don't get sexually harassed.

Imagine if similar statistics were relied upon to discount the prevalence of women's claims. While women are almost equally represented in the private workforce[340] and substantially, if not equally represented in the

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335. Hannah v. Phila. Coca-Cola Bottling Co., No. 89-0699, 1991 WL 34363, at *5-6 (E.D. Pa. 1991). *Hannah*, a same-sex case involving heterosexual men, was decided prior to *Oncale*. Had *Hannah* been decided after *Oncale* it would have been more easily dismissed simply for lack of causation. For further discussion of *Hannah*, see LINDEMANN & KADUE, *supra* note 282, at 47 n.87. For a discussion of *Oncale* and the difficulties of proving causation in the same-sex context, see *supra* Part IV.

336. U.S. Equal Employment Opportunity Comm'n, *Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1992-FY 2003*, *at* http://www.eeoc.gov/stats/harasss.html (last visited Feb. 15, 2005).

337. Kerns, *supra* note 276, at 199 n.22.

338. For further discussion of the harm inflicted on women by the feminist bias of sexual harassment, see *supra* notes 326-34 and accompanying text.

339. *See, e.g.*, Allen R. Myerson, *As Federal Bias Cases Drop, Workers Take up the Fight*, N.Y. TIMES, Jan. 12, 1997, at 1.

340. In 2001, women comprised 47.2% of the private workforce. U.S. Equal Employment Opportunity Comm'n, *Occupational Employment in Private Industry by Race/Ethnic Group/Sex, and by Industry, United States, 2001*, *at* http://www.eeoc.gov/stats/jobpat/2001/national.html (last visited Feb. 15, 2005).

federal workforce,[341] the relatively small number of sexual harassment claims could lead to the argument that sexual harassment really is not a problem for women.[342] Yet, like domestic violence, when women are the victims of sexual harassment at work we quickly recognize the underreported nature of the crime, citing all the reasons just discussed.[343] We willingly disregard litigation figures as indicators of the prevalence of sexual harassment, relying instead on the statistic that fifty-three percent of working women claim to have been sexually harassed.[344]

Drawing on these lessons learned through assisting female victims both in the domestic violence and sexual harassment contexts should be a help, not a hindrance, to male victims.[345] Rather than dismissing the relatively small percentage of male sexual harassment cases, we should remark on the nearly fifty percent increase in cases involving male victims in the past ten years and acknowledge that the number of men coming forward increases as public and legal stigmas decrease.[346] As we "explode" the private/public distinction for women, men should concomitantly enjoy greater legal protections.[347]

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341. In 2002, women comprised 42.43% of the federal workforce. U.S. Equal Employment Opportunity Comm'n, *Part I: Employment of Minorities, Women, and People with Disabilities, at* http://www.eeoc.gov/federal/fsp2002/part1.html (last visited Feb. 15, 2005).

342. In 2002, 12,251 sexual harassment claims were filed with the EEOC by women. U.S. Equal Employment Opportunity Comm'n, *supra* note 336. Only 246 Title VII litigation claims were filed by the EEOC on behalf of men and women combined. U.S. Equal Employment Opportunity Comm'n, *EEOC Litigation Statistics, FY 1992 Through FY 2003, at* http://www.eeoc.gov/stats/litigation.html (last visited Feb. 15, 2005).

343. *See supra* note 338 and accompanying text (discussing reasons that victims of sexual harassment may be reticent). Similar to the sexual harassment victim's fear, shame, company loyalty, and cost concerns, the domestic violence victim is recognized to be deterred by fear, shame, love of spouse, and costs. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 891-92 (1992) (acknowledging the underreporting by women of domestic violence). For further discussion of a domestic violence victim's difficulty in leaving an abusive relationship, see Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 308-21 (1997) (discussing the compounded difficulties battered women who are immigrants confront); Kelly, *Stories from the Front*, *supra* note 1, at 674-82.

344. *See* Kerns, *supra* note 276, at 199. Of course, underreporting concerns may make us inclined to believe that the fifty-three percent statistic still does not fully account for all the women who experience sexual harassment.

345. *See generally* Kelly, *Disabusing the Definition of Domestic Violence*, *supra* note 1 (arguing for recognition of female domestic violence and greater assistance for male victims).

346. In FY 1992, men filed 9.1% of the EEOC sexual harassment claims. By FY 2002, men were responsible for 14.9% of such claims. U.S. Equal Employment Opportunity Comm'n, *supra* note 336.

347. *See* MACKINNON, *supra* note 30, at 100. For further discussion of the private/public dichotomy, see *supra* notes 25-31 and accompanying text.

VIII. CORRECTING THE MISSPEAK

If we accept at this point that men and women can benefit from addressing the feminist bias of sexual harassment law, we still face some difficult questions. Why does such a bias exist, particularly if it risks perpetuating negative stereotypes of women?[348] And perhaps more critically, how should the law be changed?

A. *In Theory: Honest Answers*

Answering the first question provides insight to the second. In feminist theory, sexual harassment is the public counterpart to domestic violence. Each are, by definition, perpetrated by men for one purpose: to maintain control.[349] And in protecting such a position, men rely upon their most fundamental physical means: sexual power.[350] Sexual harassment is thus "[t]he executive's alternative to rape."[351] As a result of this connection between sexual harassment and core feminist doctrine, to challenge the patriarchal premise of sexual harassment law is to challenge the legitimacy of feminism.

More practical reasons may also explain feminism's tenacious hold on sexual harassment. Accepting the very disproportionate rate at which women claim sexual harassment claims as an accurate reflection of harassment may lead some to sincerely conclude that women were originally, are now, and should remain the focus of Title VII's sexual harassment protection.[352] Others may be practically motivated by less sincere considerations. As in domestic violence law, the female advantage in sexual harassment may be a vindictive perk, secured by women for enduring a history of discrimination.[353]

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348. For a discussion of the essentializing and victimizing of women through existing sexual harassment law, see *supra* notes 326-33 and accompanying text.

349. For my extensive discussion of the feminist need to maintain a patriarchal definition of domestic violence theory because the male use of physical and sexual violence is critical to all aspects of feminist theory, see Kelly, *Disabusing the Definition of Domestic Abuse*, *supra* note 1, at 817-20. For discussion of the patriarchy of sexual harassment theory, see *supra* Part IV.

350. *See supra* notes 326-27 and accompanying text (discussing feminism and the importance of sexual intercourse).

351. *Sexual Harassment, Introduction*, *supra* note 66, at 727 (quoting Caryl Rivers, *Sexual Harassment: The Executive's Alternative to Rape*, MOTHER JONES, June 1978, at 21).

352. Such an argument resonates in the concerns of domestic violence advocates who worry about the loss of funding for domestic violence centers and projects dedicated to women and their desire to maintain the focus on women who are perceived to suffer greater injury from domestic violence. *See* Kelly, *Disabusing the Definition of Domestic Abuse*, *supra* note 1, at 820-22.

353. Murray Straus argues that it is "not feminist critiques, but justifications of violence by women in the guise of feminism, which controls domestic violence theory." Murray A. Straus, *Physical Assaults by Wives: A Major Social Problem*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE (Richard Gelles & Donileen R. Loseke eds., 1993); *see also* Kelly, *Disabusing the*

Reforming sexual harassment law does not necessitate dismissing the legitimate aspects of these concerns. An individual may engage in sexual harassment to secure or maintain a position of power and control. But this desire for power may be felt both by men and by women. And it may arise without any interest in perpetuating a societal patriarchal scheme. Questioning the feminist bias leads to the important recognition that sexual harassment may occur absent any type of power motivation and may, in some instances, be an act motivated by other emotions such as fear or anger.[354]

B. *In Practice: Objectivity Renewed*

What effect results from eliminating the feminist misspeak of sexual harassment? As a matter of causation, recognizing the feminist bias does not render the Supreme Court's causation trio inoperable.[355] Instead, it frees the test from bias and levels the burden of proof for all claimants. To the extent that individuals asserting sexual harassment will have to prove a sexual desire motivation regardless of the sex of either of the two litigants, the favoritism for female victims in opposite-sex cases is removed. Moreover, ending the bias will allow the cases of female and male victims to be considered fairly without any contrived efforts to limit the gender hostility and disparate treatment options.

Similarly, testing severity within its "social context" as *Oncale* directs[356] does not have to lead inevitably to characterizations of helpless women and macho men. In fact, rather than interpreting *Oncale* as supporting such stereotypes, the argument could shift to emphasizing that *Oncale*'s repeated remarks regarding objectivity preclude such labeling.[357] The essentialism concern, which is immediately raised in reaction to such stereotyping, reminds us that women and men do not all neatly mirror their models.[358] This oft-repeated refrain becomes more compelling after the damage done to women and men by such stereotypes is considered. It simply can not be assumed that any woman or man, even if subject to

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Definition of Domestic Violence, *supra* note 1, at 822 n.133.

354. For fuller discussion of the controversial raising of such non-patriarchal explanations in the domestic violence arena, see Kelly, *Disabusing the Definition of Domestic Violence*, *supra* note 1, at 852.

355. While going beyond *Oncale*'s three-part causation test is certainly a legitimate position in reforming sexual harassment law, I have chosen to stay within the *Oncale* framework in this Part to remain consistent with my earlier analysis of the extent of current feminist influence on the law. For such discussion, see *supra* notes 165, 176 and accompanying text.

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

357. Within its two-paragraph discussion of severity, *Oncale* remarked on the need for objectivity three times. *Id.* at 81-82.

358. For further discussions of the essentialism concerns raised in the context of the severity element of sexual harassment, see *supra* note 327 and accompanying text.

harassment, identifies with such images. Consequently, the endorsement of such images, even if just in a limited number of cases, risks ignoring the objective demand of severity and slipping too far into subjectivity. Moreover, the victim's personal voice is already heard in establishing the harassment element of "unwelcome" behavior.[359] Maintaining severity as an objective standard thus does not render the law of sexual harassment devoid of subjective considerations but rather sets the proper balance.

IX. CONCLUSION

The advances of feminism should never be minimized or forgotten. Throughout its succeeding forms and theories, feminism has remained dedicated to gender equality. Feminism's contribution to sexual harassment similarly must be recognized. Feminism named the violence of sexual harassment. Feminism achieved its legal prohibition. Yet to truly recognize the freedom of women and men, the ubiquity of patriarchy cannot be presumed. Certainly, in many instances, sexual harassment may still be motivated by a desire to maintain this traditional societal framework. And certainly, in other instances, other means, such as domestic violence or rape, may be similarly motivated. Such inequality can never be tolerated. But the real intolerance must be directed at the behavior. Sexual harassment, like domestic violence, rape, or any other intimate abuse, is unacceptable regardless of the motivation. To truly end sexual harassment, the feminist misspeak must end. This change, in turn, will bring the true equality feminism seeks. Ending patriarchy necessitates ending the feminist misspeak of sexual harassment.

359. For further discussion of the "unwelcome" element of sexual harassment, see *supra* note 98 and accompanying text.