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Gender Sex Agency and Discrimination: A Reply to Professor Abrams

Katherine M. Franke

GENDER, SEX, AGENCY AND DISCRIMINATION: A REPLY TO PROFESSOR ABRAMS

Katherine M. Franke†

According to the Equal Employment Opportunity Commission, sexual harassment is the fastest-growing area of employment discrimination.[1] In fact, the annual number of sexual harassment complaints filed with the EEOC has more than doubled in the last six years.[2] No one, or at least no one who has given this problem her serious attention, can deny that workplace sexual harassment is a grave problem and that it significantly impedes women's entrance into many sectors of the wage labor market.

Notwithstanding these impressive numbers, sexual harassment legal doctrine remains remarkably undertheorized—particularly by the Supreme Court. For these and other reasons, Professor Abrams does a tremendous service by critiquing and, in many ways, refining the work that Anita Bernstein, Vicki Schultz, and I have done on the problem of sexual harassment. She seeks to signal the arrival of a jurisprudential moment characterized by reinvigorated theorizing about the appropriate legal response to sexual harassment. Professor Abrams is a particularly appropriate person to undertake such an exercise given that she has produced some of the most innovative recent scholarship on sexual harassment.[3] Moreover, this is a particularly opportune time to make such an assessment of the law of sexual harassment, as the Supreme Court will have taken action in five sexual harassment cases this term.[4] Finally, what better time to assess the

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† Associate Professor of Law, Fordham University School of Law.

1 *See* Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily: New Laws Boost Hopes for Monetary Awards*, WASH. POST, May 12, 1997, at A1.

2 *See id.*

3 *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994) [hereinafter Abrams, *Complex Female Subject*]; Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT, Winter 1995, at 48.

4 Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (holding that same-sex sexual harassment can be actionable under Title VII); Jansen v. Packaging Corp. of America, 123 F.2d 490 (7th Cir. 1997), *cert. granted in part sub nom*, Burlington Indust., Inc. v. Ellerth, 118 S. Ct. 876 (1998) (establishing whether sexually harassing conduct that does not result in an adverse job action is actionable under Title VII); City of Belleville v. Doe, 119 F.3d 563 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183 (1998); Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 438 (1997) (establishing standards of employer liability for peer sexual harassment); Doe v. Lago Vista Ind. School Dist., 106 F.3d 1223 (5th Cir.), *cert. granted sub nom.* Gebser v. Lago Vista Ind. School Dist.,

state of sexual harassment doctrine than on the eve of the twentieth anniversary of the publication of Catharine MacKinnon's *Sexual Harassment of Working Women.*[5]

In *The New Jurisprudence of Sexual Harassment,*[6] Professor Abrams voices several concerns about my formulation of the wrong of sexual harassment as a gender-based harm. I have argued that "sexual harassment is sex discrimination precisely because its use and effect police hetero-patriarchal gender norms in the workplace."[7] To the contrary, Abrams suggests that the wrong of sexual harassment lies in its power to "preserve male control and entrench masculine norms in the workplace."[8] I suspect that only the overinitiated will regard the two of us to be formulating different theories of discrimination. To be perfectly honest, I read much of Abrams's article as an elaboration of, rather than a disagreement with, the theory I advanced in *What's Wrong With Sexual Harassment?* Surely this should come as no great surprise since it is upon Professor Abrams's work that I aimed to build my account of the discriminatory nature of sexual harassment.[9] Thus, I regard my comments here not in Marshal McLuhan-terms from Annie Hall,[10] but as one new iteration of an ongoing conversation the two of us have undertaken with respect to the "why," not the "what," of sexual harassment.

I take Professor Abrams to express three major concerns about my work[11] in *The New Jurisprudence.* First, she, like Professor Schultz,[12] does not want to lose sight of the fact that the conduct prohibited by Title VII is conduct that disadvantages its targets as workers. For Abrams, any complete theory must account for the special relation sexual harassment has to the workplace.[13] Second, she is wary of any theory of sexual harassment that fails to frame its analysis around a

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118 S. Ct. 595 (1997) (establishing whether school sexual harassment claims are actionable under Title IX).

5 CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

6 Kathryn Abrams, *The New Jurisprudence of Sexual Harassment,* 83 CORNELL L. REV. 1169 (1998).

7 Katherine M. Franke, *What's Wrong With Sexual Harassment?,* 49 STAN. L. REV. 691, 772 (1997).

8 Abrams, *supra* note 6, at 1172.

9 Franke, *supra* note 7, at 762.

10 Man in Line at movie theater whom Woody Allen character finds irritating: "I happen to teach a class at Columbia called 'TV Media and Culture'! So I think that my insights into Mr. McLuhan—well, have a great deal of validity." Marshall McLuhan, who is standing nearby in the theater: "You—you know nothing of my work. . . . How you ever got to teach a course in anything is totally amazing." Woody Allen & Marshall Brickman, Screenplay of *Annie Hall, in* FOUR FILMS OF WOODY ALLEN 16 (1982).

11 I will limit my comments to Abrams's commentary on my work and will leave to Professor Bernstein the task of addressing the first part of Abrams's article.

12 Vicki Schultz, *Reconceptualizing Sexual Harassment,* 107 YALE L.J. 1683 (1998).

13 Abrams, *supra* note 6, at 1193-94.

central premise of women's subordination.[14] Third, Abrams resists an account of sexual harassment as an instrument of what she calls "gender confinement,"[15] preferring instead to understand sexual harassment understood as "an interference with human agency, and particularly the agency of women."[16] I will address each of these concerns in turn.

Without question, the workplace is a domain unique in its relationship to identity formation,[17] liberatory promise,[18] and the imposition of legal equality norms.[19] The key question, for our purposes, is whether the sexual harassment that occurs in the workplace differs sufficiently from the sexual harassment that occurs in other fora such that it demands a unique analysis. In other words, is workplace sexual harassment in some way distinguishable from, for instance, the discriminatory nature of the sexual harassment of female students?

While Abrams provides compelling arguments regarding the unique injuries that female harassment victims suffer qua workers,[20] I am unconvinced that this injury is sufficiently different in kind from that suffered by girls who are sexually harassed in school to warrant such a critique. Take, for example the experience of LaShonda Davis, a girl who in the fifth grade reported that a male classmate fondled her, touched her breasts and vaginal area, told her, "I want to get in bed with you," and "I want to feel your boobs," rubbed against her in the hallway in a sexually suggestive manner, and placed a doorstop in his pants and behaved in a sexually suggestive manner toward her.[21] The boy's actions increased in severity until he finally was charged with, and pled guilty to, sexual battery.[22] LaShonda, her mother, and other girls complained to teachers and the principal about this boy's behavior, but the school did nothing.[23] LaShonda's grades dropped from *A*s and *B*s, and, at one point, she even wrote a suicide note.[24]

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14 *Id.* at 1214-15.

15 *Id.* at 1209. I believe Abrams uses this term to describe the theory I advance in *What's Wrong With Sexual Harassment?* I resist the reduction of my theory of the wrong of sexual harassment to a notion of gender confinement.

16 *Id.* at 1172.

17 As Abrams points out, and Schultz develops at even greater length in Marxian materialist terms, the workplace is a site of resistance where women can gain "a sense of competence or independence that they had not enjoyed before." *Id.* at 1195.

18 As Abrams states, "[t]hese harms are particularly salient because they occur in a context viewed by many women as having liberatory potential, in both material and personal terms." *Id.* at 1218.

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

20 Abrams, *supra* note 6, at 1194-1205.

21 Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1188-89 (11th Cir.), *vacated*, 91 F.3d 1418 (11th Cir. 1996), *on reh'g*, 120 F.3d 1390 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997).

22 *See id.* at 1189.

23 *See id.*

24 *See id.*

Tragically, LaShonda's experience is not atypical. One survey reported that eighty-five percent of female respondents in grades eight through eleven have been sexually harassed.[25] School is a place where girls can gain a sense of themselves as competent, confident, and independent individuals, and where they are valued more for their minds than for their bodies. Sexual harassment of girls, most of it in the form of hostile environment sexual harassment by peers, is widespread in schools and affects girls educationally, emotionally and physically. Girls who have been harassed are more afraid in school and feel less confident about themselves.[26] As the Department of Education has recognized, "sexual harassment can interfere with a student's academic performance and emotional and physical well-being, . . . preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn."[27]

Enforcement of prohibitions against sex discrimination, including sexual harassment, in the schools has increased of late. The Department of Education's Office of Civil Rights recently issued guidance in interpreting Title IX of the Education Amendments of 1972 to prohibit sexual harassment in schools.[28] Should we conclude that the wrong of school-based sexual harassment is different in some principled way from the wrong of workplace sexual harassment? I do not think so. Abrams writes that "[e]ntering 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."[29] Here she is referring partic-

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25 AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993).

26 *See id.* at 16-17.

27 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034 (1997) [hereinafter Sexual Harassment Guidance]; *see also* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC (1997) (noting that "[s]exual harassment can threaten a student's phyiscal or emotional well-being, influence how well a student does in school, and make it difficult for a student to achieve his or her career goals."); NAN STEIN, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN PUBLIC (AND PRIVATE) SCHOOLS (Center for Research on Women Working Paper No. 256 (1993) (recounting the effects of sexual harassment on students)).

28 Sexual Harassment Guidance, *supra* note 27, at 12,034. The Guidance indicates that "if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian." *Id.* at 12,036. With respect to this definition, I share Professors Abrams and Schultz's concern that this definition is limited to conduct of a sexual nature, thereby ignoring, by implication, harassment of a nonsexual nature which is, without question, sex based harassment. Of course, this definition reproduces the Equal Employment Opportunity Commission's error of omission in failing to promulgate guidelines describing nonsexually explicit sex based harassment. *See* Franke, *supra* note 7, at 710 n.89, 717 n.128.

29 Abrams, *supra* note 6, at 1196.

ularly to women's entrance into jobs that were not traditionally considered "pink collar" jobs.[30] Cannot the same be said for girls' enrollment in math, science, shop,[31] and other non-traditionally "feminine" courses?

I raise the example of sexual harassment in the schools to illustrate the ways in which the sexual harassment of women by men in many different contexts, not just the workplace, operates as a means by which women are sexualized, women are feminized, women's competence is called into question, and various public and private fora are preserved as domains best suited to hetero-masculine men.[32] Even though the harassment of men by women seemingly excuses men from the injury this conduct inflicts, I maintain that harassment of this kind serves to discipline men as well. Both the perpetrators of, and male witnesses to, the sexual harassment of women by men are subject to a regulatory practice that inscribes, enforces, and polices hetero-patriarchal gender norms in men. Men who sexually harass women are teaching both men and women a lesson about gendered power.

This lesson, discipline, or enactment of hetero-patriarchal power can take place in the workplace, schools, athletics, political institutions, and countless other institutional settings within any culture. Each location contributes a unique set of intersectional dynamics that render the sting of gender discipline painful and effective in different ways. However, this fact does not undermine the overarching notion that the wrong of sexual harassment lies in its function as a technology of sexism. Rather than neglect the role that work plays in our under-

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30 As Abrams describes, "[i]t also gave some women an opportunity both to perform roles distinct from those of caregiver, nurturer, object of affection or sexual titillation and to understand more fully the constraint of those traditional roles by experiencing alternatives." *Id.* at 1195-96.

31 I was one of the first girls in my high school to choose stage crew over home economics as a required extracurricular activity. The male students and teacher called me "Spike" because "Katherine" didn't sound right in the woodshop, and I was the object of incessant banana-related jokes from the male teacher after I showed up one afternoon eating a banana. While I kind of liked the name Spike, I definitely could have done without the banana jokes.

32 I use the term "hetero-masculine men" advisedly, as I think neither masculinity nor maleness alone are what is being preserved through the use of sexual harassment. Nonfeminine women, such as Ann Hopkins, *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (noting a description of her as "macho"), non-masculine men, such as Anthony Goluszek, *see* Goluszek v. Smith, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988) (noting that the plaintiff was atypically sensitive to heterosexual male sexual banter), and masculine gay men, such as Tom of Finland, *see* F. VALENTINE HOOVEN III, TOM OF FINLAND: HIS LIFE AND TIMES (1993), do not have what it takes to pass unmolested in these venues. To the contrary, these kinds of people are the targets of frequent sexual harassment when they seek to work in places such as shipyards, construction sites, and auto repair shops. For this reason, I would disagree with Abrams's description of sexual harassment as something that "preserv[es] the workplace as a site of male control and normative influence." Abrams, *supra* note 6, at 1198. More than mere biological exclusivity drives this problem.

standing of sexual harassment in the workplace,[33] I have tried to provide an overarching theory by which to understand sexual harassment generally as a kind of discrimination "because of sex." I chose to focus my discussion on workplace sexual harassment primarily because this area has the most developed body of case law. This empirical convenience, however, should not deter us from searching for a way to understand workplace sexual harassment not as a workplace wrong, but as a wrong grounded in gender-based discrimination.

Next, I take Abrams to express concern about any theory that does not "place women's subordination at the center of sexual harassment analysis."[34] Given my critique of Catharine MacKinnon's subordination theory,[35] Abrams takes me to hold the view 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."[36] In my opinion, notwithstanding this set up, Abrams and I agree more than we disagree about the normative priority of women's subordination in a theory of sexual harassment. Some of our apparent disagreements can be attributed to different methodological preferences, while others can be understood as choices about depth of field; I am concerned about developing a theory that keeps women in the center of the frame, but that also keeps the effect that sexual harassment has on men from falling out of view. I express this concern not because I think we should reposition victimized men at the center of sexual harassment doctrine, but because I regard sexual harassment to be a systemic dynamic, the full meaning of which cannot be understood by looking at women alone.

The following short comments with respect to methodology are in order. In *What's Wrong With Sexual Harassment?*, I devoted considerable attention to the problem of same-sex sexual harassment, but I did so for the purpose of asking, admittedly in a provocative manner, "what exactly is wrong with sexual harassment?"[37] I believe that by looking to the margins of a doctrine, much can be understood about tensions in the doctrine at the center.[38] The utility of attention to the

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33 Abrams claims that, "[a]t the most concrete level, sexual harassment disadvantages its victims as workers. . . . [Because Franke does] not analyze sexual harassment as a distinct phenomenon *of the workplace*, [she] tend[s] to treat these harms as peripheral." Abrams, *supra* note 6, at 1218 (emphasis added).

34 *Id.* at 4.

35 Franke, *supra* note 7, at 759-62.

36 Abrams, *supra* note 6, at 1172.

37 Franke, *supra* note 7, at 691.

38 I used the same methodology in an earlier article in which I looked to the legal claims of transgendered persons in order to better understand the overreliance upon biological sexual differences in traditional sex discrimination jurisprudence. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 40-69 (1995).

"peculiar" has been a starting premise of cultural studies and anthropology for some time:

> it is often the "offbeat" (to our eyes) sexual and sex-related practices . . . that help to bring the native theory most clearly to the fore, probably because being unclouded by obvious utilitarian aims their "symbolic" nature stands out more boldly.
>
> The "peculiarity" reveals the underlying thought system and the underlying thought system explains the peculiarity.[39]

Thus, my purpose in drawing attention to same-sex sexual harassment cases was not to minimize or defer the importance or centrality of the sexual harassment of women by men, but to provide a means by which to better understand the underlying conception of sex discrimination that animates traditional sexual harassment doctrine.

Related to the methodological point, yet of greater concern to me, is Abrams's reluctance to depart from a subordination-based theory of the wrong of sexual harassment. I believe that any minimally adequate theory of sexual harassment must provide an account of the meaning and legality of same-sex sexual harassment. Yet, I take seriously Abrams's concern that my call to understand sexual harassment as a technology of hetero-patriarchy loses sight of the material reality of women's subordination:

> 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.*[40]

If as nuanced a reader as Professor Abrams regards the theory I developed in *What's Wrong With Sexual Harassment?* to undervalue the importance of women's subordination, then I should clarify the central meaning of hetero-patriarchy for all readers. Again, I have Frank Valdes to thank for introducing this concept into the legal literature.[41] As he and I use the term hetero-patriarchy, it refers to "the fusion of androsexism and heterosexism, both socially and sexually, to obtain and maintain the supremacy of 'masculinity' and of 'masculine'-identified (heterosexual) men, over personal, economic, and

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39 Harriet Whitehead, *The Bow and the Burden Strap: A New Look at Institutionalized Homosexuality in Native North America, in* SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY 80, 82 (Sherry B. Ortner & Harriet Whitehead eds., 1981).

40 Abrams, *supra* note 6, at 1204 (emphasis added).

41 Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 8 n.14 (1995).

cultural life."[42] Indeed, the prominence of the term "patriarchy" in the term itself signals the importance of the historical and material subordination of women to men.[43] Abrams expresses concern that a theory of hetero-patriarchy fails to give sufficient recognition to the power of sexual harassment to perpetuate male control and entrench male norms in the workplace.[44] Yet hetero-patriarchy, as I use it, analyzes gendered power on two levels: one local and one systemic. First, it explains how various practices, such as sexual harassment, actually do cultural work in the individual case—they gender males as masculine and females as feminine.[45] Second, it locates this gendering within a systemic hierarchy of power in which women are regarded as inferior to men and femininity is regarded as inferior to masculinity.[46] Reducing the theory of sexual harassment I advance in *What's Wrong With Sexual Harassment?* to a theory of "gender confinement"[47] focuses exclusively upon the first part of the analysis at the expense of the systemic aspect. Neither aspect can be fully understood without the other.

What I find curious about Abrams's critique of the theory of hetero-patriarchy is that she finds it at once too flexible and too rigid an instrument with which to understand the wrong of sexual harassment. For Abrams, the theory is too flexible because, in extending the analysis to nonconforming men, the theory loses sight of women's subordination.[48] Yet it is too rigid, she argues, because it conflates and treats as equally significant multiple, simultaneous vectors of power based in sex, gender, and sexual orientation.[49] I have already responded to the objection that the theory is too flexible.[50] I am troubled, however, by her claim that the theory is too rigid. One of the explanatory features of hetero-patriarchy that I find so satisfying is its capacity to provide an account for multiple trajectories of power: sex-

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42 *Id.*; *see also* Franke, *supra* note 7, at 739 n.247; Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 170 (1996).

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

44 Abrams, *supra* note 6, at 1213-14.

45 "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." Franke, *supra* note 7, at 762.

46 *See id.*

47 Abrams, *supra* note 6, at 1209.

48 *Id.* at 1204.

49 *Id.* at 1203-04. Hetero-patriarchy "obscure[s] variations among different kinds of subordination. . . . [It is] less helpful in describing environments in which some subordinating dynamics predominate." *Id.*

50 *See supra* notes 35-42 and accompanying text.

based, gender-based, and sexual orientation-based. These dynamics tend to be mutually constitutive in a particular context—masculine power means different things depending upon whether the person exercising it is a gay or heterosexual man, or perhaps a woman trying to fit into an environment that prizes masculinity.[51] Even with respect to this last category, a masculine woman who is known to be heterosexual may be permitted to exercise different kinds of power or suffer different forms of harassment than a woman who is known to be a lesbian.[52] Hetero-patriarchy is designed to be flexible enough to respond to each of these complex situations. Abrams desires a theory that can explain the interrelation of power dynamics on a "context by context, institution by institution" basis.[53] Yet hetero-patriarchy, rather than a theory of women's subordination, seems best equipped to address the vagaries and complexities of sexual harassment in a multitude of contexts.

I might add that one of the dangers of recentering a theory of sexual harassment on women's subordination—a danger evident in Abrams's paper—is the failure to recognize the reflexive quality of sexual harassment. I regard it as extremely important that sexual harassment be understood as a technology of sexism that operates systemically to enforce hetero-patriarchal values. When a woman is sexually harassed by a man, she is actually feminized in that process as a heterosexual object. However, the harasser does not remain unaffected; by exercising power in this way, he is heteromasculinized as a heterosexual subject. Abrams ignores the reflexive, performative power of sexual harassment in her discussion, locating women and nonconforming men as the only persons affected by sexual harassment. By refocusing our attention on the subordination of women, her field of vision no longer includes the ways in which sexual harassment reinforces hetero-masculinity in all men.[54]

One particular example makes this omission clear. Abrams discusses how the entrance of women into traditionally all-male workplaces triggered various retaliatory responses from men who were anxious about the change in workplace culture that women's presence might presage, while at the same time they feared a loss of male control.[55] Abrams notes that "[t]hese assertions of male control in the workplace, however explained, have palpably affected the lives of

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51 Abrams, on the other hand, sees a looser relationship between these dynamics. Abrams, *supra* note 6, at 1203-04.

52 One can only imagine the additional hostility that would have been directed at Shannon Faulkner or Ann Hopkins had either of them been openly lesbian.

53 Abrams, *supra* note 6, at 1204.

54 *Id.* at 1202 (stating that sexualized aggression subordinates women and damages *"some men"* (emphasis added)).

55 *Id.* at 1195-97.

women workers."[56] While this claim is unquestionably true, it is also the case that male reactions to the sexual integration of many workplaces have palpably affected the lives of male workers and may have made the imposition of hetero-masculinity on men all the more extreme. When labor market arrangements no longer evidence the inevitability of gender and sexual dimorphism, other means of reinforcing this "fact" must be resorted to. In circumstances in which masculinity is threatened because women are doing "men's jobs," it becomes all the more important to shore up hetero-masculine norms, frequently to levels that exceed those when the workplace was all male. Thus, a theory of the wrong of sexual harassment must recognize both the performative and reflexive power of harassment for both men and women.[57]

Finally, I will address Professor Abrams's comments with respect to the agency-denying aspects of sexual harassment. On the whole, I agree with her assertion that sexual harassment is an offense to agency, in that it "interferes with the capacity to both define oneself as a subject and seek less stereotypic or confining roles."[58] Yet I believe that the connection between unwelcome conduct of a sexual nature and agency must be drawn with a somewhat finer point. Abrams focuses her agency-related inquiry on whether the perpetrator acted on his desire in a way that was unilateral and without reference to the desire of the target.[59] As presented, I am not convinced that a theory regarding the denial of sexual agency is necessarily a theory of discrimination. Recall that unlike Professor Bernstein, Professor Abrams

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56 *Id.* at 1197.

57 Abrams makes one additional argument in favor of grounding a theory of sexual harassment in women's subordination, this one more practical than theoretical. Abrams notes that the legal instruments we now possess, such as Title VII, which address the problem of sex and gender based subordination, all target *sex discrimination*. *Id.* at 1204-05. She questions whether these statutes can accommodate a multifaceted theory of sex and gender subordination. *Id.* Yet courts, including the Supreme Court, have consistently interpreted both Title VII and the Fourteenth Amendment to apply not only to sex discrimination—the differential treatment of men and women simpliciter—but also to gender based discrimination. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994) (equal protection principles, as applied to gender classifications, mean state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination"). Indeed, most courts routinely use the terms "sex" and "gender" interchangeably in discussing statutes prohibiting sex discrimination, at times denoting discrimination based upon biological differences and at other times denoting discrimination based upon cultural differences; Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that discrimination against non-feminine woman is sex discrimination). *See* Franke, *supra* note 38, at 9-14. Curiously, Justice Scalia is the only member of the Supreme Court to note a difference in meaning between sex and gender. *See J.E.B.*, 511 U.S. at 157 n.1 (Scalia, J., dissenting).

58 Abrams, *supra* note 6, at 1220.

59 *Id.* at 1228.

and I are struggling to develop an acceptable account of sexual harassment as a form of sex discrimination.

Abrams gives us an example in which a male perpetrator sexually solicits a male target, apparently as an expression of sexual desire. Abrams acknowledges that, particularly under a theory of sexual harassment grounded in the subordination of women, it is difficult to provide an account of these cases that shows them to be sexually discriminatory because "sexual advances directed at male targets do not characteristically demean women as a group."[60] For Abrams, these cases would be actionable if one of two factors could be shown: the conduct was unilateral or disregarded the desires of the target in a way that tended to deny the sexual agency of the target, or the conduct was "entrenched in the workplace stereotypic notions of male sexual subjectivity."[61]

This second criterion seems correct to me as a gender-based theory of discrimination. However, I have my reservations about the first criterion. As Professor Abrams has demonstrated in nuanced and sophisticated ways in her other writings,[62] questions of sexual agency often are deeply related to gender stereotypes and expectations. I have doubts, however, about the political and theoretical advantage of subsuming all questions of sexual agency within a theory of gender-based subordination. Forcing oneself sexually on a non-complying other is certainly wrong regardless of the sexual orientation or biological sex of either party. But I hesitate to regard all unilateral and unwelcome sexual behavior as a violation of Title VII. Abrams suggests that when a woman forces herself upon another woman in the workplace we might conclude that this conduct amounts to sex discrimination because this action is "strikingly reminiscent of the behavior manifested by heterosexual males in some sexual harassment cases."[63] However, the wrong of this conduct cannot lie in the fact that its profile reminds us of other illegal conduct. Here, as elsewhere, such a strategy runs the risk of both underinclusion and overinclusion.[64]

For these reasons, I have struggled with how to address same-sex sexual harassment cases that do not evidence the enforcement of gen-

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60 *Id.*

61 *Id.* at 1229.

62 *See, e.g.*, Abrams, *Complex Female Subject*, *supra* note 3.

63 Abrams, *supra* note 6, at 1229 n.312.

64 The same criticism has been directed at recent attempts to analogize the wrong of prohibiting same-sex marriage to sex discrimination. *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1779 n.116 (1996) (criticizing Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994)); *see also* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (arguing that the comparison of whether gay men and lesbians are sufficiently "like" other protected groups misconceives civil rights law).

der norms, such as the harassment of non-masculine men,[65] but which appear to be motivated only by the harasser's sexual desire. Professor Abrams provides us with the example of *Ryczek v. Guest Services, Inc.*,[66] in which a woman expressed sexual interest toward a woman she supervised and directed various sexual behaviors at that woman over her objections.[67] Surely this conduct was unilateral and unwelcome, but should it violate Title VII's proscriptions against sexual harassment? I am not inclined to conclude that the conduct was discriminatory simply because it was sexual, or simply because the conduct was an affront to the sexual agency of the target. I argued in *What's Wrong With Sexual Harassment?* that these cases are best analyzed as disparate treatment cases, not sexual harassment cases, because of the problems incident to "but for" reasoning in sexual harassment doctrine.[68] I will not rehearse all of those arguments here, but it bears repeating that I suggested this doctrinal relocation as a matter of second best, not ideal theory. As Abrams acknowledges,[69] it is no longer realistic to demand a grand, one-size-fits-all theory of sex discrimination or sexual harassment. We are best advised to adjust the theory in pragmatic fashion to address the demands of particular circumstances.

I regard it as a tremendous honor that Professor Abrams has given my arguments about sexual harassment doctrine such thoughtful consideration in *The New Jurisprudence of Sexual Harassment.* Notwithstanding my remarks above, she has taken many of the ideas I raised in *What's Wrong With Sexual Harassment?* and improved upon them by giving them dimension and particularity I fully agree with. I look forward to the next chapter of this ongoing conversation.

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65 *See, e.g.*, Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993); Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

66 877 F. Supp. 754 (D.D.C. 1995).

67 *Id.* at 756.

68 Franke, *supra* note 7, at 766-67. One note of clarification: Abrams claims that I refer to these cases as "gay quid pro quo" cases. Abrams, *supra* note 6, at 164 (emphasis omitted). In fact, I describe them as cases in which "a gay male supervisor . . . seeks sexual favors from or creates a sexually hostile environment for his male subordinates or coworkers." Franke, *supra* note 7, at 696 (footnote omitted); *see also id.* at 766 (describing the set of cases as "gay quid pro quo or hostile environment cases where the harasser is shown to be gay and his actual sexual desire for the plaintiff is not challenged").

69 Abrams, *supra* note 6, at 1217.