New Jurisprudence of Sexual Harassment
Kathryn Abrams

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THE NEW JURISPRUDENCE OF
SEXUAL HARASSMENT

Kathryn Abrams†

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INTRODUCTION

More than two decades after its inception, legal scholarship analyzing sexual harassment has come full circle. In the late 1970s, Catharine MacKinnon focused on the wrong of the conduct, explaining why courts should consider sexual harassment a form of sex discrimination.1 Her answer, both provocative and transformative, was that sexual harassment institutionalized the sexualized subordination of

† Professor of Law, Cornell Law School. My thanks go to Sheri Johnson, Bill Kell, Henry Shue, and Steve Shiffrin for conversations on the subject of this article. I would also like to express appreciation to Nancy Cook, Mary Louise Fellows and Katherine Franke for comments on an earlier draft. Finally, I am grateful to have a forum in which to explore these ideas with those whose work I discuss and critique, so that all of us are able to reflect further on the meanings of sexual harassment and to work toward its elimination. I want to thank the editors of the Cornell Law Review for providing this forum, and Professors Bernstein and Franke for agreeing to participate in it.

1 CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (laying the theoretical groundwork for the quid pro quo and hostile environment claims and the prototype for this genre of sexual harassment scholarship).
women to men in the workplace. Yet, once this account gave scholars a means through which to describe sexual harassment as an injury, the focus of legal commentary changed. During the following period of sexual harassment scholarship, commentators focused not on the "why" but on the "what" of sexual harassment, offering examples of the acts, gestures, words, and representations we should be concerned about when we discover them in the workplace. When the Supreme Court recognized the claim for sexual harassment in Meritor Savings Bank v. Vinson, the focus of scholarship changed once again. Scholars became preoccupied with the "how" of sexual harassment: how should we interpret the newly-minted elements of the claim so as to forge an analytically coherent, practically effective instrument for enforcement?

2 Id. at 1-23.

3 I initially took this term from a distinction developed by Katherine Franke between the "what" of sexual harassment and the "why" of sexual harassment. Katherine M. Franke, What's Wrong with Sexual Harassment?, 49 STAN. L. REV. 691, 771-72 (1997). However, for purposes of this article I have supplemented this distinction to create a tripartite division of sexual harassment scholarship which addresses the "what," the "how," and the "why" of sexual harassment.


6 The question of what it meant, and whether it was advisable, to assess the pervasiveness of a hostile work environment from the perspective of a "reasonable woman" garnered the lion's share of scholarly attention. See, e.g., Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1206 (1989) (arguing that courts "must employ a standard that reflects women's perceptions of sexual harassment"); Martha Chamallas, Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 TEX. J. WOMEN & L. 95 (1992) (analyzing arguments for modifying the reasonable person standard to recognize the victim's perspective); Jane L. Dolkart, Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards, 43 EMORY L.J. 151, 152 (1994) (arguing for "an individualized standard to determine when conduct constitutes Title VII hostile work environment sexual harassment"); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177, 1214-33 (1990) (evaluating the argument for a reasonable woman standard in hostile environment cases). The unwelcomeness requirement also invoked critical commentary. See, e.g., Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 826-34 (1991) (criticizing the unwelcomeness requirement for creating a "trial of the vic-
In the past year, the focus of scholarship has again shifted, returning to the question of the wrong of sexual harassment. Schooled by almost two decades of litigation—with the inconsistencies, exclusions, and misunderstandings such efforts inevitably entail—scholars have sought to reconceptualize the wrong of sexual harassment so as to correct conspicuous errors and set the claim on a sound future course. The striking feature of this new scholarship, however, is the distance it has travelled from where the circle began. Though the new accounts describe sexual harassment as a harm that is inflicted primarily on women, they do not conceptualize the wrong as the institutionalization of women's subordination.7

In this Article, I assess this new jurisprudence of sexual harassment. I do so, first, by analyzing two recent efforts in this vein. Anita Bernstein's *Treating Sexual Harassment with Respect*,8 describes sexual harassment as a dignitary injury that should be assessed from the perspective of the "respectful" person, a standard that avoids the inevitably gendered entailments of the current "reasonableness" standard.9 Katherine Franke's *What's Wrong with Sexual Harassment*?10 describes sexual harassment as part of the "technology of sexism"11 that produces "gendered bodies":12 feminine women and masculine men.13 This approach, according to Franke, improves upon inconsistent, often incoherent doctrinal accounts of why sexual harassment should be understood as sex discrimination, while bringing within the ambit...
of Title VII some cases involving same-sex sexual harassment.\textsuperscript{14} Although these articles take starkly different approaches to defining the wrong of sexual harassment, they share one common theme: a conviction that the defects of the leading subordination based account make it dangerous or unwise to frame a theory of sexual harassment around a central premise of women’s subordination. In this Article, I contest that assumption. I argue that, by characterizing sexual harassment as a phenomenon that serves to preserve male control and entrench masculine norms in the workplace, we can place women’s subordination at the center of sexual harassment analysis while advancing a theory that avoids essentialism and encompasses cases of same-sex sexual harassment.

In Part I, I examine Bernstein’s account of sexual harassment. In Part I.A, I challenge her critique of reasonableness, arguing that respect is neither more determinate in its application nor less subject to gendered interpretation. In Part I.B, I take issue with her vision of the wrong of sexual harassment, arguing that conceptualizing sexual harassment as a form of disrespect obscures the gendered context and meaning of the conduct. In Part II.A, I turn to Franke’s theory, arguing that it illuminates many gendered aspects of sexual harassment, yet does not focus on the particularized, sex based dynamics of the workplace. In Part II.B, I offer an account of the agonistic sexual dynamics of the workplace, arguing that Franke declines such a focus in part because she associates these dynamics with the flaws of a “subordination” theory of sexual harassment. I then argue that the ostensible drawbacks of the leading “subordination” account,\textsuperscript{15} a subject of concern for both Bernstein and Franke, need not inhere in accounts that take their bearings from women’s subordination. In Part III, I develop an account of sexual harassment that recenters women’s subordination, yet seeks to avoid the biologism and essentialism of the leading account. In Part III.A, I argue that sexual harassment should be understood as a practice that preserves male control or entrenches masculine norms in the specific setting of the workplace. In Part III.B, I describe the harms of sexual harassment, leading to a conceptualization of the wrong as an interference with human agency, and particularly the agency of women. In Part III.C, I consider the implications of this account for legal doctrine, focusing on the elements of the sexual harassment claim and the cases involving same-sex harassment.

\textsuperscript{14} \textit{Id.} at 772.

\textsuperscript{15} Franke, \textit{supra} note 3, at 761-62 (describing MacKinnon’s account).
SEXUAL HARASSMENT

I

THE RESPECTFUL PERSON: DEPOLITICIZING
SEXUAL HARASSMENT

Anita Bernstein's article, *Treating Sexual Harassment with Respect*, exemplifies the shift in sexual harassment jurisprudence from a focus on "how" we litigate claims to a focus on "why" sexual harassment is a wrong. The first target of her analysis is the great bugbear of recent sexual harassment scholarship: the reasonableness standard for assessing sexual harassment in the workplace. According to Bernstein, reasonableness as "ratiocination"—the exercising of the powers of reason—is inherently unsuited to evaluate a harm whose basis of offense is indignity. It also fails to acknowledge the centrality of emotion in sexual harassment injuries and evokes age old, stereotypic questions about whether women are capable of directing themselves according to reason. More centrally, "reasonableness as average or typical thinking" is defeated by a series of problems that emerge, hydra-like, as the standard is amended or modified.

According to Bernstein's analysis, the "reasonable person" perpetuates subtly gendered understandings under the guise of neutrality. The "reasonable woman," its most widely defended replacement, manifests even greater difficulties. It can essentialize those it seeks to protect, transforming their distinct perceptions into fragility, and their experiences of coercion into inevitable victimization. It can create problems for both male triers of fact, who must embrace a perspective they have never experienced, and male victims, who may be considered, in relation to their female counterparts, to be impervious to workplace coercion. Finally, more particularized standards, such as the "reasonable person of the same gender and race or color as the plaintiff," threaten the goal of an objective measure and

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17 *Id.* at 455-71.
18 *Id.* at 449-50 (quoting Pope v. Illinois, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring)).
19 See *id.* at 456-62.
20 *Id.* at 449, 456, 463.
21 *Id.* at 464-71.
22 *Id.* at 471-82.
23 This somewhat ungainly verb comes from the noun "essentialism," which has been discussed, often pejoratively, within feminism, as an effort to describe a "monolithic" women's experience "that can be described independent of other facets of experience like race, class, and sexual orientation." See Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 588 (1990). The term is also used, as I use it here, to connote a reductive or oversimplifying characterization.
24 See Bernstein, *supra* note 7, at 472-74.
25 See *id.* at 474-77.
26 *Id.* at 477.
make prospective legal guidance difficult.\textsuperscript{27} Part of the problem lies in a failure of elaboration: triers of fact have rarely been told in any detail what sort of thinker these standards are intended to evoke.\textsuperscript{28} But part of the problem lies in the term itself: reasonableness is unsalvageably encumbered by its checkered legal history and gendered associations.\textsuperscript{29}

Reasonableness must be replaced, Bernstein argues, with the term "respect." Respect has historically been linked to reason through the Kantian framework in which the capacity for reason makes human beings worthy of respect.\textsuperscript{30} Yet respect, according to Bernstein, has been immured in none of the sexist controversies over the differential capacities of men and women.\textsuperscript{31} More importantly, "recognition respect," a form of respect elaborated in philosophical literature, seems promisingly germane to the problems presented by sexual harassment.\textsuperscript{32} Unlike appraisal respect, which is rendered for excellence, recognition respect involves "'tak[ing] account of the fact that [the individual] is a separate person, [and] that his is the only life he has.'\textsuperscript{33} It is "premised on the ideas that all human beings have respect-warranting traits in common and that each person is uniquely free."\textsuperscript{34} These "respect-warranting traits" have been interpreted by philosophers as imposing on others three "duties to refrain": from treating another person only as means of achieving one’s ends; from humiliating another person; and from denying the personhood and self-conception of another person.\textsuperscript{35} According to Bernstein, these obligations create a framework from which a respectful person could assess harassing conduct in the workplace.\textsuperscript{36}

The respectful person contributes by helping us assess claims of sexual harassment. But it also helps us think about the wrong itself and about the means through which we might correct it. The wrong of sexual harassment, according to this view, is a fundamental lack of respect. It is a failure to forebear, for example, in the ways that the three duties require; it results in an injury the basis of which is offense, indignity, or humiliation. This understanding permits Bernstein to

\textsuperscript{27} See id. at 477-80.
\textsuperscript{28} See id. at 464-67 (referring specifically to a “reasonable person” standard).
\textsuperscript{29} See id. at 464-77.
\textsuperscript{30} See id. at 482-90.
\textsuperscript{31} Id. at 454.
\textsuperscript{32} Id. at 483-86.
\textsuperscript{33} Id. at 485 (quoting ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33 (1974)) (second alteration in original).
\textsuperscript{34} Id. (citing Margaret A. Farley, A Feminist Version of Respect for Persons, 9 J. FEMINIST STUD. RELIGION 183, 194-96 (1993)).
\textsuperscript{35} Id. at 486-92. In discussing these obligations, Bernstein cites an eclectic array of philosophical sources, including works by Kant, Margalit, Spelman and others. Id.
\textsuperscript{36} See id. at 492-506.
address a range of unresolved, or poorly resolved, issues in sexual harassment doctrine. One example is the scope of employer liability for the harassing actions of employees or supervisors. Another is the question of how defendants might justify harassing behavior: justification is doctrinally available in most employment discrimination contexts but is rarely attempted in the harassment area. Bernstein concludes the article with a model jury instruction, informing lay people how to recognize in others the elements of a respectful stance.

One cannot help but be impressed by the scope and ambition of Bernstein's task. She seeks not only to resolve a protracted controversy about the proper standpoint from which to assess sexual harassment but also to reconceptualize the wrong and to address a range of ancillary problems in the doctrine. She seeks to situate sexual harassment on a continuum between employment discrimination and intentional tort and to use a rich backdrop of philosophical literature to inform some practical legal questions. Her account offers many features that enrich the existing literature on sexual harassment: a meticulous and nuanced history of the complications entailed by the reasonableness standard; an attentive, sympathetic account of some subjective injuries imposed by harassing conduct; a provocative argument for enhanced employer liability; and a commonsense, comprehensible instruction for juries about what to look for in a sexual harassment case. As a call for reconceptualization and redirection of the sexual harassment claim, however, Bernstein's argument has serious drawbacks.

A. Reasoning About Reasonableness

The first difficulty lies in Bernstein's critique of reasonableness. The alleged incompatibility between ratiocination and the claim for sexual harassment is far more contingent than Bernstein suggests. Bernstein seems initially to forget the question that the reasonable

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37 See id. at 492-97. Bernstein argues that the notion of respect entails a range of affirmative obligations for employers that includes anticipating the effects of peer pressure, confronting and sanctioning offenders, and understanding what helps particular individuals to flourish in a group. Id. at 495-96. This approach results in more robust obligations than the fault standard toward which courts frequently gesture but in more flexibility than the strict liability approach victims' advocates often promote. See id. at 496-97.

38 Working from Joel Feinberg's philosophical justifications for "offensiveness," Bernstein amends extant doctrine to provide three justifications for harassment—avoidability, welcomelessness, and hypersensitivity—only one of which has played a role in previous doctrine. Id. at 497-504.

39 Id. at 522-24.

40 See id. at 455-71.

41 See id. at 489-91.

42 See id. at 492-97.

43 See id. at 522-24.
person standard was enlisted to answer: whether the harassing behavior was sufficiently pervasive as to "unreasonably interfer[e]" with plaintiff's employment and create an environment that was hostile, intimidating, or abusive. Although it is true that some elements of this question have an emotional component, questions regarding the pervasiveness of the harm and the interference with employment are susceptible to the ratiocinative faculties. Moreover, this alleged incompatibility rests heavily on Bernstein's claim that sexual harassment must be understood as a dignitary harm—a feature, I will argue, that captures only part of the wrong. If sexual harassment is also understood as a barrier to women's professional progress, or, as a denial of their capacity for self-definition or self-direction, it seems quite capable of being apprehended by the faculties of reason.

Furthermore, the implication of reason in a series of stigmatizing, gendered dichotomies is neither inevitable, nor necessarily dispositional, if the standard is otherwise workable. Feminists and other theorists have developed sophisticated conceptions of reason that are more inclusive and less stigmatizing to women and minorities. One virtue of a properly elaborated reasonableness standard is that it would demonstrate that joining women, sex, and reason need not be oxymoronic. Not only does Bernstein eschew this revisionary strategy, but her insistence on the emotional character of the harm of sexual harassment threatens to replicate the dichotomy: to say that sexual harassment is an emotional injury that cannot be apprehended by reason risks reinforcing the all-too-prevalent belief that it is a women's injury that cannot be apprehended by the rest of the population.

There are comparable problems with Bernstein's critique of reason as average thinking. Although she is meticulous in documenting

45 For an interesting collection anthologizing recent efforts in this vein, see LOUISE ANTONY & CHARLOTTE WITT, A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIONITY (1993).
46 See Bernstein, supra note 7, at 471-72 (describing the reasonable woman standard as an answer to Alan Herbert's "famous little joke" that "in our Courts as it is in our drawing rooms . . . a reasonable woman does not exist").
47 I am not inclined to apply this argument to Bernstein's more general description of sexual harassment as a dignitary harm, but I apply it specifically to her designation of sexual harassment as an importantly emotional matter. Id. at 460-62. It is possible to speak of indignity as behavior inappropriate to or unworthy of certain human qualities of its target. This description of indignity makes it a quality that can be apprehended by reason. Moreover, to say that women have suffered indignities does not inherently associate them with a stereotyped, excessively emotional state. However, there are places in Bernstein's argument, particularly where she describes the harassment of Teresa Harris, where indignity, specifically humiliation, is described primarily by reference to the emotional response it evoked. Id. at 489-91. This section renders the broader argument about dignitary harms subject to the difficulties I cite above.
the analytic problems that reasonableness standards have produced, she is less persuasive in arguing that these problems inhere in reason as a substantive standard. The gender-inflected problems that have dogged the reasonable person, the reasonable woman, and their even more particularized counterparts arise not so much from the nature of reasonableness, as from the fact that the term has been leached of virtually all substantive content when applied in these contexts. Defining reasonableness as averageness or typicality has made the “reasonable” part of the standard a cipher. It operates only to make the succeeding noun into a prototype; all substantive content is then derived from this noun. It is hardly surprising that when triers of fact are asked to conceive of prototypical persons, women, or victims, the standards become a repository for dominant cultural understandings, in all their gendered, stereotypic or essentialized manifestations. But these problems need not occur under a reasonableness standard, nor are they more likely to be avoided under a standard perpetuating respect.

The movement toward prototypes may be countered by offering a fuller explanation of what is meant by the critical term “reasonable.” Courts and commentators using the reasonable woman standard, for example, have sought to specify the perception possessed by the average woman that the average person, characteristically male, lacks. If this approach to what is reasonable does not overcome all of the difficulties Bernstein addresses, it at least points toward a promising strategy: one could attempt to define “reasonable” rather than the noun that it qualifies. If reasonable is not understood as average, but is taken to be the object of explanation itself, we can move away from prototypes toward more contextualized understandings.

Consider the following possibility. A reasonable person is defined by more than ratiocinative faculties. In order to reason competently about a particular phenomenon, a person needs information about that phenomenon—it would hardly be reasonable to make a judgment without information germane to the question to be decided. So a reasonable person could be understood to be a well-informed person, a person armed with context-specific information about the question to be resolved. What should a person be expected to know about how sexual harassment operates in the workplace in order to render a reasonable judgment about whether a particular problem has become pervasive? In a recent article, for example, I

48 Id. at 464-71.
49 See Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 453-54 (N.J. 1993); Abrams, supra note 6, at 1202-15; see also Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (explaining the reason for adopting the reasonable woman standard is that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women”).
identified four categories of things that a reasonable trier of fact should know about sexual harassment in order to assess its perverseness in a particular case. The factors range from the barriers that women have faced and continue to face in the workplace to the effects sexual harassment has on the work lives of its targets. Although the content of the list might be debated, such context-based elaboration can reduce the scope within which dominant norms operate. It can be done, moreover, without replacing the existing standard.

Whether respect will be less entangled in gendered controversies is not at all clear. The standard is capable of elaboration, even for laypersons who lack familiarity with Bernstein’s philosophical sources, which may augur a less stigmatizing or reductive course of implementation. Bernstein’s model jury instructions, for example, suggest that “[t]o be a respectful person is to treat other human beings as persons who are as valuable as you are . . . [,] to recognize that they are like you, yet have their own goals and wishes . . . [, and to] accord them basic dignity.” Yet, reason too can be elaborated in comparably concrete and accessible ways, as I have suggested above. The question on both sides is less what courts or commentators can say about a

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50 The four categories of knowledge that the reasonable trier must know are: (1) sexual harassment is but one example of the complex set of barriers that women have faced and continue to face in the workplace, obstacles that marginalize women and take control of their fates in the workplace; (2) although the meanings assigned to sex by women in this society are varied, women associate many negative meanings with sex, including intimidation, objectification, and devaluation, when it occurs in the workplace; (3) sexual harassment produces a range of effects on the work lives of its targets, effects that can alter their conditions of employment, their ability to chart a desired professional path, and their self-esteem; and, (4) although a variety of factors condition the actual response of a particular individual to sexual harassment, including her life experience and commitment to the particular job, her personality, and her professional and personal support network on which she relies, the target’s response at the time of harassment is rarely a good indicator of whether the behavior was problematic or even whether the target felt distressed by the conduct. See Kathryn Abrams, The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law, DISSERT, Winter 1995, at 48, 52-54 (arguing that the Harris Court’s apparent endorsement of a reasonable person over a reasonable woman will make little substantive difference if the standard is elaborated by reference to information that the reasonable person should know about sexual harassment).

51 Bernstein elaborates it energetically. She offers a detailed survey of its philosophical entailments, as well as a briefer, common sense view that could be included in a jury instruction. Bernstein, supra note 7, at 482-557. However, much of this discussion serves simply to present academics with what Bernstein views as the legitimacy of the term. While the philosophical elaboration supplies some reasons we might want to invoke the term “respect” in connection with sexual harassment, the duties derived from a concept of recognition respect seem less entailed by the term than associated with it in various parts of a broad literature. It is therefore not easy to view any of these duties as compelled by or inextricably associated with the term “respect.” Moreover, these nuanced philosophical understandings are likely to give way to the common-sense approach when the standard is applied in court. Therefore, I will focus on the common sense approach, which is analytically connected to this philosophical discussion but radically distills and simplifies it.

52 Id. at 523 (emphasis omitted).

53 See supra text accompanying notes 45-47.
particular standard than what understanding is likely to "stick": what common-sense interpretation is likely to be distilled and used by triers of fact. Here Bernstein's point about reason as average thinking may be relevant.\textsuperscript{54} Her argument suggests that there may be a least common denominator of understanding that triers of fact or the public may ultimately reach with respect to a particular term.\textsuperscript{55} This understanding may be resistant to enrichment or enhancement even through more detailed elaboration. If Bernstein's hypothesis is correct, the question becomes what least common denominator is likely to emerge in connection with respect.

Respect is likely to be translated by triers of fact as a kind of decency. It connotes both civility and, as Bernstein suggests in her model instructions, giving a person his or her due.\textsuperscript{56} This common-sense definition highlights a quality in respectfulness that does not inhere in reasonableness: respectfulness is an attribute of the subject that not only reflects his or her character (a tendency to be decent or civil) but also responds to the characteristics of the object (giving a person his or her due). Although one would not describe a person as being worthy of reason,\textsuperscript{57} we can and do debate whether particular persons are worthy of respect. Bernstein attempts to downplay this aspect of respectfulness by arguing that sexual harassment implicates "recognition respect," a form of respect which is due people as human beings, rather than "appraisal respect," a form of respect which reflects "admiration" for certain distinctive qualities.\textsuperscript{58} However, this distinction between forms of respect that apply uniformly to human beings (recognition respect) and forms of respect that discriminate among them (appraisal respect), is not likely to be as easily maintained as Bernstein suggests. The admiration implicit in appraisal respect reflects the high end of an evaluative spectrum that is always, if subtly, in operation in our interactions with others. There are also inevitable judgments at the low end of the spectrum that distinguish

\begin{itemize}
\item Bernstein, \textit{supra} note 7, at 456, 464-65.
\item \textit{Id.} at 464-65.
\item \textit{Id.} at 523.
\item Bernstein does, however, recognize certain phenomena as appropriate for analysis by the faculties of reason and certain phenomena as not appropriate for such analysis. For example, she says that reasonable analysis of sexual harassment may be inappropriate because of its strong emotional component. \textit{Id.} at 460-62.
\item \textit{Id.} at 483-84. These categories are carefully distinguished in Bernstein's discussion of the philosophical literature, and she labors mightily to keep them distinct in her model jury instructions.
\end{itemize}

Respect is not the same as admiration. You might respect Q [name an athlete] because he is so good at his game. That's the kind of respect that comes with admiration for a person's special skills or talents. Respect in the workplace, however, means the fundamental dignity due to every person regardless of unique ability or exceptional talent. \textit{Id.} at 523 (alteration in original).
those who are worthy of the most basic forms of respect from those who are not. These judgments, which are often discussed under the rubric of "respectability," are likely to influence recognition respect as well as other forms of respect. While recognition respect is, in theory, applicable to all of us as humans, it has proven persistently difficult, in practice, for most of us to treat all humans with an even hand. Estimations of the level of respect that is due persons as human beings are almost inevitably tied to our assessment of what kinds of human beings we believe they are. These judgments of respectability, in turn, are often deeply influenced by assumptions regarding gender, race, class, and other group based characteristics.59 Two examples of recent legal scholarship analyzing the social meanings of respectability make this clear.

The first emerges from Mary Louise Fellows's analysis of women and the provision of childcare in the late-nineteenth and twentieth centuries.60 Hiring domestic workers was one of the ways that members of the emerging middle class expended their discretionary income, in large part because it helped them to realize the norms of respectability that characterized urban capitalism of that time.61 Respectability, in this setting, was associated with "good character,... sobriety, chastity, and dedication to family,"62 and, in the important context of the home, with "cleanliness, orderliness, and ornateness of children, things, and rooms."63 A careful analysis of this notion of respectability reveals that it was deeply inflected with notions of gender, race, and class. The middle class wife, who was constantly at risk of falling from respectability be-

59 The tendency to tolerate some of these differentiations may be exacerbated by the notion that respect should extend reciprocally to the subject or agent. Bernstein's model jury instructions encourage this reciprocity of respect, or flexibility, toward the agent. One model instruction, for example, states:

A respectful person does not have to be perfect. An employer acting as a respectful person is entitled to do unpleasant things, to make a profit from employment, to hire and fire, and to act as it needs. The respectful person does not have to be generous or patient, for instance. Nor does the respectful person have to have a high opinion of everyone and anyone . . . .

Id. at 523. The notion of respect as extending reciprocally to the agent might encourage triers of fact to treat some differentiations—those which correspond to differentiations drawn by the triers themselves—as unremarkable or as according the necessary level of respect; it might encourage triers to treat other differentiations—particularly those which are subtle, not facially offensive, or unnoticed by a particular target—as harmless idiosyncracies of the particular agent.


61 See id. at 21-22.

62 Id. at 21.

63 Id. at 25.
cause of women's association with the primitive and the bodily, was obliged to keep an immaculate, orderly household but also was required "to be above the dirty work of scrubbing floors and changing babies." These conflicting pressures led to the transformation of homemaking and child rearing into a profession in which the respectable woman supervised others who removed the inculpatory dirt. The creation of the homemaking and caregiving professions both reflected and exacerbated distinctions in respectability among women. Those deemed appropriate to perform this domestic labor were largely nonwhite, working class women. However, the employment of these women in homemaking and child rearing positions resulted in their further degradation. As Fellows explains:

The domestic worker knew the very truth that middle-class life was designed to eradicate—she knew its dirtiness. To make it not matter that she saw and knew intimately middle-class dirt, she had to be stripped of the ability to know. She had to be stripped of her subjectivity. By degrading her and her work, the middle class family transformed her from a knowing subject into an invisible object and in the process made the reality of their dirt a nonreality.

Denying the subjectivity of these workers—overwhelmingly poorer women of color—created further group-based disparities in popular understandings of respectability.

The second example of the group-inflected meanings of the term respectability emerges from Randall Kennedy's *Race, Crime, and the Law*. In this book, Kennedy describes a "politics of respectability" that he hopes will encourage advocates of equality for African-Americans to consider his approach of race-neutrality in criminal law. The main tenet of this politics is that "freed of crippling, invidious racial discriminations, blacks are capable of meeting the established moral standards of white middle-class Americans." One of its principal strategies is "to distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes."

Kennedy notes illustratively:

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65 Fellows, supra note 60, at 26.
66 See id. at 26-27.
67 See id. at 25-26 (noting that women with skin darker than Northern Europeans were often associated with dirt and viewed as appropriate individuals to undertake its removal).
68 Id. at 29.
69 Id. at 35-45.
71 Id. at 21.
72 Id. at 17.
73 Id.
The politics of respectability . . . would have cautioned against the triumphalist celebrations that followed the acquittal of O.J. Simpson on the grounds, among others, that such displays would singe the sensibilities of many, particularly whites, who perceived the facts of the trial differently. Acting based on the notion that blacks need not be attuned to the way they are perceived by others has adversely affected the racial reputation of African-Americans, facilitating indifference to their plight.\textsuperscript{74}

The politics of respectability, thus described, helps advocates of black equality decide which blacks should be the focus of legal and political reform (black victims) and which should not (blacks who are accused of crimes).\textsuperscript{75} It also helps black reformers decide which initiatives should be undertaken (those that are "extra-careful in order to avoid the derogatory charges lying in wait in a hostile environment")\textsuperscript{76} and which should not (those that "singe the sensibilities of many, particularly whites").\textsuperscript{77}

In both these examples, concern with respectability reflects and perpetuates intricate hierarchies based on race, gender, class, and other attributes. It reflects a desperate "politics of the margin," in which relatively privileged members of a devalued group degrade other members of their own group in order to demonstrate their worth to those in power.\textsuperscript{78} In addition to dividing those who might make common cause for change, the pursuit of respectability naturalizes, or renders invisible, the power arrangements that created centrality and marginality in the first place.\textsuperscript{79} When 19th century middle class women sought bourgeois respectability by creating a degraded class of poor women who cleaned their houses and took care of their children, they accepted the judgment of the emerging normative system that women were primitive and bodily.\textsuperscript{80} They accepted the "dirt" as occurring within themselves, rather than seeing it as another impo-

\textsuperscript{74} Id. at 21.

\textsuperscript{75} Kennedy argues that "the principle injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws." Id. at 19. Blacks, he notes, "suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racist misconduct of white police officers." Id. at 20.

\textsuperscript{76} Id. at 20.

\textsuperscript{77} Id. at 21.

\textsuperscript{78} See generally Fellows & Razack, supra note 64 (describing the competing efforts of marginal groups to obtain a "toehold" on respectability).

\textsuperscript{79} See id. at 10-12. According to Fellows and Razack:

The marking of subordinate groups, and the unmarking of dominant groups leaves the actual processes of domination obscured, thus intact. Subordinate groups simply are the way they are; their condition is naturalized. To be unmarked or unnamed is also simply to embody the norm and not to have actively produced and sustained it. To be the norm, yet to have the norm unnamed, is to be innocent of the domination of others.

Id. at 12 (emphases in original).

\textsuperscript{80} See Fellows, supra note 60, at 29.
sition of an illegitimate hierarchy: an Enlightenment ideal of the virtuous citizen, which was ostensibly available to all, but was in practice limited to the privileged few who were supported by a range of subordinated others.\textsuperscript{81} Similarly, when some 20th century blacks seek respectability by aspiring to the morality of middle class whites, they decline to challenge the partiality and injustice of these dominant norms\textsuperscript{82} and acquiesce in dominant stereotypes about the criminality of African-American men.\textsuperscript{83}

Bernstein, of course, does not advocate the pursuit of respectability, as Kennedy does, or as 19th century middle class domestic morality did. Nor does this examination of the hierarchy and power evasion associated with the concept of respectability mean that every invocation of the term "respect"\textsuperscript{84} or "respectable" will produce group based distinction and stigmatization. But, it does suggest that popular understandings of both respect and those who merit it are enmeshed in judgments reflecting group based differentiation. Therefore, Bernstein's efforts to avoid the raced and gendered entailments of reasonableness through the substitution of the term respect may be less successful than she hopes.

This excavation of the hierarchical, gendered connotations of Bernstein's proposed standard also suggests, more generally, the limits of education that can occur through a focus on a single standard or term.\textsuperscript{85} While language can be a powerful constructive force in life

\begin{footnotesize}
\begin{enumerate}
\item See Fellows & Razack, supra note 64, at 13 (describing the "structures of domination" necessary to "make the middle class" under a system that proclaimed fundamental equality).
\item See Sheri Lynn Johnson, Respectability, Race Neutrality, and Truth, 107 YALE L.J. (forthcoming June 1998) (manuscript at 21-25, on file with author) (reviewing Kennedy, supra note 70). Critiquing and eschewing the politics of respectability, Johnson argues that the "white morality," or color blindness in the criminal area, is not only partially but also radically unjust. \textit{Id.} (manuscript at 38-39).
\item See \textit{id}. (manuscript at 21-25).
\item Respectability is not the only term connected with Bernstein's standard that appears to be connected with group based differentiation. The term respect, as understood by employers or triers of fact, may also subtly differentiate according to gender, race, class, or other socially salient categories. For example, the man who places women on a pedestal, opining audibly that they should be protected from either the uglier features of office politics or the demands of occasional physical chores, respects women under this standard, though his behavior is strongly gender differentiated. The male employer who treats women employees as he might his mother or sister, addressing them kindly or even affectionately but declining to treat them as serious professional contenders, might also be seen as fulfilling the demands of respect according to this minimalist understanding.
\item In my own work, I have devoted considerable effort to refining and improving the reasonableness standard. See Abrams, supra note 6, at 1209-15; Abrams, supra note 50, at 52-54; Kathryn Abrams, Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein, 41 DePaul L. Rev. 1021, 1031-37 (1992). Yet, I regard this focus largely as a pragmatic response. Reasonableness has been the standard that the courts seem committed to using; it therefore was a propitious site for promulgation of the substantive understandings I believed would improve the doctrine.
\end{enumerate}
\end{footnotesize}
and law, it is inevitably inflected by the social environment in which it is used. I am skeptical about our power to transform substantive understandings—or to step away from a world deeply marked by group based inequalities—through the alteration of a single term in a legal standard, no matter how skillfully that alteration might be explained or justified in scholarly commentary. If we hope to modify or reconstruct sexual harassment doctrine, we need a coherent account of where existing doctrine is going wrong, and, perhaps more importantly, a reconceptualization of the real problem to be remedied through sexual harassment litigation. This is why the latest phase of sexual harassment scholarship is so crucial. It does not simply describe sexual harassment anecdotally, as was the pattern in much of the first decade of scholarship, or analyze the technical means of adjudicating it, as was the pattern in much of the second decade of scholarship. Rather, it attempts to re-articulate the wrong of sexual harassment and to redraw the boundaries of legal enforcement according to that understanding.

B. The Neutered Wrong of Disrespect

Interestingly, Bernstein appears to concur in many of these conclusions. Her own argument offers a critique of current sexual harassment doctrine and is strongly concerned with a reconceptualization of the wrong. The great advantage of the respect standard, according to Bernstein, is that it is "a standard that measures action rather than reaction." The respect standard offers not only a standpoint from which to assess legal claims but also an affirmative account of what is wrong with harassing behavior. Harassment, in this view, is a failure of respect: it is a dignitary injury that offends, humiliates, and denies the equal human status of the object. However, the value of this dual role for respect depends on its account of the wrong. A legal standard, however practical, that is linked to an erroneous or incomplete description of the wrong has little value. Herein lies my final and most pressing reservation about Bernstein’s argument. Her account of the wrong seems accurate but disturbingly underspecified.

There is no doubt that sexual harassment is a failure of respect. Although her use of putative synonyms such as “offensiveness” or “in-

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86 See supra notes 3-4.
87 See supra notes 5-6.
88 Bernstein, supra note 7 (rejecting all current forms of the reasonableness standard in favor of a respect standard, which she believes more accurately expresses the wrongs of sexual harassment).
89 Id. at 507.
90 See id. at 450-52.
91 See id. at 450, 506-12.
civility” risks trivializing the wrong. Bernstein’s description of harassment as a dignitary injury that humiliates and denies the equal personhood of the target seems wholly accurate. Moreover, Bernstein’s sensitive discussions of the impact of this injury on the lives of women suggest that she fully appreciates the dignitary dimension of the harm. The problem with her account, however, is not with what it says but with what it fails to say. First, it is not central to Bernstein’s conceptualization of the wrong that sexual harassment occurs in the workplace. Bernstein reflects in passing on the meaning of being humiliated at work and argues that respect should entail an appreciation of the community that connects the harasser and the target. But the indignity that she defines as harassment’s central harm could occur anywhere—on the street, in a social institution, in one’s home. Bernstein neglects important dimensions of the injury specifically attributable to the fact that it occurs in the workplace. The absence of these work-specific dimensions affect the completeness of her account. The humiliation of sexual harassment occurs in a setting where it has the potential to thwart the earning of one’s livelihood and to prevent the achievement of one’s professional fulfillment or self-definition. It also occurs in a setting where women have historically been marginalized or relegated to distinct and limited roles and where they continue to face hostility and systematic obstacles to professional progress.

This latter observation raises a second difficulty that goes not simply to the completeness of Bernstein’s account but to its political valence. It is not central to Bernstein’s account that the humiliation of sexual harassment is perpetrated by more powerful members of a gendered hierarchy against the less powerful members. This is a hierarchy that shapes not only the workplace but also a range of institutions and attributes of our social and cultural life. What is relevant, and obscured by Bernstein’s account, is that the humiliation of sexual harassment parallels a number of other humiliations suffered by wom-

92 This is particularly true in a cultural setting where claims of offense are both legion and sometimes unwarranted. For a lucid discussion of the pervasiveness and varieties of such claims, tinged sometimes with a rather astringent attitude toward legitimate victims, see Robert Hughes, The Culture of Complaint (1992).
93 Bernstein, supra note 7, at 489-92.
94 Id. at 461-62 (describing how trying a hostile environment is, both psychologically and physiologically); id. at 509 ("That hostile environment sexual harassment is fundamentally an injury to dignity escapes few who have experienced and studied the phenomenon.").
95 Id. at 490-91.
96 See infra notes 151-53 and accompanying text.
97 For a discussion of the impact of women’s collective experiences in the workplace on their perceptions of harassing behavior, see Abrams, supra note 6, at 1204-05.
98 This point was made originally in MacKinnon, supra note 1, at 1-23.
men through their sexual coercion, their reduction to two-di-
men through their sexual coercion, their reduction to two-di-
dimensional stereotypes, the devaluing of their abilities, and the
dimensionality of their abilities, and the
discounting of their critical perspectives on discriminatory practices in
discounting of their critical perspectives on discriminatory practices in
many walks of life. Bernstein is undoubtedly aware of these connec-
maintenance of these connections: gender inequalities in the workplace shape the cases she
tions: gender inequalities in the workplace shape the cases she
discusses and inflect some of her proposals for doctrinal
discusses and inflect some of her proposals for doctrinal
revision. Moreover, the gendered harms inflicted upon women are central to
Moreover, the gendered harms inflicted upon women are central to
the emergence of the reasonable woman standard she critiques.
the emergence of the reasonable woman standard she critiques.
Yet the very political conundra in which that standard became en-
Yet the very political conundra in which that standard became en-
mired seem to have convinced her that an apolitical account of the
mired seem to have convinced her that an apolitical account of the
wrong is to be preferred. The reasonable woman standard, according
to her account, risks fixing women’s differences in stone. Ascribing
those differences to coercion risks rendering women everywhere vic-
time, unable to combat their own almost inevitable violation. If
time, unable to combat their own almost inevitable violation. If
gender specificity has wreaked havoc with this instrumental standard,
gender specificity has wreaked havoc with this instrumental standard,
Bernstein seems to be reasoning, how much more dangerous to offer
Bernstein seems to be reasoning, how much more dangerous to offer
a gendered, politicized account of the wrong itself.

The race, class, and gender differentiated connotations of re-
pectability, as I suggest above, may import into this standard a set of
pectability, as I suggest above, may import into this standard a set of
hierarchies more complex than those Bernstein seeks to evade.
hierarchies more complex than those Bernstein seeks to evade.
Yet, if the standard worked according to plan, it would lean toward
genre neutrality and abstraction. This choice, to my mind, yields
neutral neutrality and abstraction. This choice, to my mind, yields
both descriptive inadequacy and normative compromise. Yes, harass-
ment as a dignitary injury, but if we do not appreciate that this digni-
ment as a dignitary injury, but if we do not appreciate that this digni-
tarity injury is a function of, and connected to, other injuries within an

99 Cf. Estrich, supra note 6 (noting parallels between both sexual harassment and rape
in the humiliation of the injury and of the trial).
100 A sense of current inequalities in the workplace might underlie her proposal for
the imposition of greater affirmative burdens on employers in order to avoid liability for
harassment by subordinates. Bernstein, supra note 7, at 492-97.
101 See Abrams, supra note 50, at 48-51 (describing how women’s gendered life exper-
ences make a reasonable woman standard appropriate).
102 See Bernstein, supra note 7, at 475-77. Though Bernstein’s discussion is not lengthy,
accompanied by the critique of “reason as ratioincation” as gendered, it seems to consti-
tute the primary motivation for her quest for a gender neutral standard and an apolitical
conception of the wrong. It is possible that I am overstating Bernstein’s interest in gender
neutrality or abstraction from the politicized aspect of the phenomenon when it comes to
defining the wrong. She may have learned from such problems to prefer respect to reason-
ablesness as a legal standard and simply deduced the account of the wrong from that stan-
dard. However, that approach would seem to put the cart before the horse. It is quite
possible to embrace a standard for assessing pervasiveness that is distinct from one’s ac-
count of the wrong. I do so myself. See infra Part III.C.1. I suspect that Bernstein’s con-
cern with the complications of gender specificity inform both her choice of legal standard
and account of the wrong.
103 See supra notes 51-83 and accompanying text.
104 Bernstein describes avoiding the gendered entanglements of reasonableness as a
goal of her approach. Bernstein, supra note 7, at 454-55.
unequal, hierarchial relationship, we miss much of what is morally and politically significant about the wrong.

Bernstein’s real focus may be on the remedy when she defines the wrong of sexual harassment as disrespect.\textsuperscript{105} It is true, she might say, that defining the wrong of harassment as disrespect elides some of the politically salient features of the context in which harassment occurs. But if enjoining workers and employers to behave respectfully produces a less complicated and accusatory remedial course, are we worse for having avoided the potentially inflammatory details of gender inequality? I think we are, for two reasons.

First, failing to highlight the fact that this humiliation arises from a context of systematic gender inequality individualizes the wrong and diminishes the imperative for responding to it. Correcting a non-systematic problem of disrespect is a far less urgent matter than curtailling a practice of gender discrimination, which imposes consequences on women’s economic and personal well-being and which has parallels throughout society. This is not simply an abstract point but an issue with ramifications for public education, legal enforcement, and private efforts at prevention. The public will better understand the need for concerted enforcement efforts, and employers will better comprehend the need for strong affirmative obligations of prevention and response, if they understand that they are remedying a longstanding, often entrenched problem.

Second, and perhaps more importantly, failing to highlight the political or gendered character of sexual harassment will make it more difficult, as a practical matter, to assess and prevent. If I am right about Bernstein’s pragmatic remedial focus, disrespect operates as a noninflammatory proxy for the sexist devaluation of the less powerful by the more powerful members of a sex and gender hierarchy. Because the term and the helpful instructions that accompany it do not begin to capture the varied, intricate dynamics of that devaluation, they are unlikely to enable triers of fact and employers to recognize all of the problematic conduct they need to act against. Triers of fact may not recognize the gendered forms that disrespect takes.\textsuperscript{106} Employers charged with prevention may not recognize the subtly stereotypic or devaluative attitudes that increasingly fuel harassment as women move into the workplace in greater numbers and as competi-

\textsuperscript{105} This interpretation, moreover, is plausible considering Bernstein’s serious effort, throughout her article, to improve the adjudicative means by which sexual harassment is identified, sanctioned, and prevented. \textit{E.g.}, Bernstein, \textit{supra} note 7, at 492-506 (analyzing respect as a legal standard for adjudicating sexual harassment cases in the employment context).

\textsuperscript{106} \textit{See supra} note 56-59.
tion becomes more intense. Employees asked to modify their behavior prospectively may not grasp the range of conduct that is forbidden or the underlying attitudes that need to be re-examined. Declining to identify the gendered character of sexual harassment both effects a moral and political neutering of the problem and imposes an unnecessary impediment to remedying or preventing it.

II
SEXUAL HARASSMENT AS A TECHNOLOGY OF SEXISM: THE GENDERED DYNAMIC(S) OF HARASSMENT

A. Gendering in the Context of Harassment

For Katherine Franke, neglecting the political dimensions of sexual harassment would be anathema. Explaining why sexual harassment is a form of sex discrimination is her central project in What's Wrong with Sexual Harassment? Contrary to what one might expect, Franke argues, the Supreme Court has not provided an answer to this question. Lower courts and commentators have advanced three possible explanations: that sexual harassment violates formal equality, because it would not have occurred but for the sex of the victim (the "but for" argument); that sexual harassment is sex discrimination because the expression of sexuality is prejudicial to women in the workplace (the "anti-sex" argument); and, that sexual harassment is sex discrimination because it sexually subordinates women to men (the "subordination" argument). According to Franke, none of these arguments provides a principled or fully satisfactory explanation in the typical sexual harassment case in which a man harasses a woman. Furthermore, they produce particularly flawed decision-making in the growing category of cases involving same-sex harassment.

Franke focuses in particular on the "but for" and anti-sex arguments, which are most often articulated in the case law and come in for particular criticism. The "but for" explanation, Franke argues, treats sexual harassment as an unfettered expression of sexual desire. This equation of harassment with desire is uncomfortably reminiscent of an earlier period when harassing behavior was excused.

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107 The potential effects of these developments are discussed infra notes 146-50 and accompanying text.
108 Franke, supra note 3.
109 Id. at 692.
110 Id. at 693.
111 Id.
112 See id. at 693-94, 729.
113 Id. at 730-31. The fact that it is sex discrimination is obvious because the desire would not have been evoked or manifested but for the sex of the target. See id. at 730-32.
because it reflected a "natural expression of male agency." It is also heterosexist because it assumes that the target capable of evoking the sexual desire of the harasser must be a person of the opposite sex. This assumption, often implicit in the cross-sex cases, is made explicit in certain same-sex cases where, in order to prove that s/he was harassed by a person of the same sex, a plaintiff must demonstrate the homosexual orientation of the perpetrator. The equation of sexual harassment with desire also causes claimants to be treated inequitably in another category of same-sex cases. The courts have denied most claims involving the harassment of an effeminate or sexually inexperienced male worker on the grounds that they do not involve the expression of desire.

When current doctrine does see beyond sexual desire to highlight the inequalities of power implicated in workplace harassment, both the anti-sex and "but for" approaches tend to impose broad prohibitions on sexuality in the workplace. The problem with this impulse, according to Franke, is that it disparages women's sexual agency. To assume that sexuality in the workplace is presumptively a bad thing "draws into question women's capacity to either consent...

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114 Id. at 763; see also id. at 734 (noting that "[t]he law and our culture have evolved beyond that rather primitive view"). Under the "but for" approach, this expression of desire is proscribed because it ultimately results in treating members of one sex differently from members of the other. See id. at 735.
115 See id. at 735-36.
116 See id. at 732-33. Although Franke does not describe it as such, there is a parallel to this additional requirement in same-sex cases under the anti-sex approach. In same-sex cases where male plaintiffs have alleged sexual epithets or comments (e.g., "suck my dick"), courts have not permitted plaintiffs to prevail on the basis of showings that the conduct was sexual and unwelcome, as they would in cross-sex cases involving similar epithets, but have required a showing of "something more" to distinguish what they describe as either boorishness or a grudge match between male employees from discrimination on the basis of sex. See id. at 722-25.
117 See id. at 737-39. Although Franke does not focus on it in this portion of her argument, the equation of sexual harassment with sexual desire also functions to exclude from Title VII coverage another category of same-sex cases in which sexual desire does not appear to play a part: those in which a male plaintiff complains of pervasive hypermasculine behavior such as "rough housing" or "bagging" ("mak[ing] a feinting motion with [one's] hand toward [another man's] groin," id. at 767 n.400) by co-workers in the workplace. For Franke's discussion of this category of cases, see id. at 767-69.
118 See id. at 740-43. Franke argues that the role of power becomes clear in interracial cases of both rape and sexual harassment, where sex is evidently a vehicle for expressing racially specific hatred or devaluation. Id. at 744.
119 The anti-sex argument, that sexuality is consistently inappropriate in the workplace and injurious to women per se, seems to be analytically distinct primarily in the work of commentators such as Susan Estrich. Estrich, supra note 6. It appears from Franke's discussion of the cases that judicial arguments about the toxicity of sexuality in the workplace are offered in either the course of demonstrating why the conduct was (or was not) motivated by sexual desire (usually as a part of an effort to meet the but for requirement) or, in a smaller subset of cases, the course of demonstrating why sexuality in the workplace subordinates women. Franke, supra note 3, at 714-25, 746-47.
120 Franke, supra note 3, at 746-47.
or object to certain kinds of workplace sexual activity.”  

It also threatens to transform the workplace into a setting in which workers must “check their sexualities at the door,” something Franke views as an unattractive prospect.

Ultimately, both the “but for” and the anti-sex arguments fail because they explain why sexual harassment differentiates women without explaining why sexual harassment discriminates against women. A stronger argument, in this sense, is that sexual harassment is sex discrimination because it functions to subordinate women to men. The subordination approach seeks to identify, where others do not, the discrimination in sexual harassment. The problem with this argument, according to Franke, is that this argument relies “too heavily

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121 Id. at 746. Franke describes the anti-sex approach (and arguably the sexual-harassment-as-desire component of the “but for” approach) as entailing the view that “since the law has done a bad job of differentiating welcome from unwelcome sexual conduct, better to declare it all unwelcome.” Id. Yet, while some commentators Franke associates with this approach, notably Susan Estrich, have argued for eliminating the unwelcomeness requirement, see Estrich, supra note 6, at 831, I do not read the cases that have embraced this approach as obviating the unwelcomeness requirement. I expect that this requirement will continue to be with us, in some form or another, under any of the three dominant explanations. While unwelcomeness has sometimes been interpreted in such a way as to produce a “trial of the victim,” id. at 813-16, it can also, as Franke acknowledges, be a vehicle for demonstrating women’s agency. Franke, supra note 3, at 746-47 (“The requirement that the plaintiff prove the sexual conduct was unwelcome clearly presupposes a degree of female agency in these contexts.”) (footnote omitted); see also Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304, 365 (1995) (arguing that the “unwelcomeness” requirement might be met by demonstrating behavior women most frequently use to respond to unwanted harassment, such as changing the subject in conversation or attempting to avoid the perpetrator). Therefore, it is possible that the anti-sex view may cast fewer aspersions on women’s agency than Franke suggests. However, this argument does not meet Franke’s larger claim, described below, that the anti-sex view assumes rather than explains why sex is, in and of itself, discriminatory to women. Franke, supra note 3, at 747-59.

122 Katherine Franke, What’s Wrong with Sexual Harassment?, Address at the Annual Meeting of the Law & Society Association (May 30, 1997). In the oral presentation of her paper, Franke did not elaborate on this point at length. However, in the article Franke endorses “provid[ing] all people more options with respect to how they do their gender” as one of the most important goals of antidiscrimination law. Franke, supra note 3, at 758. Defining the workplace as an area in which workers may not manifest sexuality in virtually any form places burdensome restrictions on workers in doing their gender, restrictions which are particularly unwarranted if commentators cannot explain why sex is, in and of itself, harmful to women in the workplace.

123 In a few anti-sex cases, courts have gone further by arguing that sexual conduct or representations in the workplace are “disproportionately more offensive and demeaning to women.” Franke, supra note 3, at 720-21 (citing Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1523 (M.D. Fla. 1991)). This understanding either implies that women are particularly susceptible to sexual offenses, a potentially stigmatizing suggestion of delicacy that Franke rejects, id. at 747, or collapses into a critique of sexuality as subordinating to women.

124 This argument was originally advanced in MACKINNON, supra note 1, at 174-92.

125 See id. at 1-23 (describing sexual harassment as one of many practices that render women unequal to and subject to the will of men).
SEXUAL HARASSMENT

on the premise that [sexual harassment] is something that men, as a biological category, do to women, as a biological category.\footnote{126} In this vein, sexism is seen as "a kind of biological warfare, the shrapnel of which is gender."\footnote{127} Because the subordination theory is cast in terms of biologically defined groups, it tends to obscure phenomena that should be viewed as related, such as the restriction of men and women to conventionally gendered roles and the entrenchment of a hierarchy between masculinity and femininity.\footnote{128} Furthermore, a theory organized around biological categories cannot accommodate same-sex cases where a man is harassed not because of his biological sex but because of his nonmasculine social characteristics.\footnote{129}

Franke improves upon the subordination argument by reconceptualizing the problem of sexual harassment "as one of gender subordination defined in hetero-patriarchal terms."\footnote{130}

The subordination of women by men is part of a larger social practice that creates gendered bodies—feminine women and masculine men. According to this ideology, sex and gender ultimately collapse in such a way that femininity is understood as the authentic expression of female agency and masculinity is regarded as the authentic expression of male agency. This ideology also includes a sexual hierarchy in which women are regarded as inferior to men, and femininity is regarded as inferior to masculinity.\footnote{131}

Sexual harassment, understood within this scheme, is part of a "technology of sexism" that constructs the identities\footnote{132} of men and women according to "fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered."\footnote{133} A woman fondled or derided as a sexual object becomes, in her own eyes and in the eyes of

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\item \footnote{126} Franke, \textit{supra} note 3, at 760.
\item \footnote{127} \textit{Id.} at 761.
\item \footnote{128} See \textit{id.} at 760-61.
\item \footnote{129} See \textit{id.} at 749. Although Franke does not explicitly say so in this section, the biological orientation of the subordination account also makes it difficult for the account to explain cross-sex cases where a woman is harassed or discriminated against less because of her biological sex than because of certain social characteristics that she manifests along with it. See, e.g., \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228, 235 (1985) (alleging that a woman was denied partnership for failing to follow admonishment to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" (citations omitted!)). For Franke's discussion of this case, see Franke, \textit{supra} note 3, at 749 n. 301.
\item \footnote{130} Franke, \textit{supra} note 3, at 760.
\item \footnote{131} \textit{Id.} at 762 (footnotes omitted).
\item \footnote{132} \textit{Id.} at 693. Franke describes this aspect of the harassment dynamic as "performativity." \textit{Id.} (arguing that harassment is "[p]erformative in the sense that the conduct produces a particular identity in the participants"). The fact that harassment constructs the identity of the perpetrator as well as that of the subject is described as "reflexivity." \textit{Id.} at 693-94 (arguing that harassment is "reflective in that both the harasser and the victim are affected by the conduct").
\item \footnote{133} \textit{Id.} at 693.
\end{itemize}
others, more of a sexual object by virtue of that conduct and the man
who imposes this treatment becomes more of a sexual subject. \(^{134}\) This
technology is also capable of oppressing some subgroups of men by
terrorizing, stigmatizing, and inducing conformity among men who
are effeminate, are sexually inexperienced, or depart in other ways
from conventional masculinity. \(^{135}\) Thus, Franke's argument offers not
only a more complete, unbiologized account of how sexual harass-
ment functions as sex discrimination in the cross-sex cases but also a
basis for including some same-sex cases within Title VII's ambit. \(^{136}\)

\(^{134}\) See id.

\(^{135}\) It is unclear whether Franke believes that her view of harassment as performative
distinguishes it from MacKinnon's view. She states at the end of her critique of the subor-
dination argument that

[w]hile I may get no argument from MacKinnon on these observations
about what sexism is and does, I want to resist her impulse to collapse sex-
ism with sex: for MacKinnon sexism is something the male sex does to the
female sex, and sex (as in "to have sex") is always, already sexist.

id. at 762. It is not clear from this statement whether Franke understands MacKinnon to
say that women are always, already sexual objects and men are always, already sexual sub-
jects. Some commentators read MacKinnon this way, an interpretation that is attributable
in part to the fact that MacKinnon describes the process of sexual construction with such
uniformity and inevitability that it may seem as if it has always, already occurred. E.g.,
Catharine A. MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurispru-
dence, 8 Signs 635, 646 (1983) (defining sexuality as "a social sphere of male power of
which forced sex is paradigmatic"). For a critique of the inevitability of women's victimiza-
tion in MacKinnon, as well as the essentialism of her approach, see Harris, supra note 23.

MacKinnon also elects, as a matter of strategy, not to focus on atypical women or instances
of women's resistance (apart from women's support for her legal initiatives), a factor that
may contribute to the perception that women are always, already objectified. MacKinnon
alludes to this strategy in Catharine A. MacKinnon, Feminism Unmodified: Discourses on
Life and Law 218-19 (1987). For one commentator's discussion of this choice as strategic,
see Frances Olsen, Feminist Theory in Grand Style; 89 COLUM. L. REV. 1147 (1989) (reviewing
MacKinnon, supra). For a fuller discussion of these points, see Abrams, supra note 121, at
324-29. But, whatever her view of MacKinnon on this point, Franke's account of sexual
harassment places more emphasis on how women become sexual objects, or more generally,
on the processes through which gender hierarchy tends to be established. Franke,
supra note 3, at 693-94. I endorse this emphasis, which tends to highlight the particularity,
and perhaps ultimately the contingency, of that objectification or hierarchization. As I will
argue below, what needs to be added to this account of sexual harassment is a greater
emphasis on how women and men resist this process of objectification or gender construc-
tion. See infra Part II.B.

\(^{136}\) Franke considers three categories of same-sex cases. In the first, the harasser is a
gay man who manifests uncontroverted sexual desire for the target, through quid pro quo
or hostile environment sexual harassment; in the second, the harasser is a nongay man or
group of men who sexually harass another man not as a result of desire but as part of a
practice of masculine "horsing around"; and in the third, a man in the workplace is
 targeted for harassment of a sexual nature because he is effeminate, sexually inexperi-
enced, or otherwise fails to conform to "hetero-masculine" norms. Franke, supra note 3, at
696-97, 766. Franke finds the first set of cases outside the ambit of sexual harassment
enforcement and should be litigated under a claim of disparate treatment. id. at 766-67.
She finds the second category of cases actionable under the sexual harassment claim but
limited by requirements of standing to those cases where the harasser targeted the plaintiff
for objecting to the conduct. id. at 767-69. She finds the last set of cases, involving the
Franke’s account makes a crucial contribution to the emerging jurisprudence of sexual harassment. Far from abstracting from the political or gendered context of sexual harassment, Franke links it carefully to a range of social dynamics of gender subordination. Women may be harassed as a means of devaluing conventional femininity or as a means of disciplining nonfeminine behavior. Franke also links harassment to the enforcement of masculine norms against nonconforming men, a dynamic rendered largely invisible by the male-on-female framing of subordination accounts. Additionally, Franke situates sexual harassment doctrine in the context of women’s struggle for agency, a struggle insufficiently attended by feminist theorists. She recognizes women’s capacity for self-direction when she warns that the anti-sex approach obscures women’s ability to consent or resist. She recognizes their capacity for self-definition when she identifies as a goal of antidiscrimination enforcement the “provid[ing of] all people more options with respect to how they do their gender.”

Yet there is a gap in Franke’s otherwise successful elaboration of context. While she skillfully situates sexual harassment within various society wide dynamics of gender subordination, she seems less concerned with situating it within the salient dynamics of the workplace. Franke does not neglect the workplace setting, yet one could say

\[\text{disciplining of nonmasculine men, fully actionable as a sexual harassment claim. Id. at 770-71. I discuss these conclusions in more detail, infra Part III.C.2.}\]

\[\text{Id. at 693, 763.}\]

\[\text{See id. at 693.}\]

\[\text{Id. at 766-68.}\]

\[\text{Id. at 729-30. Feminist theorists have often walked a tightrope between emphasizing the systematic character of women’s constraint and acknowledging the possibility of women’s present and future agency. See, e.g., Abrams, supra note 121 (exploring feminist accounts of women’s agency and arguing for an account of women’s constraint that does not obliterate women’s agency). A range of feminist theorists have also addressed this point in other topics and disciplines. See, e.g., Sharon Marcus, Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention, in Feminists Theorize the Political 385 (Judith Butler & Joan Scott eds., 1992) (discussing women’s agency in relation to rape); Susan Etta Keller, Viewing and Doing: Complicating Pornography’s Meaning, 81 Geo. L.J. 2195 (1993) (discussing women’s agency in relation to pornography); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1 (1991) (discussing women’s agency in the context of spousal abuse); see generally Seyla Benhabib et al., Feminist Contentions (1995) (discussing the role of agency in poststructuralist feminist accounts).}\]

\[\text{Id. at 758.}\]

\[\text{Franke’s cases all concern misconduct at work and her definition of the wrong locates gendering in the workplace. Id. at 760 (arguing that sexual harassment is sex discrimination because it is a “mechanism by which an orthodoxy regarding masculinity and femininity is enforced, policed, and perpetuated in the workplace” (emphasis added)). Furthermore, she is concerned about the effects of anti-sex enforcement on the workplace environment. Id.}\]
that Franke locates sexual harassment in the workplace without investigating its specific relation to the workplace.\textsuperscript{144} Have struggles specific to the workplace fueled or shaped sexual harassment? Has sexual harassment produced effects on the workplace that are related to, but distinct from, the effects it has produced on the men and women within it? Sexual harassment is surely a form of sex discrimination, and it, importantly, is linked to other forms of discrimination that occur outside the workplace. But it also is comprehended under a statute that proscribes employment discrimination on the basis of sex, and it exhibits crucial connections to other forms of discrimination that occur in that context.\textsuperscript{145} Answering these questions will help us to understand why sexual harassment is encompassed within this latter category as well.

In the following section I turn to the context of the workplace. I highlight the following different developments that have shaped life at work over the past few decades: the movement of increasing numbers of women into the workplace, the challenges to and partial disestablishment of sex segregation in employment, and the ensuing struggles between men and women about control over and normative structuring of the workplace. While it is not the only story that might be told about the workplace, this account emphasizes a series of dynamics that seem likely to bear on the practice and meaning of sexual harassment. It also frames an issue central in assessing Franke's theory: the role of accounts emphasizing the subordination of women within broader theories of gender subordination.

B. Context Revisited: The Workplace

Over the last several decades—during which time the claims for sexual harassment have flourished—the workplace has undergone important, albeit partial, transformations. In quantitative terms, these

\textsuperscript{144} One indication that Franke considers the workplace location of sexual harassment nondeterminative is the fact that her definition of the wrong of sexual harassment—the enforcement of gender orthodoxy through coercive or derisive language or touching—is one that could occur in virtually any context. In fact, it has interesting parallels to accounts of rape that describe it as a process of gendering, a crime that can occur in virtually any context. For a provocative discussion of rape as a process of gendering, see Marcus, supra note 140, at 390 (stating that rape "[creates] female sexuality as a violated inner space" and "produces as an effect the male power that appears to be rape's cause").

\textsuperscript{145} My emphasis on the dual nature of sexual harassment distinguishes my account from Franke's, which tends to connect harassment to practices of gendering that occur outside the workplace. It also distinguishes my account from that of Vicki Schultz, which emphasizes the connection of harassment to other practices of discrimination that occur within the workplace and mutes its ties with nonworkplace forms of sexual coercion. See, e.g., Schultz, supra note 7. As I will explain more fully below, infra Part III.A, highlighting this multifaceted, intersectional character of sexual harassment is critical if the phenomenon is to be fully understood, and if legal decisionmakers and the public are to understand the multifaceted character of gender based oppression more generally.
transformations have meant a large influx of women into the workplace with an increase in the amount of full-time work being done by women, including mothers of small children. In qualitative terms, they have meant a gradual, if ultimately radical, change in the kinds or categories of work being performed by women. Although "women have always worked"—a statement particularly true of working class women and women of color—they have historically been confined to specific jobs, from domestic labor to the teaching of small children, that draw explicitly on the gendered roles they have occupied within the family. Between the 1960s and the 1980s, women, using the analytic wedge provided by liberal feminism, challenged their exclusion from traditionally male jobs ranging from the professions to the blue collar trades—sometimes under court order and sometimes with the assistance of foresighted employers and supervisors.

In individual, as opposed to aggregate, terms, work often proved transformative for the women who undertook it. Although women entered the workforce for reasons ranging from economic necessity to curiosity, many found that it provided them with unanticipated opportunities and resources. Working gave women an opportunity to perform tasks for remuneration, an experience that often conferred a sense of competence or independence that they had not enjoyed before. It also gave some women an opportunity both to perform

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147 Alice Kessler-Harris, Women Have Always Worked 10 (1981) ("Women have always worked in their homes and the homes of others, in fields, factories, shops, stores, and offices.").

148 These jobs have also been characterized by sexual segregation and low pay. See generally, id. at 146 (describing women's employment in the 1970s). One salient exception, strongly encouraged by numerous forms of government intervention, was the employment of women in defense related industries during World War II. For a discussion of the means employed by governmental and private employers to move women into the wartime workforce and accommodate their family responsibilities, see Delores Hayden, Designing the American Dream: The Future of Housing, Work, and Family Life 3-6 (1984); Kessler-Harris, supra note 147, at 141-43.

149 See Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in Feminism Unmodified: Discourses on Life and Law, supra note 135, at 35 (arguing that equality and liberal feminism helped women gain access to employment opportunities).

150 For an interesting account of the ways in which supervisors supportive of women's employment opportunities can and have made a difference in disestablishing sex segregation, see Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749 (1990).

151 See Lillian Breslow Rubin, Worlds of Pain: Life in the Working-Class Family (1976) (studying the attitudes of women and men toward their work and the work of their
roles distinct from those of caregiver, nurturer, object of affection or of sexual titillation and to understand more fully the constraint of those traditional roles by experiencing alternatives.\textsuperscript{152} Entering the workforce also gave women the chance to develop conceptions both of themselves and of their goals, which were at least partially independent of the men whose lives often structured their own.\textsuperscript{153} The workplace, in short, began to emerge as a site of resistance from which women could perceive and oppose the straitening, stigmatizing constraints on their lives.

Yet, if some women saw this transformative potential in their movement to a range of workplaces, so did a number of men. These changes have been resisted both by employers and workers frankly hostile to women in the workforce, and by others anxious about what women's growing numbers meant for male control within the workplace and for women's roles outside it.\textsuperscript{154} Some forms of resistance,

\textsuperscript{152}See id. at 175. Some of the women Rubin interviewed also note that working helps to equalize the relationship with their spouses within the home. As one woman stated: I can't imagine not working. I like to get out of the house, and the money makes me feel more independent. Some men are funny. They think if you don't work, you ought to just be home everyday, like a drudge around the house, and that they can come home and just say, "Do this," and "Do that," and "Why is that dish in the sink?" When you work and make some money, it's different. It makes me feel more equal to him. He can't just tell me what to do.

\textsuperscript{153}See Rubin, supra note 151, at 182. As one woman, whose husband had recently compelled her to stop work, noted: I still belong to the Business and Professional Women's Club here. When I get dressed to go to one of their meetings, it's the only time I feel like a whole individual. I'm not somebody's wife, or somebody's mother. I'm just Karen. I suppose that's why I liked working, too. When I'd be there, I could just be who I am—I mean, who I am inside me and not just all those other things.

\textsuperscript{154}Many of these employers and workers have been men, but they also have been supported, sometimes in extremely effective ways, by a number of women who have been anxious about the implications of these changes for the family or for the valuation of traditional women's roles. See Donald G. Mathews & Jane Sherron De Hart, Sex, Gender and the Politics of ERA: A State and the Nation 152-80 (1990). For obvious reasons, many of these resistant women never enter the workplace, so they do not play a role in the workplace dynamics I describe below. However, some women in this group have been
from outright hostility to pretextual job requirements to "glass ceilings" and "sticky floors," have been designed to communicate opposition and discourage women from remaining in the workforce.\textsuperscript{155} Some forms of sexual harassment have played a role in this explicit opposition.\textsuperscript{156} However, not all actions disadvantageous to women workers are conscious, rear guard actions against the entry of women into particular workforces. Some employers and workers have responded to the increasingly palpable presence of women by affirming the norms and practices that had characterized the all male or strongly sex-differentiated setting.\textsuperscript{157} This conduct seeks to secure familiar working conditions or re-establish a comfort level, rather than resist change or preserve explicitly masculine norms. Included in this normative "affirmation" process is conduct often challenged as sexual harassment—vulgarity and roughhousing, sexually explicit talk or depictions, and demeaning or sexualized characterizations of women.

These assertions of male control in the workplace, however explained, have palpably affected the lives of women workers, making it difficult for some women to remain or to function effectively in their workplaces. Consequently, women are sometimes forced to place self-protection above economic opportunity, professional experience, or advancement.\textsuperscript{158} Even the less explicitly combative practices have rendered women perpetually off balance, unclear about whether they will be regarded as serious workers and uncertain what "rules of the game" apply to them in a particular setting.\textsuperscript{159} These practices render the

\textsuperscript{155} See Abrams, supra note 6, at 1187.

\textsuperscript{156} Many of the most brutal cases of sexual harassment involve pioneering women in jobs involving physical labor. See, e.g., Hall v. Gus Const. Co., 842 F.2d 1010-12 (8th Cir. 1988) (involving women on road construction crew physically assaulted, fondled, and repeatedly referred to as "fucking flag girls").


\textsuperscript{159} This sense of confusion about the rules of the game, which is sometimes translated into an intense form of self-doubt, is a major theme among women who speak about their experiences of harassment. Consider this statement by a student who had experienced harassing behavior in a college classroom, an environment technically covered by Title IX of the Civil Rights Act rather than Title VII, but equally subject to coerciveness by harassing behavior:

The classroom became a highly sexualized environment. Just beginning to be comfortable with school and still uncovering the sexual mores
workplace less a site of resistance for women than a setting for a pitched battle. They have undermined the opportunity some women have enjoyed in the workplace to develop new skills or aspirations and to present themselves in a way that brings long submerged characteristics to the fore. These practices sometimes have the goal and, inevitably, have the effect of preserving male control and masculine norms that have characterized the workplace.\textsuperscript{160}

This sketch of recent developments in the workplace is not a new story; it is, in fact, a familiar story. It sets out an agonistic dynamic between the sexes in the workplace that has shaped and been shaped by the practice of sexual harassment. It points to an account of sexual harassment that is concerned with preserving the workplace as a site of male control and normative influence. The interesting thing is that this story plays little role in Franke's account of sexual harassment—an account that is concerned with theorizing what has been assumed to be obvious about the practice. Franke writes vividly about the devaluation of feminine women and the disciplining of nonfeminine women, yet her account describes the ultimate wrong of harassment as the perpetuation of conformity to gender stereotypes.\textsuperscript{161} She does not focus on what sexual harassment means for women as participants in the workplace, as partial agents struggling with the broader opportunity it provides. Nor does she address what sexual harassment means for the workplace as a potential site of women's resistance and

which worked for me in my personal life, I was unhappy to discover sex in the classroom. Classes had been one area where I felt secure, where I knew what was expected of me and how to respond. Suddenly what was expected of me seemed vague and somewhat insidious; there were new rules to the game.


The element of self-doubt is clear, for example, in the statement of a writer confronted with a sexual quid pro quo from an editor whom she approached for a job.

He made me question my own ability, and I hated him for that. He made me wonder if the assignment came to me only because he wanted me. But I knew I could do it. I'd done a good sample first chapter. But he seriously eroded my confidence. I wept in frustration.


\textsuperscript{160} The emergence of these practices does not, of course, end the story. There has been what might be described as a second round of change and resistance, this time with a stronger focus on the norms that structure the workplace. For a discussion of this phase of the sex based struggle in the workplace, see Abrams, \textit{supra} note 6, at 1186-90, 1197-1202, 1220-26. Some women have begun to argue that entry into the workforce and performance of the work is just the first step; women must also re-evaluate and revise the norms that have perpetuated male control and masculine values within the workplace. Other women have responded by using the law, including the claim for sexual harassment, to address the most discriminatory or disruptive practices. Their opponents have asserted the "naturalness" or economic optimality of longstanding norms, retaliated against the use of legal claims, or asserted the arbitrary or self-defeating influence of sexual harassment enforcement.

\textsuperscript{161} See Franke, \textit{supra} note 3, at 745.
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a historical site of male control. In an account as nuanced and illuminating as Franke's, this omission seems unlikely to have been the result of oversight. Considering why Franke may have chosen to de-emphasize the local context of the workplace and the ongoing struggle between the sexes may tell us more about her account and about the prospects for extending or enriching it.

First, Franke may view these workplace dynamics as largely extraneous to her account. They represent but a handful of the innumerable, intersecting dynamics that animate sexist gendering too undecidable in their particular effects to warrant significant emphasis. To emphasize one such dynamic could obscure or marginalize others—a particularly undesirable effect when the goal is to demonstrate that gendering is a pervasive and multiply driven phenomenon.

There is undoubtedly some truth to this position. Gendering, even within the confines of the workplace, is animated by multiple dynamics, some specific to the workplace and some linking the workplace to the social domains beyond it. The disciplining of an aggressive woman or a sexually inexperienced man may be driven by the impulse to enforce masculine norms in the workplace or by the almost aesthetic distaste all hetero-patriarchs feel for individuals who transgress gender stereotypes. Thus, emphasizing one animating dynamic can necessarily obscure others. However, this argument, assuming it motivated Franke's choice, need not be conclusive. An analysis of gendering as a complex, contingent social process would benefit by proceeding contextually, interaction by interaction and institution by institution. Within the institution of the workplace, the ongoing sex-based struggle for control is a prominent dynamic, animating forms of gendering among other things. What might be

162 Franke may also believe that analyzing the dynamics that drive gendering is primarily germane to the question of perpetrator's intent, an issue that should not be central in sexual harassment analysis. While I agree that perpetrator's intent is not important in a sexual harassment claim, this should not disqualify legal scholars from examining the dynamics that animate gendering. First, my analysis of the dynamics of sexual harassment is not strictly concerned with intent, as it is often developed in the antidiscrimination case law, because it focuses less on individual motivation and more on the social and institutional influences that condition those motivations and choices. For an interesting discussion of this distinction in the context of Title VII law, see Martha Chamallas, Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins, 15 Vt. L. Rev. 89, 89-92 (1990). Second, my account of workplace dynamics will ultimately contribute to an explanatory narrative about sexual harassment. If some of these dynamics or elements of the resulting narrative concern the self-understanding of those who perpetrate sexual harassment, it may be useful to use them in illuminating the phenomenon for the public and for those employers who must attempt to ameliorate or prevent it. Whether these intent-oriented elements produce an intent-oriented inquiry on the part of triers of fact is a separate question, which depends on the way that the elements of the claim are structured.

163 See supra notes 98-100 and accompanying text.

164 See Franke, supra note 3, at 760-62.

165 See supra notes 157-61.
obscured in the process of emphasizing it is an important question, but one that should be answered only after we know what this dynamic will reveal and how stark the tradeoffs are likely to be. We cannot begin to answer any of these questions if workplace dynamics are not carefully considered.

However, I am not convinced that fear of obscuring other dynamics is Franke's reason for de-emphasizing sex-based struggles in the workplace. The agonistic dynamic I describe may be seen as a variant of the subordination account of sexual harassment, a theory about which Franke has expressed telling reservations. Her concern, therefore, may be less about one underlying dynamic obscuring another and more about a potential antagonism between a theory of sex-based subordination and the theory of gendering she seeks to advance. Elaborating Franke's reservations about the subordination account may help determine whether any account taking its bearings from women's oppression in the workplace can meet these reservations.

Franke has no quarrel with the fact that women are subordinated by men; in fact, she notes that it is "descriptively true in most cases." However, she takes issue with three features of the paradigmatic subordination account. The first is its tendency to biologize the phenomenon. The operative assumption, that "sexism is something men do to women," obscures the harms that sexism can impose on men, and makes gender hierarchy appear to be an incidental by-product, rather than a central component, of sexism. Second, the "transitive" logic of this explanation ("'Man fucks woman; subject verb object'") obscures the multidirectional force of social construction. Franke contests this neglect of male social construction: the man is constructed (as subject) as much through his act of sexual violence as the woman is constructed (as object). She also disputes the uniformity of dynamic that makes women seem always, already victim-

166 This account, like the subordination argument, renders the struggle between the sexes primary and paints women as the ultimate losers, with losses being defined as economic marginalization, sexual objectification, and constraints upon personal agency.

167 Franke, supra note 3, at 761-63.

168 Franke, supra note 3, at 761.

169 Franke describes this as the MacKinnon/Colker account of subordination. Id. at 759-60. While much of her analysis draws on the antisubordination theory of Catharine MacKinnon, Franke also cites and uses Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. Rev. 1003 (1986).

170 See Franke, supra note 3, at 760-61.

171 Id.

172 See id.

173 Id. at 761 (quoting Catharine A. MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 Signs 515, 541 (1982)).

174 See id. at 761-62.
IZED AND MEN ALWAYS, ALREADY PREDATORS.\textsuperscript{175} INTERESTINGLY, SHE SHARES THIS CRITIQUE WITH BERNSTEIN, WHO HIGHLIGHTS THE ESSENTIALISM REGARDING "WOMEN'S" CHARACTERISTICS AND THE PESSIMISM REGARDING WOMEN'S AGENCY THAT ARE REFLECTED IN THE "REASONABLE WOMAN" APPROACH.\textsuperscript{176} THIS PROBLEM PREVIEWS FRANKE'S FINAL OBJECTION TO THE SUBORDINATION ACCOUNT, THE NOTION THAT "SEX (AS IN 'TO HAVE SEX') IS ALWAYS, ALREADY SEXIST."\textsuperscript{177} FRANKE HOPES TO ENCOURAGE A RANGE OF SEXUAL PRACTICES, AS WELL AS MANY WAYS OF INTERPRETING ANY GIVEN SEXUAL PRACTICE, AS PART OF THE LARGER GOAL OF SANCTIONING MULTIPLE WAYS OF "DOING ONE'S GENDER."\textsuperscript{178} THE NOTION OF SEX AS UNIFORMLY, IRRESISTIBLY OPPRESSIVE DEFEATS THE HUMAN AGENCY FRANKE SEES AND HOPES TO FOSTER.

THIS IS A STRONG CRITIQUE OF THE LEADING SUBORDINATION BASED ACCOUNT, JOINING NOVEL AND FAMILIAR ELEMENTS TO CREATE AN ORIGINAL FOCUS AND APPLYING THAT FOCUS TO SEXUAL HARASSMENT, THE LEGAL AREA OFTEN THOUGHT TO BE MACKINNON'S STRONG SUIT.\textsuperscript{179} HOWEVER, I BELIEVE FRANKE'S CRITIQUE SPEAKS MORE TO THE FLAWS IN THE WAY SOME LEADING THEORIES HAVE BEEN ARTICULATED THAN TO THE POTENTIAL OF ANY THEORY HIGHLIGHTING WOMEN'S SUBORDINATION. IT MAY BE TRUE THAT THE LEADING SUBORDINATION BASED ACCOUNTS OF SEXUAL HARASSMENT HAVE EMPHASIZED BIOLOGICALLY BASED DICOTOMIES AT THE COST OF MARGINALIZING GENDER, OBSCURED THE OPPRESSIVE INFLUENCE OF SEXISM ON NONCONFORMING MEN, AND DESCRIBED SEX AS ALWAYS, ALREADY COERCIVE. HOWEVER, IT DOES NOT FOLLOW THAT ANY ARGUMENT FOCUSING ON THE SUBORDINATION OF WOMEN, IN THE WORKPLACE OR ELSEWHERE, WILL SUFFER THESE SAME SHORTCOMINGS. ON THE CONTRARY, FEMINISTS ARE INCREASINGLY VIEWING THESE DRAWBACKS AS UNNECESSARY FEATURES OF SUBORDINATION THEORY, THE RESULT OF CONTROVERSIAL STRATEGIC CHOICES BY PARTICULAR FEMINIST LEGAL THEORISTS WHO ARE, EVEN NOW, MODIFYING THEM.\textsuperscript{180} THE STRUGGLE BETWEEN THE BIOLOGICAL SEXES, AS FEMINIST LEGAL THEORISTS HAVE MADE CLEAR, IS OFTEN DEEPLY LINKED TO CON-

\textsuperscript{175} Id. at 762.
\textsuperscript{176} Bernstein, supra note 7, at 471-80.
\textsuperscript{177} Franke, supra note 3, at 762.
\textsuperscript{178} Id. at 758-59.
\textsuperscript{179} In fairness, it is not surprising that I agree with many elements of this critique. Franke describes my work as exposing some of these same limitations of MacKinnon's subordination theory. See Franke, supra note 3, at 761-62 (discussing Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2516 (1994)).
\textsuperscript{180} See Abrams, supra note 121, at 324-29. A number of other feminist legal theorists who have critiqued MacKinnon's essentialism without abandoning theories that posit women's systematic subordination have reached similar conclusions. See, e.g., Harris, supra note 23 (arguing that gender essentialism, including that of MacKinnon, silences the voices of racial minorities, who have a distinct experience of subordination); Mahoney, supra note 140, passim (challenging cultural and legal images of battered women as dysfunctional, helpless, and dependent while acknowledging domestic violence's subordinating effects). For a more favorable account of MacKinnon's theory that nonetheless emphasizes the strategic and chosen aspect of such features as the apparent inevitability of sexual coercion, see Olsen, supra note 135 (interpreting MacKinnon's approach as involving a strategic understatement of women's agency under gender based coercion).
tests over the meaning of gender.\textsuperscript{181} It is neither descriptively accurate nor politically prudent to obscure the increasingly obvious damage that sexualized aggression or gender stereotyping, associated with women's subordination, imposes on some men.\textsuperscript{182} Moreover, the practice of characterizing sex as consistently and incontrovertibly coercive is a strategic overstatement carrying unanticipated costs for public perceptions both of feminism and of women's agency.\textsuperscript{183} A central challenge for feminists is to characterize gender subordination in a way that illuminates a greater pluralism of dynamics—affecting women, affecting men, more coercive, less coercive, resistant—without diluting the message that sex-based hierarchy is a scourge or blunting the impetus for corrective action. Franke's critique would seem to be a fine point of departure for such an effort.

Yet, interestingly, Franke chooses not to offer a revised or enriched subordination account. She offers an account of gendering that rests on the confluent social forces she describes as "hetero-patriarchy."\textsuperscript{184} Her point, in the end, may not be that subordination theory is beyond saving, but that a theory of hetero-patriarchal

\textsuperscript{181} See infra Part III.A (discussing the important place of gender subordination within sex subordination).

\textsuperscript{182} In fact, Catharine MacKinnon, in an amicus brief written for fourteen organizations of male survivors of sexual assault by men, argues that the sexualized abuse of men by men is a phenomenon deeply connected with the subordination of women. See Brief of National Organization on Male Sexual Victimization, Inc., et al., at 7-11, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (No. 96-568) [hereinafter Amicus Curiae Brief]. According to MacKinnon, men typically sexually abuse those over whom they have power in society as a means of expressing and perpetuating that power. See id. at 9. This includes, pervasively, women and children, but it also includes men who are distinguished by size, weight, ethnicity, race, disability, or sexual orientation (perceived or real) in a way that places them lower in the hierarchy that regulates normative masculinity. See id. at 9-10. Far from denying this form of sexualized injury, MacKinnon argues that its denial by legal decisionmakers or the public is part of the "social ideology of male dominance." Id. at 11. This ideology, which characterizes men as sexually invulnerable, obscures sexual violence against men at the same time as it "naturalizes the sexual abuse of women[ by] making it seem that women, biologically, are sexual victims." Id.

The argument in this brief should not be seen as a new development for those associated with dominance feminism. For example, John Stoltenberg, an activist who has collaborated extensively with Catherine MacKinnon and Andrea Dworkin in advocating the MacKinnon-Dworkin Anti-Pornography Ordinance, eloquently details the consequences of male dominance for men, particularly nonconforming men. See John Stoltenberg, Refusing To Be A Man (1989). Stoltenberg focuses not only on the sexual abuse of men, but on the kinds of devaluation of non-conforming men that are associated with the masculine "normative affirmation" I describe above. Id. at 187-98.

\textsuperscript{183} See Abrams, supra note 121, at 329-53.

\textsuperscript{184} Franke cites the following definition of hetero-patriarchy.

"[T]he ideology of compulsory hetero-patriarchy rests on four key tenets: the bifurcation of personhood into "male" and "female" components under the active/passive paradigm; the polarization of these male/female sex/gender ideals into mutually exclusive, or even opposing, identity composites; the penalization of gender atypicality or transitivity; and the devaluation of persons who are feminized."
gendering is a better means of achieving the same analytic goals. Whether hetero-patriarchy is a better means of analyzing the multiple dynamics underlying sexual harassment seems to me the most difficult question yet, one with which I have only begun to grapple. However, there may be reasons for preferring an enhanced subordination account (i.e., one that analyzes both sex and gender and encompasses phenomena like the oppression of nonconforming men) in connection with the practice of workplace sexual harassment.

Theories of hetero-patriarchy posit the conflation, in both the public mind and in legal enforcement, of a number of elements, including sex and social gender, social gender and sexual gender, sexual gender and sexual orientation, etc. These conflations produce a multifaceted but unified system that oppresses persons who are "feminized" along any one of these dimensions. While such theories may raise the potential for important connections among forms of oppression, as well as encouraging possibilities for coalition, they also may obscure variations among different kinds of subordination. We may learn more about such dynamics, as a descriptive

Franke, supra note 3, at 739 n.247 (quoting Francisco Valdes, Unpacking Hetero-patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins, 8 YALE J.L. & HUMAN. 161, 170 (1996)) (citation omitted).

For example, the conflation of sex and social gender may be found in the expectation that members of the biological sexes will manifest the social characteristics associated, respectively, with male or female gender. The conflation of social gender and sexual gender is reflected in the association of social gender nonconformists with sexual gender nonconformists (i.e., those who play sexual roles not associated with their sex and social gender) and in the conflation of sexual gender and sexual orientation in the association of gender nonconformists with those manifesting non-conforming sexual orientation. See Valdes, supra note 184, at 161-70. For a fuller discussion of these conflations and the way they are buttressed by law, see Francisco Valdes, Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society, 83 CAL. L. REV. 1 (1995).

Hetero-patriarchy, at least as Valdes defines it, is distinguished not only by its multiple, simultaneous conflations, but by the fact that none of its dynamics is described as taking priority over or animating any of the others. Id. See Janet E. Halley, Intersections: Sexuality, Cultural Tradition, and the Law, 8 YALE J.L. & HUMAN. 93, 94-97 (1996).

Some might argue that against this theoretical backdrop, it is more difficult to analyze the ways in which conflation is inconsistent or varies across different pairs of elements (sex and social gender, social gender and sexual gender, etc.). A number of the early works that examine the formation or operation of hetero-patriarchy in different contexts seem to be alert to the development of multiple, disparate dynamics within hetero-patriarchy itself. See, e.g., Valdes, supra note 184, at 175-82 (arguing that Greek society, which did not use the tool of sexual orientation, conflated sex and gender without conflating gender and sexual orientation or sex and sexual orientation). Some have argued that these accounts, attempting to chart the relations among many elements, inadvertently suppress some of them. See, e.g., Mary Coombs, Comment, Between Women/Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male)Sex Sexual Activities, 8 YALE J.L. & HUMAN. 241 (1996) (observing that theories of heteropatriarchy have been built on same-sex male relationships and consequently both obscure and have inconsistent applicability to same-sex female relationships).
matter, by seeing their interrelation as contingent and by analyzing it context by context, institution by institution.\textsuperscript{189} Such theories also may be less helpful in describing environments in which some subordinating dynamics predominate. The workplace may be one such environment, with its potent history of sex based antagonism and its implication in the "separate spheres" paradigm\textsuperscript{190} that rendered the workplace ideologically and structurally\textsuperscript{191} a "man's world."\textsuperscript{192} If it is possible to develop a theory of sex and gender subordination that extends to such phenomena as the oppression of nonconforming men, we may lose more than we gain by replacing that approach with a theory of hetero-patriarchy that addresses the gendering of both men and women but fails to foreground women's subordination, in the context of sexual harassment.

There is, finally, the more practical question of legal enforcement. The legal tools that we currently possess to fight gendering and gender hierarchy are a series of statutes that prohibit discrimination on the basis of sex. If we develop a contingent, multifaceted account

Moreover, Janet Halley suggests that complications involved in building theories of heteropatriarchy around forms of subordination may be metaphysically or epistemologically distinguishable. Halley, supra note 187, at 96 ("The metaphysics of sexual orientation groups and their subordination are also anomalous, so that many of the assumptions about the caste-like structure that ensures the continued subordination of racial and ethnic groups, of 'the poor' and of 'women' don't work when the subject shifts to sexual orientation.").

\textsuperscript{189} This more contingent, contextualized approach may also be a better way of creating political coalitions for change. See Harris, supra note 23, at 615-16 (describing coalitions, like individual identities, as forged by a contingent act of will, not formed in accordance with some natural harmony).

\textsuperscript{190} For a discussion of separate spheres ideology and its relation to the structuring of the workplace, see Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 823-25, (1989). See generally Linda K. Kerber, Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History, 75 J. Am. Hist. 9 (1988) (discussing the concept of "separate spheres" and its development, including that "[f]or all our vaunted modernity, for all that men's 'spheres' and women's 'spheres' now overlap, vast areas of our experience and our consciousness do not overlap").

\textsuperscript{191} It is worth noting, of course, that the workplace was not, as an empirical matter, an exclusively male world. Women, particularly women of color and women who were not paired with men of financial means, have long been participants in the workforce. See KESSLER-HARRIS, supra note 147, at 15-20. For a discussion of the ways in which the workplace has been structured around norms of masculinity, see infra Part III.A.

\textsuperscript{192} The fact that the workplace was identified as a "man's world" means that it was structured around normative masculinity as a presumptive attribute of maleness. Whether it was also structured around hetero-masculinity as a presumptive male attribute is an interesting question. The longstanding practice of being closeted at work probably affected the answer to this question, although precisely how is unclear (and certainly beyond the scope of this essay). If there was no discernable contest between norms associated with gay male sexuality and those associated with straight male sexuality because gay men remained closeted, the norms that prevailed would have been those of hetero-masculinity, although because of the lack of explicit contestation, they might have been understood simply as those associated with "masculinity."
based on a theory of women's subordination,\textsuperscript{193} we may have a theory that is better adapted to the legal instruments at hand. In the next section, I turn to this task.

III

SEXUAL HARASSMENT AS A MEANS OF PERPETUATING MALE POWER AND MASCULINE NORMS IN THE WORKPLACE

Sexual harassment is a phenomenon which closely corresponds to the agonistic workplace dynamic I have just described. It functions as a means of establishing male control and expressing or perpetuating masculine norms in the workplace. In Part A, I describe the diverse dynamics of sexual harassment, highlighting the social forces that condition individual acts of harassment and the varied forms that harassment can take. In Part B, I analyze the effects of sexual harassment, beginning with its harm to individual targets, the groups to which they belong, and the workplace as a whole, and ending with a reconceptualization of sexual harassment. Finally, in Part C, I consider some implications of this account for the enforcement of the sexual harassment claim.

A. The Dynamics of Sexual Harassment

Even before the workplace emerged as a site of struggle over gender equality, sexual harassment functioned to preserve male supremacy and reinforced masculine norms. Many "pink collar" jobs and jobs traditionally held by women were defined in order to replicate or draw on the roles women performed in the home or in sexual encounters or relationships.\textsuperscript{194} Furthermore, the gendered role of women workers also permitted male employees to enjoy many of the male privileges which men enjoyed outside the workplace. Some attributes of female employment roles perpetuated advantages that were not sexual in nature. A secretary, for example, made her boss's coffee, organized his worklife, and assumed responsibility for social amenities, such as the purchase of gifts. Other female employment roles perpetuated male prerogatives that were characteristically sexual. From office worker to stewardess, women were expected to dress and conduct themselves so as to be aesthetically pleasing or stimulat-

\textsuperscript{193} Interestingly, even the effort to develop a multifaceted theory of sex and gender subordination has proved controversial, with critics arguing that statutes referring to sex are concerned with sex-based subordination alone. See Kathryn Abrams, \textit{Title VII and the Complex Female Subject}, 92 \textit{Mich. L. Rev.} 2479, 2532 n.198 (1994). Presumably, this argument would apply \textit{a fortiori} to interpretations of antidiscrimination statutes referring to even more complex (or compound) accounts of subordination.

\textsuperscript{194} The following discussion was inspired by, and elaborates upon, Catharine MacKinnon's statement that sexual harassment was built into the job description of women in traditionally female jobs. \textit{MacKinnon, supra} note 1, at 23.
ing to male sexual desires. The men who supervised or worked with such women often considered it appropriate to comment on this physical presentation or to act on the desire it was intended to arouse, without any particular reference to the desires of the woman involved. It is in this sense that Catharine MacKinnon wrote in 1979 that sexual harassment was built into the job descriptions of many women in traditionally female jobs. Sexual harassment, along with sex segregation and the specific job requirements of women’s work, was a part of the work environment that conditioned the expectations of workers and reinforced the gender hierarchy—of men over women and of masculine power and sexual subjectivity over female service and sexual objectification—that permeated the rest of society.

As more women have begun to claim equal status in society and have sought access to a wider range of jobs, male control over the workplace is no longer so hegemonic that sexualization and sexual availability are built uncontroversially into women’s job descriptions. Women now realize that work roles need not replicate the roles prescribed in broader society at large. They have begun to see demands for sexual availability or titillation as extraneous, though they have not always recognized such demands as illegitimate or illegal. In the face of women’s demands for equality in the workplace and their tentative exploration of new roles that secured some degree of independence from the roles of wife, mother, or sex object, harassment has begun to both follow different patterns and take on different meanings.

In some cases, sexual harassment has emerged as a means of preserving male control over the workplace, particularly where the entry of women into a particular workforce appears to call that control into question. A prime example is sexual harassment directed at women who have entered predominantly male fields. Some types of harassment within this category are particularly flagrant, including physical or sexual aggression or persistent, targeted verbal abuse so severe as to serve unequivocal notice that women are not welcome. Women

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195 *Id.* at 18-23.
196 Some feminist theorists have described these features of the workplace as “structures” that condition the responses of workers to various forms of sex and gender hierarchy. This conceptualization concludes that instances of sex discrimination, including sexual harassment, arise not so much from individual motivation as from organizational or institutional conditioning. See Rosabeth Moss Kanter, *Men and Women of the Corporation* 9 (1977) (stating that “discrimination itself emerges as a consequence of organizational pressures as much as individual prejudice”); Chamallas, *supra* note 162, at 91.
197 *See* MacKinnon, *supra* note 1, at 1-25.
198 *See* Schultz, *supra* note 7, at 1755 (noting that harassment is one means male workers use to preserve the masculine identification of occupational turf they consider to be theirs).
199 *See*, e.g., Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (how first female floor person at Las Vegas casino was subjected to repeated sexual epithets and demeaning language from her supervisor); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012
targeted in this way are often compelled to leave the workplace or transfer to a job with different coworkers or another supervisor. Even when they stay, it is clear that they remain at the sufferance of their male coworkers; they have no hope of getting sufficient purchase on the workplace to make it in any sense their own.

Other forms of harassment aimed at preserving male control are slightly subtler. Supervisors or coworkers may sexualize women employees by either propositioning them directly or treating them in a manner that highlights their sexuality, as opposed to other, work related characteristics. Supervisors may demand that women workers conform to dominant feminine stereotypes that operate outside the workplace by making repeated comments or suggestions regarding the employees, physical appearance, or through instructions to behave in a feminine manner. In some cases such treatment may discipline a woman who behaves in a nonfeminine way—a woman who may be viewed as a particular threat to male control. In other cases, it may be applied categorically to signal that women are not taken seriously: that they are considered sex objects or “pets” instead of competent workers. These latter forms of harassment may not be

(8th Cir. 1988) (plaintiffs, women workers on a road crew, were exposed to physical abuse, obscene behavior, fondling, and repeated sexual epithets). With this form of harassment, male perpetrators are often aware of what they are doing and would be willing to say (indeed some do in the course of the harassment itself actually say) that women do not belong in this workplace and that the offensive conduct is intended to make this clear to them. However, this latter understanding—that women do not belong in the workplace—is at least in part a function of certain features of the workplace such as continuing sex segregation, disparate pay, and, as I argue infra note 214 and accompanying text, the structuring of the workplace around masculine norms.

See, e.g., Pollak, supra note 158, at 36-38 (describing virulent harassment of women in blue collar trades).


The allegations made by Professor Anita Hill against Justice Clarence Thomas—that she was subjected to repeated conversations containing highly sexualized content—suggest that she was being treated in this manner.

Although Ann Hopkins charged Price Waterhouse with disparate treatment in consideration for partnership, the frequent instructions she received to “walk more femininely, talk more femininely, dress more femininely...[.]” and the criticism she received for being “overly aggressive” might under different circumstances have constituted this form of harassment. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (quoting the district court opinion).

For a discussion of the way in which a woman who behaves in a nonfeminine way functions as a threat to male control and may be harassed not only as an individual but as a member of a particular subgroup of women, see infra note 206 and accompanying text.

Vicki Schultz makes the important point that there are nonsexual ways of maintaining male control over the workplace. Schultz, supra note 7, at 1686-87 (describing practices such as characterizing work as appropriate for men only; denigrating women’s performance or ability to master the job; providing patronizing forms of “help”; withholding the training, information, or opportunity to learn to do the job well; deliberately sabotaging work; giving sexist evaluations of work performance; denying promised promotions; isolating women from workplace social networks; denying women perks or assigning
sufficient to compel all women to leave any particular workplace. Yet they make clear—to women and the men who work with them—that mere presence is not equal to influence or control. These forms of harassment suggest that whatever professional goals women pursue, they will continue to be viewed and judged by reference to more traditional female roles and whatever careers they enter, they still will occupy subordinate roles.

A distinctive feature of these control oriented forms of sexual harassment is that they operate against women as a group. While the harassment may be directed at a particular target who suffers individual employment detriment, most harassment within this category treats individual women as representatives of their sex based group. The message communicated is not simply about a particular woman

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206 A woman punished for departing from feminine stereotypes may occupy a more ambivalent position in this regard. In some cases, which may be structured less by workplace dynamics than by broader social patterns, she may be punished for a failure to conform to the feminine stereotypes a particular supervisor or coworker regards as normative. In other contexts, particularly in workplaces where male control is perceived as threatened either by a numerical influx of women or by explicit challenges, there may be a subtle group dimension to this disciplinary harassment of women. This is particularly true in the case of a nonfeminine woman whose departures from femininity gesture in the direction of masculinity. This nonfeminine woman may be treated not simply as a distasteful individual (as, for example, the nonmasculine man) but as a member of a stereotyped subgroup, the "bitchy, assertive" women, who is perceived as a power claimant and as a particular threat. The disciplining of such a woman may be interpreted as sending a message to other such women that this form of resistance will not be tolerated.

In contrast, the disciplining of a nonmasculine man, discussed infra notes 287-99 and accompanying text, is generally directed only at the man in question, although it might be intended to caution a wider audience. A nonmasculine man under the normative hierarchy characteristic of sexism, is surrendering power that is his biological entitlement, rather than claiming power that is not his. Therefore, he is not assumed to have a motive for so doing or suspected to be part of a larger, potentially resistant group. While there are reasons that men might manifest nonmasculinity as a form of resistance to hetero-patriarchy in general, or to a particularly controversial employer for whom it is an important issue, such resistance is not automatically understood as defiance in the workplace the way that nonfemininity resembling masculinity is assumed for a woman.
but about the suitability of all women for employment in a particular job or work environment.

Other forms of harassment are concerned not with resisting women directly but with asserting the primacy of male prerogatives or norms in the workplace. Sexism involves a hierarchy between men and women, but it is rarely concerned simply with the relations between the biological sexes. Most forms of sexism also involve a valuation of masculine norms—those practices or characteristics associated with men—and a devaluation of feminine norms—those practices or characteristics associated with women. Similarly, most forms of sexism involve a confinement of men and women to paradigmatically masculine and feminine roles. This confinement prevents women from partaking of the privilege that may flow from manifesting more socially valued characteristics. It also prevents men from compromising the hierarchy among values by embracing devalued norms. Discouraging or disciplining instances of nonconformity creates the illusion, as Franke notes, that “femininity is . . . the authentic expression of female agency and masculinity is . . . the authentic expression of male agency.” The apparently inevitable association of males with valued (or superordinate) norms and of females with devalued (or subordinate) norms also rationalizes as “natural” the subordination of women to men.

Some forms of harassment seek to enforce this gender hierarchy or gender confinement in the workplace, as they might in other spheres of life. One coworker may devalue a woman who performs

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207 I find particularly insightful a formulation in Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. Rev 1043, 1043-46 (1987), in which she argues that women’s inequality arises from three interrelated phenomena: “sex discrimination,” which consists of irrational prejudice against women; “gender oppression,” which consists of restricting both men and women to stereotypic gender roles; and, “sexual subordination,” which consists of the systematic devaluation of characteristics and practices associated with women.

208 See id. at 1046-47.

209 See id. at 1045-46.

210 Cf. Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. Rev. 511, 627-28 (1992). Fajer, who argues that homophobia reflects an intense concern with the transgression of gender roles, notes that in challenging these roles, lesbians are often thought to be claiming more power and gay men to be relinquishing gender-based power. Id. at 628.

211 Franke, supra note 3, at 762.

212 These explanations, which relate gender confinement to the preservation of sex and gender hierarchies, are specific to theories that take their bearings from the subordination of women. A theory of hetero-patriarchy, for example, might offer a wholly different explanation for the origins and functioning of gender confinement.

213 This is Franke’s explanation for most workplace harassment: it functions not as a response to a particular workplace dynamic, but as part of a larger social pattern. Franke, supra note 3, at 772. I agree that perhaps some significant share of harassment functions in this way, and this is why I would distinguish my account from Vicki Schultz’s effort to look primarily to the workplace to understand sexual harassment. See Schultz, supra note 7. Among the cases that fall into this category are the disciplinary harassment cases on which
a traditionally feminine task (such as secretarial work or food service) by sexualization or derogation. Another may harass a nonfeminine woman or nonmasculine man. These actions may have little to do with workplace relations between the sexes and much to do with social struggles over normative hierarchy and gender conformity.

Yet, there are other forms of sexual harassment which relate to a particular expression of gender hierarchy that occurs in the workplace. The social power of men and the social valuation of masculine norms are expressed, as they are in other social and institutional settings, through the creation of work environments that reflect these norms. Not only do masculine qualities define the effective or successful worker, but also masculine tastes and prerogatives shape the environment in which people do their jobs. Some of this male interaction, such as roughhousing, sexualized talk or pornographic images in the workplace, may not seem "masculine" so much as "the way things are done." Other examples of the entrenchment of masculine norms, such as the toleration of unilateral or even predatory sexual expression, may be recognized as such but are given little thought. All of these norms, however, may be called into question when women, to whom such norms are frequently less natural or less congenial, enter the workplace. When this occurs, male workers may assert these norms more vigorously in order to re-entrench them in the workplace. Some portion of this entrenching behavior may be sexual harassment.

Franke focuses. Franke, supra note 3, at 764-66. However, I believe there are other forms of harassment that are better explained by reference to particular workplace dynamics.

See Abrams, supra note 6, at 1191.

See id. at 1189.

Id. at 1189-90.

Id.

Workers may also engage in a subtler form of harassment arising from a phenomenon called "sex role spillover," which occurs when men in the workplace see female co-workers "as women first and work role occupants second." BARBARA GUTEK, SEX AND THE WORKPLACE 134 (1985). Experiencing sex role spillover is thus similar to employing the role traps described by Kantor, supra note 196, at 233-36. Both tend to occur in environments where men significantly outnumber women. GUTEK, supra, at 132-49. A man who experiences sex role spillover may treat women in a sexualized or demeaning way, without necessarily perceiving his control or normative primacy as being threatened. He may believe that this is the appropriate way to treat women because this is the way he has treated them in other spheres of his life. However, the partial sex segregation of his workplace has helped condition him to perceive women relative to their nonwork related roles. While a man who harasses as a result of sex role spillover may not be seeking to entrench masculine norms, one might still argue that he is acting from a masculine viewpoint, a remnant of the "separate spheres" ideology that men's comparative privilege has permitted them (and men's employment advantage has encouraged them) to retain undisturbed in some environments. It is possible that sexual harassment arising from sex role spillover might be exacerbated or might become more of a conscious, combative assertion in the face of challenges to masculine normative primacy.
Workers may engage (or engage more intensely) in talk that sexualizes or derogates women. They may circulate or post sexually explicit or pornographic visual images. They may engage in practices such as bagging that express a vaguely sexualized form of masculine camaraderie. Such practices not only make “masculine” male workers more comfortable, but they also mark the workplace as an arena in which masculinity is appropriate or even constitutive. Workers may also express the traditionally male prerogative for initiating sex in a range of contexts and without particular reference to the desires of the target. A number of forces may motivate such prac-

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219 This account does not separate sexual harassment from sex based harassment. See, e.g., Franke, supra note 3, at 716-18 (describing, though not endorsing, a doctrinal separation between sexual and sex based harassment). Although the two are analytically distinct and the first is more frequently argued and easier to establish under current sexual harassment doctrine, I believe both should be actionable under a claim for sexual harassment. However, I am alert to the danger recently identified by Ruth Colker and Vicki Schultz, that courts and commentators are “sexualizing” the sexual harassment claim to the point that sex based derogation that is not sexual is ceasing to be cognizable under the claim for sexual harassment as well as under other Title VII claims. See Ruth Colker, Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine, 7 YALE J.L. & FEMINISM 195, 199-200 (1995); Schultz, supra note 7, at 1706-29. Interestingly, this concern has also been expressed in the nonlegal literature on sexual harassment and sex discrimination. See, e.g., Henry Louis Gates, Jr., Men Behaving Badly: Who Put the Sex in Sexual Harassment?, NEW YORKER, Aug. 18, 1997, at 4, 5.

What’s most troubling about the way we’ve sexualized sexual harassment... is that it puts victims of gender discrimination at a disadvantage when the abusive conduct isn’t sexual in nature.... The courts have failed to recognize the existence of hostile environments that don’t involve sexual content—and this can mean giving the plain old unsexy kind of sex discrimination a free pass.

Id. at 5 (emphasis in original).

I believe that this problem requires a conceptualization of sexual harassment that highlights the place of sex based derogation of women without downplaying the significance, or the distinctive role, of sexualization and sexualized abuse of women in undermining perceptions of their professional competence. See infra notes 236-44 (comparison with Schultz).


221 See, e.g., Quick v. Donaldson & Co., 90 F.3d 1372, 1374-75 (8th Cir. 1996) (alleging over one-hundred incidents of bagging by more than twelve male co-workers). See generally, Franke, supra note 3, at 767-68 & n.400 (discussing Quick and, more generally, the practice of bagging).

222 Vicki Schultz makes the similar argument that these practices, as well as other non-sexual practices from the derogation of women to the tampering with women’s equipment or the failure to train women appropriately to operate such equipment, help mark the actual work as male or as requiring a masculine form of competence. Schultz, supra note 7, at 1687.

223 See, e.g., Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1209-10 (D.R.I. 1991) (involving a male supervisor who engaged a female subordinate in a sexual relationship and then pressured two male subordinates to join in on it); see also Meritor Sav. Bank
tices, including actual sexual desire, the impulse to affirm a previously unchallenged prerogative of masculinity, or both.\textsuperscript{224} What is distinctive about this last category of behavior, for purposes of sexual harassment analysis, is not the particular motivation (i.e., sexual desire or nonsexual desire) but that the perpetrator feels sufficiently authorized to express himself in this way that he fails to consider the possibility of either contextual inappropriateness or injury to the target.\textsuperscript{225} Finally, workers may engage in vigorous disciplinary action against colleagues whose action or self-presentation threatens to undermine the primacy of masculine norms. Men or women who object to these norms or practices may be targeted, as may men who manifest nonmasculine traits.\textsuperscript{226}

Some of this behavior appears to be almost reflexive: it is conditioned by a structural arrangement that suggests the centrality or naturalness within the workplace of certain masculine norms, and that may suggest, at some subconscious level, the need to reassert them if workers perceive these norms to be in danger. However, some of this behavior may also be more self-aware and explicitly responsive, aimed at retaliating against women intruders or signalling that the demographic composition of the workplace may have changed but the or-

\textsuperscript{224} Male workers also may combine these motivations with a desire to coerce, annoy, or undermine a particular target (which might mean that the particular practice functioned both to re-establish masculine control by undermining women, and to re-entrench previously unchallenged masculine norms). See, for example, Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wyo. 1993), in which a supervisor subjected both a husband and a wife to sexually abusive remarks, the general import of which was that he could be a better lover to the woman than her husband could. The supervisor may have either desired the woman or wanted to marginalize, humiliate, or annoy her, or both; he clearly sought to humiliate or annoy her husband.

\textsuperscript{225} I differ somewhat from Franke in acknowledging the role of sexual desire in some forms of sexual harassment. Franke is concerned that the focus on desire has produced detrimental consequences, particularly the justification of harassment on the grounds that it reflects misplaced desire, rather than discrimination on the basis of sex. Franke, supra note 3, at 730-47. I fear that disregarding desire as an animating dynamic in sexual harassment, as with overlooking sexualization, results in a characterization that may not adequately convey to legal decisionmakers and the public the complex, multifaceted nature of harassment. Therefore, I characterize sexual desire as sometimes present, though frequently not present, in harassing behavior. I stress, however, that desire itself is not what makes the conduct actionable as sexual harassment. What makes the conduct actionable is that it acts on desire unilaterally, without reference to the desires of its object. This kind of conduct entrenches both male control by objectifying women and male norms by enforcing a traditional, masculine conception of legitimate sexual behavior in the workplace.

\textsuperscript{226} See, e.g., Goluszek v. Smith, 697 F. Supp. 1452, 1453-55 (N.D. Ill. 1988) (involving an employee who was taunted by coworkers for his lack of sexual experience). While social dynamics that extend beyond the workplace often animate disciplinary harassment against nonmasculine men, see supra note 139, workplace challenges to masculine norms may incite male workers to more harshly punish men whose nonmasculine presentation also seems to call these norms into question.
ganizing norms have not. Nevertheless, such behavior as a whole seeks to restore a balance, an orientation around masculine normative lines, that workers perceive disturbed. These norm entrenching forms of sexual harassment may be directed at women as a group—insofar as sexualization or derogation of women is an accepted mode of expressing masculinity or masculine camaraderie. They also may be directed at individual men or women whose actions or modes of self-presentation seem to pose a threat to the unquestioned (or embattled) predominance of masculine norms.

This account of sexual harassment is distinct from MacKinnon's subordination account which describes sexual harassment as structured predominantly by the male impulse to dominate women, either institutionally or on an individual, sexualized basis. MacKinnon has argued that sexism entails the privileging of masculine norms and notes that these norms have structured many institutions, including the workplace. However, she does not tend to describe sexual harassment as either the expression or the product of efforts to entrench

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227 Examples of such behavior may be found in Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1496-99 (M.D. Fla. 1991). Franke notes that the pornography of which plaintiffs complained had been in the workplace when it was exclusively male. Franke, supra note 3, at 757 (discussing the Robinson case). There is, of course, some overlap between practices that affirm male norms and those that secure male control over the workplace. Conceptually, the latter are more concerned with undermining women and the former with reassuring men. Yet, in practical terms, in cases involving sexualized talk, pornographic visual representations, or sexual advances, the categories of conduct may be the same. Severity, pervasiveness, and targeting may determine whether the conduct serves simply to mark the environment as a setting in which traditionally masculine men feel comfortable, or whether they seek affirmatively to disempower women or drive them from the workplace. I would note, however, that this distinction is important primarily as an explanatory tool. It seems unlikely that claimants would be required to make such a distinction in the course of litigating the claim, even under the doctrinal modifications proposed infra Part III.C.1.

228 The display of pornography or the use of sexually objectifying language or humor exemplify this kind of conduct.

229 See, e.g., Steiner v. Showboat Operating Co., 25 F.3d 1459, 1461 (9th Cir. 1994) (involving harassment directed at first female floor person at Las Vegas casino); Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) (involving harassment directed against loud, abrasive female worker).

230 MacKinnon, supra note 1, at 1-23.

231 MacKinnon, supra note 149, at 36. In a display of characteristic eloquence, MacKinnon focuses on a series of sex and gender based differences between men and women and explains how the masculine characteristics structure social life as we know it. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit . . . their image defines god and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.

Id. (emphasis added) (footnote omitted).
masculine norms in the workplace.\textsuperscript{232} Therefore, as a practical matter, her theory does not reflect the second category of harassment I describe above.\textsuperscript{233} In addition, her analysis of sexual harassment has tended to be more static than dynamic. She does not focus on changes in the workplace or on the phases of a struggle between men and women.\textsuperscript{234} Consequently, she forgoes an opportunity to elaborate on her theory\textsuperscript{235} and to emphasize the agency women are able to express, even under circumstances of oppression, by seeking to loosen dominant role constraints through participation in the workforce and by resisting male efforts at control and male normative entrenchment.

This account is also distinct from those of Bernstein and Franke. Unlike Bernstein’s account, it connects harassment with a set of explicit sex and gender based dynamics. It intensifies, rather than abstracts from, the focus on context that has characterized leading accounts of sexual harassment. Furthermore, this approach is distinct

\textsuperscript{232} Furthermore, MacKinnon focuses on the way male norms structure substantive workplace expectations, but not on the way they structure the social environment of the workplace. \textit{Id.}

\textsuperscript{233} In her Brief Amicus Curiae for \textit{Oncale v. Sundowner Offshore Services, Inc.}, 118 S. Ct. 998 (1998), MacKinnon argues explicitly that the sexualized abuse of (some) men is a feature of the subordination of women. \textit{See} Amicus Curiae Brief, \textit{supra} note 182, at 7-11. However, perhaps because of the facts of \textit{Oncale} (a case that involved several incidents of overt sexual abuse or attempted rape) or perhaps because of her clients for the brief (who are organizations representing men who have been the victims of rape or other sexualized abuse), MacKinnon treats male rape or male sexual abuse as paradigmatic for thinking about the sexual harassment of men by men, rather than focusing on the less overtly violative, norm reinforcing practices such as sexualized verbal abuse or bagging. Her discussion occasionally considers behavior that is more taunting or insulting than sexually violative. For example, in discussing \textit{Goluszek v. Smith}, 697 F. Supp. 1452 (N.D. Ill. 1988), she notes that "Goluszek was punished, ostracized, insulted, and forced to consume pornography to make him conform to their stereotype of how a man should be a man by subordinating women sexually." Amicus Curiae Brief, \textit{supra} note 182, at 10-11. This description echoes Franke’s argument about the disciplining of non-conforming men. \textit{Compare id.} at 10 (noting that such conduct "feminize[s]" the victim, and "demeans his masculinity"), \textit{with} Franke, \textit{supra} note 3, at 760-61 (noting that sexual harassment "has the effect of reducing [the target’s] identity to that of a sex object while figuring [the perpetrator’s] identity as that of a sex subject"). However, such behavior is, above all, part of a system, both inside and outside the workplace, which subordinates women. It is not described as a practice that marks the workplace as normatively masculine, as I suggest above (or a practice that should primarily be understood as part of a larger process of gendering, as Franke suggests).

\textsuperscript{234} Interestingly, MacKinnon’s present tense description of “women’s work” in \textit{The Sexual Harassment of Working Women} describes sexual harassment as “built into the job descriptions” of many pink collar and traditionally female jobs, a view I would describe as slightly anachronistic even in 1979. Mac\textit{KINNON, supra} note 1, at 18-23.

\textsuperscript{235} It is quite possible that MacKinnon would not want to undertake an elaboration along these lines. One of the forms of essentialism for which MacKinnon has been criticized is the failure to acknowledge any historical or contextual contingency in her account. \textit{See generally} Harris, \textit{supra} note 23, at 590-601 (describing MacKinnon’s dominance theory as flawed by its essentialism which ignores black women’s voices). She has also been described as muting or repressing, arguably for strategic reasons, examples of women’s agency in resisting oppression. \textit{See} Abrams, \textit{supra} note 121, at 327-29.
from Franke's account in that it begins by analyzing the subordination of women to develop a theory that reaches the harassment of both women and men. In so doing, it analyzes sexual harassment as arising not only from broad social patterns but also from particular patterns specific to the workplace. While Franke's account is attentive to the agency of both women and men (both in its goals and in its account of sexual coercion as less than inevitable), the proposed account focuses on yet another dimension of agency: the ways in which women struggle against oppressive constraints.

This approach is also distinct in the variability and complexity of the phenomenon it describes. Sexual harassment, as depicted here, is a more plural phenomenon than even Franke suggests. There is harassment that secures the workplace as a site of male control versus harassment that secures it as a zone of either male comfort or masculine normative entrenchment. There is harassment that is directed at women as a group, harassment that is directed at individual women as representatives of a group, and harassment that is directed at men and women as individuals. There is sexual harassment that involves the expression of sexual desire, sexual harassment that involves sex but no sexual desire, and even sexual harassment that involves no sex.

This theory's extension to nonsexualized forms of abuse or derogation has important parallels to that of Vicki Schultz.\textsuperscript{236} Schultz criticizes courts and feminist commentators for narrowing sexual harassment doctrine by focusing, to the point of exclusivity, on sexualized forms of harassment.\textsuperscript{237} Emphasizing the intersection between sexual harassment and job segregation, Schultz makes the crucial argument that harassment includes nonsexual conduct, from taunting to sabotaging equipment to failing to provide adequate training. Moreover, she conceptualizes sexual harassment as a strategy for preserving highly valued and remunerated lines of work as bastions of male competence.\textsuperscript{238} I differ from Schultz mainly in my concern that her "competence-claiming" model runs a higher risk of replacing one unitary theory of sexual harassment with another. Although she recognizes the role of sexualized forms of harassment and argues that these should be acknowledged along with nonsexual forms of harassment,\textsuperscript{239} she describes sexualized forms of harassment as constituting

\textsuperscript{236} Schultz, supra note 7, at 1686-89.
\textsuperscript{237} Id. at 1686, 1713-38. This point was also made by Ruth Colker. Colker, supra note 219, at 198.
\textsuperscript{238} Schultz, supra note 7, at 1686-88, 1755-96.
\textsuperscript{239} Id. at 1692 ("It is time to focus on gender, along with sexuality: on work competence, along with sexual abuse."). My argument is not that Schultz intends to marginalize sexuality and sexualization based theories. It is simply that her downplaying of sexualized harassment and, more importantly, her critiques of the effects of sexually based theories, may be more likely to produce this effect than a more explicitly pluralizing theory.
a relatively small number of the total cases. Moreover, she does not appear to consider the comparative advantages sexualization provides in casting aspersions on female competence. In addition, she argues that an emphasis on sexualized harassment risks stereotyping women as victims and restricting speech in the workplace. Though her approach may respond in part to the current overemphasis on sexualized harassment, it runs the risk of encouraging courts to turn away from the regulation of sexualized harassment rather than plural-

240 Sexualizing women on the job has many comparative advantages in casting aspersions on their work competence. By sexualizing a woman worker, a supervisor or coworker can call her competence into question simply by relying on the incongruity between female sexuality, which may imply everything from passivity to siren-like allure, and most conceptions of work related competence. He is not obliged to make facially dubious statements about her lack of competence, or about women's lack of competence more generally, statements that could be contested by other workers or by the target (whether through argument or through competent work performance itself). Sexualization also may be more likely to disconcert or disable the target because the conduct seems to be a violate of the rules of the game, in that she expected to be treated as a worker. Furthermore, sexualization is more difficult to refute than aspirations on work competence. Finally, sexualizing a woman worker locates the disability in her (i.e., she's a pet, a sex object, a siren, rather than a competent worker), rather than suggests that there is some issue of fit between her abilities and the demands of the job, which could be addressed. Under this analysis, sexualization on the job is not simply a “technology of sexism,” Franke, supra note 3, at 693, but a comparatively efficient technology of sexism. This feature of sexualized harassment should be acknowledged in order to make clear why it should remain important to our understanding of sexual harassment.

241 Schultz, supra note 7, at 1729-32. Schultz argues that the problem with stereotyping women as victims is not simply that women are provided protection for the wrong reasons (i.e., they are viewed as victims in need of paternalistic solicitude), but that they are sometimes denied protection if they do not conform to socially conservative images of “proper victim[s].” Id. at 1732. I agree in many respects with this point. See Abrams, supra note 121, at 325-26 (discussing the dangers of characterizing women as victims through dominance theory). However, I worry that offering this critique in the context of an argument that generally rejects a sexuality based paradigm for understanding sexual harassment, may encourage courts to turn away from the regulation of sexual abuse and sexualization.

242 Schultz, supra note 7, at 1789-96 (discussing a case in which Miller Brewing Co. fired an executive after he discussed with a female employee a joke from Seinfeld which involved the word “clitoris” and then, when she failed to understand the joke, sent her a copy of a page from the dictionary referencing this term). While I do not necessarily believe that the executive's actions justified his firing, I do not agree with Schultz's analysis of the implications of this case and the others she discusses under this heading. Schultz's treatment of the Seinfeld case is careful; she discusses different possible motivations for the firing of the executive and offers other interpretations of the case. Id. at 1791. However, I disagree with Schultz's apparent valorization of the executive as a victim (“Mackenzie appears to have been railroaded out of a company to which he devoted much of his life for having joked about a racy television episode and referred to female genitalia,” id.), and with her ultimate conclusion that “the case has disquieting implications.” Id. This is particularly true given that the executive later won a $26.6 million award in his suit against Miller Brewing Co. and the woman who originally claimed to have been injured. If the employer inappropriately fired his long time employee, a conclusion that is difficult to verify on the basis of the newspaper accounts Schultz discusses, the problem seems more likely traceable to a range of flawed managerial judgments, including the exaggerated fear of legal liability that Schultz mentions but does not ultimately credit, than to a sexually based theory of sexual harassment.
izing their analysis of the various motives and modes of sexual harassment. One of the primary advantages of characterizing sexual harassment as a means of preserving male control and entrenching male norms in the workplace is the breadth and flexibility of such a characterization. It permits courts and commentators to understand sexual harassment as applicable to individuals and groups, as desire based and nondesire based, as sexually violative and sexually stigmatizing, and as sexualizing and nonsexualizing. This pluralism is crucial in propounding an accurate description of a phenomenon that occurs at the intersection of a variety of oppressive dynamics. It is also critical in helping courts and the public to view women’s oppression, more generally, as the product of multiple dynamics, none of which should be understood to exclude or even to marginalize the others.

Franke and Schultz are correct in viewing sexual harassment doctrine as having been hampered by narrow, unitary characterizations of the wrong, but the problem extends more broadly to feminist interpretations of female oppression. A persistent assumption that one dynamic should explain everything about women’s oppression has made it difficult for feminists to demand pregnancy leaves under equality based theories, fight job segregation under difference based theories, and highlight women’s agency under dominance based theories. Instead, feminists should argue that one size cannot fit all, theoretically speaking: it is crucial to see women’s inequality as the product of many intersecting motives, constructions, and modes of treatment. Because sexual harassment has captured public attention to perhaps a greater degree than any other gender based injury, an understanding of sexual harassment that is explicitly, paradigmatically plural will be a tremendous resource in this effort.

B. The Wrong of Sexual Harassment

The final respect in which this account differs from the others under consideration is in its characterization of the harms of sexual harassment. When sexual harassment becomes pervasive, it can dramatically affect individual targets, women and men as groups, and the

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243 This risk already appears to have materialized, albeit in a non-legal venue. In a recent article in The New Yorker, Jeffrey Toobin presents Schultz’s work as a stark contrast to his construction of MacKinnon’s approach—that “there is no sex without harassment... and no harassment without sex.” Jeffrey Toobin, The Trouble With Sex, New Yorker, Feb. 9, 1998, at 48, 55. Citing those portions of Schultz’s article that critique the subordination approach, he presents her as a alternative or adversary, notwithstanding Schultz’s expressed desire to broaden the scope of sexual harassment enforcement. Id.

244 For a discussion of the oppressive dynamics implicit in sexual harassment, see supra Part III.A.

workplace as an institution. Examining these effects can point us toward the ultimate harm or wrong of sexual harassment.

At the most concrete level, sexual harassment disadvantages its victims as workers. Bernstein and Franke acknowledge these harms, but because they do not analyze sexual harassment as a distinct phenomenon of the workplace, they tend to treat these harms as peripheral. Sexual harassment makes it more difficult for workers to perform their assigned tasks, thereby disadvantaging them relative to workers who are not obliged to endure this behavior. Harassment may compel choices that trade professional advantage for a more secure or peaceful environment. It may render targeted workers sufficiently uneasy that they do not extend themselves to other workers, depriving the harassed workers of professionally crucial mentoring and camaraderie. Harassment may also harm women workers at a more abstract level. They may be confused by the intrusion of sexual norms or expectations of femininity in the workplace. They may believe that they understood the rules of the game and be perplexed when these rules do not seem to structure their interactions with supervisors and colleagues. They are likely to feel that they are not being treated or perceived as serious workers. Because men frequently harass through language or behavior that casts aspersions on women as a group, targets may feel that the environment is unpredictable and adverse not only to them as individuals but also to women as a group. Nontargeted women may feel unnerved, demoralized, or alienated from the workplace by harassment meted out to other women. These harms are particularly salient because they occur in a context viewed by many women as having liberatory potential, in both material and personal terms.

As Franke observes, however, harassment does not simply shape people as workers, it also shapes them as men and women. These constructive influences affect perpetrators as well as targets. Many


\[247\] See Pollack, supra note 158, at 37-38.

\[248\] See Brief for Amicus Curiae American Psychological Association in Support of Neither Party, at 7, Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (No. 92-1168). Women workers are also denied these forms of support and assistance directly as part of the harassment. See Schultz, supra note 7, at 1686-88.

\[249\] See supra note 159.

\[250\] See Abrams, supra note 6, at 1206 (noting that women view sexual harassment as "affronts to their competence as workers").

\[251\] See id. at 1198 (stating that sexual harassment "communicate[s] a view of women that may be understood as threatening or dismissive"). This last perception may not be shared by men who are harassed for nonconformity to masculine stereotypes. In most cases, the nature of the derogation clearly indicates that these men are being harassed not simply as men, but as men who manifest certain individual characteristics. See, e.g., Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

\[252\] Franke, supra note 3, at 771.
kinds of harassment cast male perpetrators as active sexual subjects, “manly” men whose penchant for physicality and sexuality is unconstrained and frequently unchallenged.\textsuperscript{253} Targeting nonmasculine men reinforces this association of men with a sexualized masculinity and illustrates the consequences of departure from this socially ordained role.\textsuperscript{254} Harassment, in turn, feminizes women because they are frequently cast as sexual objects, a role that is both anomalous in relation to work and wholly passive in relation to sexuality.\textsuperscript{255} Moreover, women and men not only are gendered by the sexual, and sometimes disciplinary, aspects of sexual harassment\textsuperscript{256} but also are feminized and masculinized by its dimension as a power struggle. Sexual harassment feminizes women by throwing them off balance in the work environment and depriving them of opportunities the workplace could provide to chart new, more independent courses and to explore different conceptions of self.\textsuperscript{257} Additionally, it feminizes women by confining them in yet another (and potentially more promising) setting to the roles that have constrained, inhibited, and oppressed them in many other spheres of life. Men, correspondingly, are masculinized by exerting control over whether and when women act as self-determining agents and how far they may go in defining new, more autonomous realms of activity.

These latter forms of gendering point most conclusively toward the ultimate harm or wrong of sexual harassment. This wrong relates both to the workplace as an institution, explaining perhaps why sexual harassment is actionable under Title VII, and to the workers within it. Sexual harassment helps perpetuate the workplace as a site of male control, where gender hierarchy is the order of the day and masculine norms structure the working environment. Sexual harassment helps structure the workplace as yet another setting where men are pressed toward masculinity and women toward femininity. But, as with the tangible harms to individual workers, sexual harassment does not simply entrench sex and gender hierarchy in any institution. It does so in an institution that has held particular promise for many women, thus compromising the potential opportunities implicit in work, such as greater economic self-sufficiency and the exploration of new roles and

\begin{footnotes}
\item[253] See id. at 693, 770-71.
\item[254] See id. at 770-71.
\item[255] Franke makes the point about female sexual objectification, id. at 764-65, but such characterizations also harm women because they conflict with the prevailing image of a competent worker.
\item[256] Franke's account focuses on gendering by the sexual and disciplinary aspects of sexual harassment. Id. Although her account does not preclude the possibility that men and women may be gendered in other ways, it does not illuminate these dynamics.
\item[257] See supra Part II.B.
\end{footnotes}
new conceptions of the self not linked to stereotyped expectations. In fact, for both women and nonconforming men, sexual harassment undermines the primary form of agency we retain as complex subjects in a world of multiple social influences: the capacity to put together the disparate elements of self—biological being, gendered subject, worker, sexual actor—to create a particular, contingent whole in a particular context. In contrast to Bernstein's claim that sexual harassment is an offense to dignity, I would argue that sexual harassment offends personal agency in both a gendered social world and a specific institutional context where agency is differentially difficult to achieve.

C. Applications to Legal Doctrine

I have described sexual harassment as a practice rooted in a struggle between men and women in the workplace that perpetuates both male control and the primacy of conventionally masculine norms, that genders both men and women through a variety of dynamics commensurate with their individual and subgroup based variations, and that interferes with the capacity both to define oneself as a subject and to seek less stereotypic or confining roles. How this conceptualization will shape legal doctrine is the final question I will consider. This Part explores two issues: (1) what changes this understanding of sexual harassment will require in the basic elements of the hostile environment claim, and (2) what results this account will produce in the growing body of same-sex sexual harassment cases.

1. Modifying the Elements of the Sexual Harassment Claim

Since Meritor Savings Bank v. Vinson first validated the claim for sexual harassment as sex discrimination, the elements of the claim, developed primarily in hostile environment cases, have remained rela-

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258 Sexual harassment may undermine the capacity of non-gender-conforming men and women to explore less constraining or less stereotyped roles, to the extent that such nonconformity is conscious or intentional. See, e.g., Price Waterhouse v. Hopkins, 485 U.S. 933 (1988). However, it is not clear whether Ann Hopkins adopted a more aggressive, masculine persona as a way of exploring gender roles or as a way of succeeding in a masculine world, or whether this was the way her personality developed apart from any conscious direction on her part.

259 Angela Harris describes this form of agency vividly when she notes that "wholeness of the self and commonality with others are asserted (if never completely achieved) through creative action." Harris, supra note 23, at 612-15. She cites the shifting relational, contextually based identity illuminated by Zora Neale Hurston in How it Feels to be Colored Me. See Zora Neale Hurston, How It Feels to be Colored Me, in I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE 152 (A. Walker ed., 1979). Harris defends "a conception of identity as a construction, not an essence—something made of fragments of experience, not discovered in one's body or unveiled after male domination is eliminated." Harris, supra note 23, at 613.

tively stable. A plaintiff must demonstrate that: (1) s/he is a member of the protected class; (2) s/he was subject to "unwelcome" sexual harassment in the form of requests for sexual favors or verbal or physical conduct of a sexual nature; (3) the harassment complained of was "based on sex"; (4) the conduct unreasonably interfered with plaintiff's work performance and created an intimidating, hostile, or offensive work environment; and, (5) there is respondeat superior liability on the part of the employer. Of these elements, the first will require no adjustment to accommodate the understanding of sexual harassment discussed above. Each of the remaining elements will require reinterpretation, sometimes very modest, sometimes more substantial. The revised elements are ultimately quite recognizable, perhaps because the proposed account owes some of its substantive grounding to subordination theory.

The second element, the unwelcomeness requirement, has attracted, as I noted above, considerable debate. Some critics allege that it has encouraged a trial of the victim, or that placing the burden on the plaintiff suggests that requests for sexual favors in the workplace are presumptively welcome. Others, such as Franke, express concern that abandoning the requirement may undermine perceptions of women's agency by casting doubt on their ability to consent to or resist sexual advances. The proposed approach strikes a balance between these critiques by contextualizing the showings required. For sexual propositions and touchings, on the one hand, and nonsexual forms of harassment, on the other, a showing of unwelcomeness should not be required. As Vicki Schultz correctly observes, for nonsexual forms of sexual harassment, such as derogation of opportunity, failure to train, or sabotage of equipment unwelcomeness should be assumed. Cases of sexual propositions or touchings entail a substantial risk of a trial of the victim, in which a range of stereotypes hostile to women's sexuality may be mobilized. Moreover, in such contexts, unwelcomeness may really be the wrong question. The stan-

261 See, e.g., Bohen v. City of E. Chicago, 799 F.2d 1180, 1187 (7th Cir. 1986). The only element that has been revised or clarified during this period is the fourth, or pervasiveness, standard. The holding of some circuit courts of appeal that it was necessary to prove "serious psychological injury" in order to prevail on this element was conclusively rejected by the Supreme Court in Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

262 See supra note 121.

263 See, e.g., Estrich, supra note 6, at 831-34 (discussing the various problems with the unwelcomeness requirement).

264 Franke, supra note 3, at 746-47 (arguing that the abandonment of the unwelcomeness requirement would result in a paternalistic approach that doubts women's capacity to consent to or object to certain kinds of workplace sexual activity).

265 Schultz, supra note 7, at 1802.

266 See Estrich, supra note 6, at 830-32 (detailing negative stereotypes discussed under unwelcomeness requirement).
standard should not focus triers' attention on the nature of the target's response but on the nature of the perpetrator's act. The question is not whether sexual advances in the workplace are presumptively acceptable but whether the coercive imposition of sex is forbidden. Therefore, a better approach, with respect to sexual propositions or sexualized touching, requires the plaintiff to prove that the conduct was unilateral or disregarding of her desires.\(^2\) A plaintiff could demonstrate that the harasser coerced her consent, that he ignored her objections, or, in cases where her response was more equivocal, that the perpetrator's actions manifested disregard for her response.

In the case of sexualized talk or representations, a showing of unwelcomeness may be more appropriate because the plaintiff's response is less likely to be assimilated to stigmatizing stereotypes.\(^2\) Moreover, the premise that sexualized talk or representations are not presumptively unacceptable has benefits regarding the recognition and depiction of women's agency. This premise is more consistent with a world in which sexuality is a part of the way one "does one's gender" and women are able to communicate discomfort. It is important, however, to maintain some context based flexibility in the evidence that is sufficient to demonstrate unwelcomeness. Courts should not require plaintiffs in all cases to prove unwelcomeness with contemporaneous verbal objection to the perpetrator. Such an objection is the response toward which claimants should ultimately strive—and it may be possible even at present in the case of particularly assertive claimants or in workplaces that are not systematically poisoned with or organized along rigid sexual hierarchies. Courts should also permit proof of unwelcomeness through more typical responses, such as changing the subject or leaving the room,\(^2\) that reflect the con-

\(^{267}\) Drucilla Cornell, who is also concerned with promoting agency and sexuality while addressing sexual coercion, has advocated, through a different analytic route, a standard focusing on the unilateral character of the perpetrator's advance. DRUCILLA CORNELL, THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT (1995). Cornell proposes three "routes" to proving sexual harassment in the workplace, the first of which focuses on "unilaterally imposed sexual requirements in the context of unequal power." Id. at 170. Although this is obviously a more radical departure from the current doctrinal framework that I am proposing here, it also replaces unwelcomeness with an inquiry into the unilateral character of the sexual demand for some subset of sexual harassment cases.

\(^{268}\) It is possible that women raising these claims might be characterized as delicate or vulnerable to vulgar language. See Abrams, supra note 85, at 1034 (citing the tendency of factfinders to naturalize expressed differences in perception between men and women). However, this characterization seems both less likely and less ingenious than those that tend to be employed when women charge sexualized touching or violation.

\(^{269}\) See Louise F. Fitzgerald et al., Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment, J. Soc. Issues 120-23 (1995) (reviewing studies suggesting that approximately 50% of employed sexual harassment victims use avoidance strategies for dealing with harasser, while other common strategies involve the use of humor or efforts to "put off" the harasser).
straints under which many sexual harassment victims operate. The perceived precariousness of their foothold in a contentious workplace may mute women's responses; nonmasculine men may be deterred from blunt protest by the same discomfort with matters implicating sexuality that triggered the harassment in the first place.

The based-on-sex requirement, as Franke skillfully demonstrates, needs substantial revision. What might based-on-sex mean in a world characterized by sex and gender hierarchy? An interpretation consistent with the above theory might answer that it means "connected with the enforcement of a sex and gender hierarchy." In the sex based struggle of the workplace, such enforcement translates into efforts to preserve male control by undermining women, or efforts to entrench masculine norms. The relation of specific acts, particularly the sex based derogation of women, to the male control of the workplace may be more readily demonstrated. The entrenchment of masculine norms through harassing conduct might require expert testimony both in the cross-sex and same-sex cases. Such testimony is not analytically distant from the expert testimony used under current doctrine to demonstrate the relationship between harassing practices and workplace norms.

The pervasiveness requirement asks whether the harassment was sufficiently severe and detrimentally encompassing to modify the working environment. Since Harris, courts have resolved this issue by reference to a "totality of the circumstances" test. Evidence of many of the harms enumerated in Part III.B—from evidence of professionally detrimental tradeoffs to evidence of confusion or self-doubt concerning one's prospects as a worker—could help meet this flexible requirement. Under current doctrine, a court assesses the sufficiency of this showing from the standpoint of the reasonable person. Notwithstanding Bernstein's arguments for the merits of respect

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270 For a discussion of ways that the unwelcomeness requirement might be met consistent both with the most prevalent responses to harassment and with a concern for highlighting women's agency, see Abrams, supra note 121, at 365-66.

271 See Abrams, supra note 6, at 1204-05 (describing women's perceptions that their foothold in workplace may be precarious).

272 This testimony, which might be offered by a social psychologist, would include identification of particular norms as paradigmatically masculine and discussion of how particular workplace conduct served to entrench these norms.

273 See, e.g., Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (explaining through testimony of Dr. Susan Fiske how pervasive pornographic representations in the workplace served to "prime" male workers for devaluative treatment of women). It is worth noting, however, that such testimony has not always been viewed as helpful or unproblematic by courts. For an interesting discussion of the merits of this form of expert testimony in sex discrimination cases, as well as some negative judicial response, see Chamallas, supra note 162.

as a standard for assessment,\textsuperscript{275} I advocate the reasonable person standard subject to the following elaboration. The term "reasonable," as I argue above, should be understood to characterize a person with a solid base of political knowledge regarding sexual harassment.\textsuperscript{276} Such knowledge includes understanding the ways in which sexism has operated on women in the workplace and elsewhere.\textsuperscript{277} It also means understanding the ways in which a sex and gender hierarchy impinges on nonconforming women and men.\textsuperscript{278} The account of sex based struggle in the workplace and of sexual harassment as a means of male control and masculine normative entrenchment encapsulates many of the understandings that this reasonable person should have.

The respondeat superior element has been an enigma under current doctrine.\textsuperscript{279} Bernstein offers a convincing argument for expanding employers' affirmative obligations to remedy sexual harassment, drawing on duties inferable from recognition respect.\textsuperscript{280} This expansion results in a standard that imposes substantial responsibilities on employers to structure the workplace so as to prevent failures of respect and to take "energetic measures" of correction in response to employees who believe they have been harassed.\textsuperscript{281} I would endorse a similarly stringent standard, but on different grounds. Sexual harassment structures the workplace as a site of male control and masculine normative primacy, where men and women are shaped in accordance with conventional norms of masculinity and femininity. In short, it helps structure the workplace as a site which expresses and propagates a sex and gender hierarchy. Title VII should dismantle such arrangements because they are precisely the forms of sex and gender hierarchy that Title VII was intended to address.\textsuperscript{282} Employers should incur liability for the harassing acts of supervisory employees, particularly where such supervisors invoke their authority to perpetuate harassment or prevent resistance to or reporting of harassment.\textsuperscript{283} Courts should also find employer liability where

\textsuperscript{275} Bernstein, supra note 7, at 482-92, 506-21.
\textsuperscript{276} See supra Part I.A.
\textsuperscript{277} See Abrams, supra note 50, at 50-51.
\textsuperscript{278} See Franke, supra note 3, at 759-63.
\textsuperscript{279} See Bernstein, supra note 7, at 492-93 (offering a lucid guide to this doctrinal confusion).
\textsuperscript{280} Id. at 495-97.
\textsuperscript{281} See id. (quoting Pinkney v. Robinson, 913 F. Supp. 25, 34 (D.D.C. 1996)).
\textsuperscript{282} For an argument that Title VII has been distinctively flexible in accommodating equality, difference and subordination based accounts of discrimination, see Abrams, supra note 193, at 2479-81.
\textsuperscript{283} See Brief for Petitioner at 15-20, Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir.), cert. granted, 118 S. Ct. 438 (1997) (No. 97-282); Brief Amici Curiae of National Women's Law Center, Equal Rights Advocates and Womens Legal Defense Fund on Behalf of Petitioner at 6-8, Faragher (No. 97-282) [hereinafter Brief Amici Curiae]. Faragher itself provides a good illustration of a case in which the supervisor used his authority to perpetu-
employers failed to establish an explicit policy against sexual harassment, buttressed by a firm, "zero tolerance" approach to administration\textsuperscript{284} or where employers failed to establish clear policies and lines of authority for reporting of sexual harassment and protection against retaliation.\textsuperscript{285} Even where such measures are taken, employers should not be immunized where agency principles otherwise mandate a finding of liability.\textsuperscript{286}

2. Same-Sex Harassment

The final question for legal doctrine is what the proposed account means for the same-sex harassment cases. Franke's focus on the process of gendering, as a theoretical matter, moves these cases closer to the core of sexual harassment enforcement. Gendering is a process that operates on both men and women.\textsuperscript{287} Thus, the gendering of men through sexual harassment is arguably as important, if not as frequent, a potential object of enforcement as the gendering of women. The proposed account recenters women's subordination as an explanatory dynamic. Therefore, while it may explain how men can be gendered and even disciplined pursuant to this organizing, sex based dynamic, it may move the same-sex cases further to the fringes of sexual harassment enforcement.

However, in an account that is organized by sexual subordination that depicts a plurality of dynamics, there may be less distance between the "center" and "margin" than Franke finds under the current doctrinal regime.\textsuperscript{288} If the gendering of men is identified under the proposed theory as a contributing dynamic, same-sex harassment becomes actionable, analytically, through its connection to a system of sex and gender subordination. Moreover, this approach comprehends a great deal of same-sex harassment, at least as much as is actionable under Franke's theory.

\textsuperscript{284} See Brief for Petitioner, supra note 283, at 23-26. Petitioner's Brief argues that employers should be treated as having constructive knowledge when they have failed to put in place such a policy. \textit{Id.} at 23. Sexual harassment policies should be vigorously effectuated by imposing a duty to report on witnesses or supervisors by following up all complaints and, generally, by announcing zero tolerance for such practices in the workplace. \textit{Id.} at 24-26.

\textsuperscript{285} See \textit{id.} at 24-26; Brief Amici Curiae, \textit{supra} note 283, at 16-18.

\textsuperscript{286} See Brief Amici Curiae, \textit{supra} note 283, at 16-18.

\textsuperscript{287} Franke, \textit{supra} note 3, at 759-63.

\textsuperscript{288} \textit{Id.} at 759-62.
The clearest case for actionability is the disciplinary harassment of nonconforming men. Sanctioning men who do not manifest prototypical, (hetero-)sexualized masculinity is an important way of entrenching masculine norms in the workplace. The fact that such harassment is directed at particular individuals rather than sex based groups, or individuals serving as proxies for same-sex groups, would not be problematic under the proposed theory because this account describes sexual harassment as targeting specific individuals as well as proxies and sex based groups.

The proposed approach would also include some cases in which nongay men engage in sexualized talk or practices directed at other men, not as an expression of desire but as a form of roughhousing or horsing around. Franke argues that such cases should be decided by reference to standing: because Title VII is not intended to establish a new normative orthodoxy but rather to facilitate gender choice in the absence of coercion, plaintiffs should have standing only if they were targeted for objecting to such conduct. My approach is analytically distinct in such cases, though it would probably produce a similar outcome. The entrenchment of masculine norms is one of the dynamics characteristic of sexual harassment. There is little doubt that practices such as bagging express conceptions of normative masculinity. However, not all propagation of masculine norms amounts to employment discrimination. If the plaintiff is to recover, the discrimination must still produce an effect that the law is prepared to recognize as an employment related disadvantage. In sexual harassment doctrine, the pervasiveness requirement performs this gatekeeping function by insisting that the plaintiff show that the harassment "unreasonably... interfere[d] with [the] individual's work performance" or, in the recent language of Justice Ginsburg, "'ma[d]e it more difficult to do the job.'" Plaintiffs who can

289 See id. at 770-71.
290 See supra notes 226-29 and accompanying text.
291 See supra notes 227-29, 237-40 and accompanying text.
292 See Franke, supra note 3, at 767-68.
293 Id. at 768-69.
294 See supra Part II.A.
295 See Franke, supra note 3, at 768-69; supra notes 221-22.
296 I am somewhat less concerned than Franke about entrenching new orthodoxies. The recentering of women’s subordination may mean that my theory values neutrality (among orthodoxies) at least slightly less highly. However, the fact that my approach is concerned with agency means that it should provide some scope in which women and men can express themselves, including their sexualities, in the workplace consistent with the mandate of not interfering with the work performance of others.
297 This test was part of the standard articulated by the Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986).
demonstrate this in the context of nongay sexualized practices ought to prevail; those who are simply annoyed by such practices should not.

The most critical distinction between my approach to the same-sex cases and Franke’s may come in cases involving solicitation or other direct sexual approaches by a perpetrator to a target of the same sex. Franke finds these “gay quid pro quo” cases beyond the scope of the sexual harassment claim. According to Franke, the target is not selected by reference to his deviation from masculine norms, and the tendency of current doctrine to require proof of the perpetrator’s sexual orientation reinforces the heterosexism of the prevailing “but for” approach. Because these cases most likely would not have occurred but for the same sex of the target, they satisfy a minimalist “but for” requirement. However, because these cases involve the use of coercion to satisfy sexual desire, rather than a process of gendering, Franke concludes that they are more appropriately litigated under the disparate treatment wing of Title VII.

My proposed approach would handle these cases differently. First, I would define the category more broadly than does Franke to include any case in which a sexual demand is made of one man by another without reference either to the sexual orientation of the perpetrator or to whether the demand stated or implied a quid pro quo. The fact that these cases are not about disciplining nonconformers is not dispositive. Under the proposed approach, policing conformity with gender stereotypes is only one dynamic in the broader pattern of entrenching male control and masculine norms in the workplace. Moreover, the fact that the demands in these cases may be animated by sexual desire is not determinative. The presence of desire, in and of itself, neither requires nor forecloses sexual harass-

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299 This category would include those who are targeted because they objected to such practices. Because I do not regard the disciplinary dynamic as central in the way that Franke does, I do not use it to define the category of those who should recover.

300 The following discussion focuses, as does Franke’s analysis, on cases involving two men. I deal briefly with the prospect of a solicitation case involving two women, infra note 309.

301 Franke, supra note 3, at 766-67.

302 Id. at 732-33, 735-36.

303 Id. at 767.

304 Though many of these cases involve gay perpetrators, there are other cases where the perpetrators are straight or perhaps bisexual. See, e.g., Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991) (involving a quid pro quo case where the supervisor coerced two subordinate male employees to participate in a sexual relationship between him and a woman employee).

305 See supra notes 226-29, 237-40 and accompanying text.
ment enforcement. The critical question, under the proposed approach, is whether the perpetrator acted on his desire in a way that was unilateral and without reference to the desires of the target. Such behavior affirms traditional norms regarding male sexual subjectivity and, in the employment context, marks these norms as operative in the environment of the workplace. While sexual advances directed at male targets do not characteristically demean women as a group, establishing male control by disempowering women is not the only dynamic involved in sexual harassment. Male sexual subjectivity may be validated or entrenched as a norm of the workplace even when the target of male predation is not a woman.

The effects are more readily observable in a case such as Showalter v. Allison Reed Group where a supervisor pressured two male subordinates to become part of a sexual relationship that he was conducting with a subordinate woman. Here, sexual desire for the male subordinates may or may not have motivated the perpetrator, but in coercing them to join the relationship, the perpetrator displayed just as much disregard for the subordinate men's sexual agency as for the agency of his female target. Perhaps because the case already involved a woman and manifested a coercive, devaluative sexual dynamic, the trier of fact could more easily understand the male plaintiff's injury. But these features would not, under the proposed approach, have been a sine qua non of the male plaintiff's recovery.

Cases where a male perpetrator solicits a male target apparently out of homosexual desire are more difficult because actionability may imply a direct parallel between the dynamics of gay or lesbian sexuality and coercive heterosexual patterns. However, while subordination theorists have too often assumed that one may interpret gay sexuality by reference to the heterosexual model, it also would be an error to assume that coercion or disregard for the desires of the other cannot inflect gay and lesbian sexuality. These cases should be resolved by

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306 By this I mean either that the perpetrator coerced the target, that the perpetrator ignored the target's objections, or, if the target's response to the solicitation was ambiguous, that the perpetrator acted in a way that suggested that the target's response was immaterial to his decision to act on his desire.

307 See supra notes 223-24 and accompanying text.


310 See Cory Dziggel, "The Perfect Couple," in Naming the Violence: Speaking Out About Lesbian Battering 62 (Kerry Lobel ed., 1986) (describing the dynamics of lesbian battering relationships as manifesting some elements in common with and others distinct from heterosexual battering relationships); Lydia Walker, Battered Women's Shelters and Work with Battered Lesbians, in id. at 73 (reporting experiences in working with battered lesbians.
SEXUAL HARASSMENT

If the conduct was unilateral, or if it disregarded the desires of the target in a way that denied his sexual agency, or if it entrenched in the workplace stereotypic notions of male sexual subjectivity, then it should be subject to enforcement as well.

and examining the approaches used when the abuser was a woman compared to those used when the batterer was a man. It is also possible that a unilateral, disregarding approach by a gay male perpetrator might have the effect of entrenching norms of male sexual subjectivity, regardless of whether the dynamic at issue was the same as in cases of unilateral heterosexual approaches.

In the case of sexual solicitation involving women, the question of whether the approach of the perpetrator tended to disregard the sexual agency of the target is a central one. Whether this should also be true in same-sex cases is a more difficult question because the sexual agency of men as a group is neither undermined nor underestimated in the same manner as that of women. See Franke, supra note 3, at 768-69 (noting that the socially dominant view is of men as sexual subjects). It is arguable, however, that respect for sexual agency is a normative good that is undermined by sexual relations characteristic of sexism. Therefore, a male perpetrator's action disregarding the sexual agency of another man is a wrong that is related to or derived from a sexist social or institutional order and ought to be actionable under an antidiscrimination regime that is designed to ameliorate the effects of sexism. I have argued, in a partially analogous case, that believing skin color to be determinative of merit is a premise characteristic of racism, and that the decision of one black person to deny a job to another black person on the basis of her skin color (i.e., light or dark) is a decision derivative of or inflected with the racism characteristic of white society and should therefore be actionable under a statute designed to address that racism. Abrams, supra note 193, at 2504-09. These two examples are distinguishable in the sense that the race case involves one member of a disempowered group discriminating against another member and the instant case involves one member of an empowered group discriminating against another member. But the notion of an intragroup dynamic that derives from an intergroup dynamic of subordination is the same.

Another important and potentially complicated question is whether a woman could entrench norms of male sexual subjectivity with the unilateral, disregarding pursuit of another woman in the workplace. Cf. Coombs, supra note 188 (arguing that theories challenging hetero-patriarchy have been built on analyses of relations between men and asking what additional insights might be gained by exploring relations between women). This is tricky because a unilateral sexual approach might be interpreted differently when a woman undertakes it. For example, some take it as a form of sexual agency or as something less threatening or coercive. However, I suspect there are some sexual approaches that a lesbian woman could make that would strike workplace observers as more characteristic of normative heterosexual masculinity than anything else. In Ryczek v. Guest Services, Inc., for example, a female plaintiff alleged that the defendant, another woman, had expressed a sexual preference for females to the plaintiff, inquired about the plaintiff's sexual practices, dipped the plaintiff's finger in a pot of sauce and licked it, looked at the plaintiff suggestively and leaned against her, and took off her shirt while riding in an elevator with the plaintiff. 877 F. Supp. 754, 756 (D.D.C. 1995). While one could imagine ways of distinguishing this course of conduct from those involving male perpetrators (less touching; no devaluative, trivializing, or menacing language; more intimacy and less threat in sexualized gestures), one also could imagine concluding that this perpetrator had pursued a unilateral course of sexualizing her professional relationship with the plaintiff, notwithstanding the plaintiff's distress, that is strikingly reminiscent of the behavior manifested by heterosexual males in some sexual harassment cases.
Conclusion

The emerging jurisprudence of sexual harassment reveals the defects and dangers of a sex based, subordination account. However, these dangers do not justify Bernstein’s move to an apolitical, nongendered account of the wrong. They do not require Franke’s readjustment of the balance away from a theory of subordination toward a theory of gendering. Instead, these dangers invite—indeed require—us to offer a more contingent, multifaceted account of women’s subordination through sexual harassment. They invite an account that explains the ways that a gender hierarchy can oppress men and illuminates the surprising range of dynamics through which such a hierarchy can be implemented. By such means, we will gradually and contextually move toward an account that does justice to the complexity of the phenomenon of gender subordination and to the men and women who struggle against it.