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## PANEL 6: Fighting Gender and Sexual Orientation Discrimination

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# FIGHTING GENDER AND SEXUAL ORIENTATION HARASSMENT

*Martha Davis\**

Thanks very much. This is an exciting conference, and definitely an interesting time to be a civil rights lawyer – so I'm glad to have an opportunity here to think bigger thoughts than are the bread and butter of everyday practice.

The topic of this panel is harassment, but in my office – and this is true of most women's rights advocates – we view harassment on a continuum of violence against women. Of course, we've known since the Supreme Court's decision in *Meritor*,<sup>1</sup> if not before, that Title VII encompasses not just verbal harassment but also sexual assault and other workplace violence initiated “because of sex.”<sup>2</sup>

We also know that verbal harassment and threats can serve the same purpose as physical violence – and that laws protecting women from violence will be ineffective if they are limited to actual assaults and battering. For example, the federal Family Violence Option<sup>3</sup> of the welfare law provides relief from time limits and work requirements for welfare applicants experiencing threats that might preclude them from working, as well as for those who are getting physically beaten up when they attempt to gain independence.

Power and control can be manifest in coercion and threats, intimidation, using blame, using children, imposing isolation, and using emotional abuse – none of which involve physical violence.

So despite the explicit focus of this panel on “harassment,” I will concentrate on the “violence” end of this continuum.

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<sup>1</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>2</sup> 42 U.S.C. § 2000(e) (2000). *See also Meritor*, 477 U.S. at 65-69.

<sup>3</sup> 42 U.S.C. § 602(a)(7) (2000).

The 1990s saw a number of conceptual breakthroughs in the understanding of the role of violence in women's lives – and, significantly, their translation into public policy. Two important legal developments were the Violence Against Women Act ("VAWA")<sup>4</sup> and the Family Violence Option<sup>5</sup> of the welfare reform law. The 1994 Violence Against Women Act's civil rights remedy defines violence against women as a civil rights issue – and views states' failure to adequately respond to such violence as a denial of equal protection that supports Congressional action to provide alternative remedies.<sup>6</sup> Recent news from Pennsylvania provides a good illustration of why the VAWA Civil Rights Remedy is necessary. According to the *Philadelphia Inquirer*, until a few months ago the Philadelphia police routinely coded sexual assault cases in such a way that investigators would know to steer clear of them, allowing those charges to languish until any potential evidence was long gone.<sup>7</sup> The VAWA Civil Rights Remedy, which provides a civil remedy against individual perpetrators of gender-motivated violence, was also grounded in Congress' understanding of the impact of violence against women on the national economy.

VAWA's redefinition of violence against women as a civil rights violation also redefines this as an issue of public concern – not something personal and private that should be left to the individuals to deal with, but an issue important to women's participation in civil society. However, the VAWA civil rights remedy's impact is ultimately limited — while the initiation of a case is controlled by the victim rather than the state, VAWA claims can only be leveled against individuals, not institutions. This exclusive focus on individual perpetrators means that, as a practical matter, many plaintiffs will not choose to pursue these cases against defendants who are not deep pockets.

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<sup>4</sup> Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (Sept. 13, 1994).

<sup>5</sup> 42 U.S.C. § 602(a)(7) (2000).

<sup>6</sup> 42 U.S.C. § 13981 (2000).

<sup>7</sup> Mark Fazlollah et al., *Review of City Sex Cases Sought*, PHILADELPHIA INQUIRER, Oct. 19, 1999, at A1; Mark Fazlollah et al., *How Police Use a New Code When Sex Cases Are 'Unclear'*, PHILADELPHIA INQUIRER, Oct. 18, 1999, at A1.

The other legal breakthrough in the 1990s that I mentioned earlier – Family Violence Option – also redefines violence against women as a public policy concern, but takes a different tack by putting legal responsibility for addressing domestic violence (very broadly defined) on an institution – the welfare system. The Family Violence Option for the first time explicitly recognizes the role that violence plays in perpetuating women's poverty, and takes a first step toward addressing that issue by requiring that – in states taking the option – welfare recipients be screened for domestic violence, referred to services and given flexibility if violence prevents them from complying with welfare requirements like time limits.<sup>8</sup> We are currently exploring the question of whether, when a state takes the option, it creates an entitlement for welfare recipients.

As recognition that violence against women is an issue of public concern continues to grow, the challenge for lawyers in the new millennium will be to make these public policies on the books real and available to women – and to begin using law to change the culture that promotes violence against women. I am going to address the second issue – changing the culture – and argue that by focusing on an institution – the welfare system – and according legal responsibility to that system for addressing the public policy problem of violence against women, the Family Violence Option provides a model for going forward.

There are other, very good, models that demonstrate the way that institutional change – encouraged by legal liability – can promote social change. In the area of sex harassment law, We have seen how effective the threat of litigation has been in convincing businesses and government employers that workplaces must be non-discriminatory. Indeed, the *Faragher*<sup>9</sup> and *Ellerth*<sup>10</sup> cases of the Supreme Court's 1998-99 term, spelled out specific requirements for employers – including maintenance of effective anti-harassment policies and swift responses to harassers – that have been (or should have been) adopted by every responsible employer

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<sup>8</sup> 42 U.S.C. § 602(a)(7)(A).

<sup>9</sup> *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

<sup>10</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

in the country.<sup>11</sup> This is a huge change from even a few years ago. I believe that over the next few years, these changes will make a tremendous difference in workplace culture – ultimately leading to fewer lawsuits, and greater likelihood that the inevitable issues that arise when people work together will be resolved without federal litigation.

And these Title VII developments have clear legal implications for other institutions and systems. For example, there has been little sexual harassment litigation under Title VIII, the Fair Housing Act,<sup>12</sup> though the provisions barring sex discrimination in housing are comparable to those under Title VII. Sexual harassment in housing is typically manifest when a superintendent offers to forego evicting a low income woman if she will sleep with him, or a neighbor constantly engages in verbal harassment. This area of harassment law may be the next major frontier.

So what are the institutions that need to be held accountable in order to change the culture that accepts violence against women? Expanded employer and school responsibility has proven to be effective in the sexual harassment area. Those same techniques should apply in dealing with violence – which is after all, part of the same continuum that uses power and control to keep women in their place.

Now, I should address the White Elephant in the room – the fact that the VAWA Civil Rights remedy has been challenged as unconstitutional by two individual defendants and their counsel, the

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<sup>11</sup> See *Faragher*, 524 U.S. at 806 (discussing an employer's "affirmative obligation to prevent [Title VII] violations" by taking the necessary steps to prevent sexual harassment from occurring, such as informing employees of their right to raise and how to raise harassment claims, and by establishing complaint procedures that encourage victims to come forward without requiring them to first confront the offending supervisor); *Ellerth*, 524 U.S. at 765 (noting that an employer can avoid liability if it can demonstrate that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise); see also Tara Kaesebier, Note, *Employer Liability in Supervisor Sexual Harassment Cases: The Supreme Court Finally Speaks*, 31 ARIZ. ST. L.J. 203 (Spring 1999).

<sup>12</sup> 42 U.S.C. §§ 3601-19 (2000).

Center for Individual Rights.<sup>13</sup> At issue is whether Congress exceeded its authority under the Commerce Clause and Section 5 of the Fourteenth Amendment, which permits Congress to enforce the equal protection clause.<sup>14</sup> Though some recent federalism cases suggest that the result is a foregone conclusion – and the press typically followed this line in reporting on the argument – I'm not so sure that the civil rights remedy will be struck down. Compared with other acts recently reviewed by the Court, it is quite narrowly tailored and is also based on a voluminous, extensive Congressional record demonstrating the economic impact of gender-based violence.<sup>15</sup>

If it is struck down, it becomes that much clearer that we should take an approach more closely modeled on Title VII. Two aspects of that approach are immediately apparent: expanding Title VII's coverage of violence against women; and developing new laws expanding employers' responsibility for addressing the workplace impacts of violence against women.

First, looking at Title VII – while *Meritor* assumes that sexual assault is “because of sex,” it is less clear what circumstances are necessary to give rise to Title VII liability for other types of violence against women. Two recent cases have raised this issue.

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<sup>13</sup> “The Center for Individual Rights is a nonprofit public interest law firm dedicated to the defense of individual liberties.” Center for Individual Rights, *Mission Statement*, at <http://www.cir-usa.org/mission.html> (last visited Mar. 10, 2001).

<sup>14</sup> *United States v. Morrison*, 120 S. Ct. 1740 (2000) (holding that the Commerce Clause did not provide Congress with the authority to enact the civil remedy provision of VAWA inasmuch as the provision was not regulation of activity that substantially affected interstate commerce, and the enforcement clause of the Fourteenth Amendment did not provide Congress with the authority to enact the provision).

<sup>15</sup> First, the Court attacked the substance of the findings, stating that although Congress made findings regarding impact of gender-motivated violence on victims and families, such findings were based on unworkable but-for reasoning. *Id.* at 1752. Next, the Court attacked the effect of Congressional findings, asserting that while Congressional findings may enable the Supreme Court to evaluate the legislative judgment, the conclusions that the legislative branch makes from these findings are ultimately subordinate to the conclusions of the judicial branch. *Id.* at 1753 n.7.

In *Smith v. Sheahan*,<sup>16</sup> decided by the Seventh Circuit last fall, Valeria Smith and Ronald Gamble were both guards at the Cook County Jail in Chicago. Gamble was generally unpleasant to female colleagues and violently assaulted Smith while at work, pinning her against a wall and twisting her wrists until he damaged her ligaments. This was not a sexual assault, though Gamble did call Smith and other female officers “bitch,” and made sexual comments to one of the other female guards. The court concluded that Gamble's violence, apparently directed exclusively at women, was enough to sustain a claim under Title VII. While the “gendered epithets” might also convince a jury that Gamble's hostility was “because of sex,” they were not necessary to the result. Accordingly, the Sheriff's office was held responsible for failing to adequately prevent or remedy the harassment.<sup>17</sup>

A brief dissent argued that this was a case of battery.<sup>18</sup> But *Sheahan* is really a classic case of sex discrimination – differential treatment based on sex. The fact that the treatment dispensed was violence, as opposed to bonuses or demotions, made no difference.

Smith had the advantage of working in a workplace with many women who had experienced the same treatment from Gamble – so the differential nature of the treatment was easily demonstrated. But NOW LDEF just settled a case in the Federal District Court of Oregon, *Valdez v. Truss Components*,<sup>19</sup> brought on behalf of a lone domestic violence victim who was threatened at her place of work by her former partner, also an employee at the same workplace. The employer, Truss Components, fired the woman – which gave rise to a sex discrimination claim under Title VII. But, had the case not settled, Maureen Valdez also planned to argue that

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<sup>16</sup> 189 F.3d 529 (7th Cir. 1999).

<sup>17</sup> *Id.* at 535 (holding that genuine issues of material fact as to whether Valeria Smith was subject to sex-based harassment in violation of Title VII, and whether the sheriff's department was negligent in failing to prevent or remedy the harassment, precluded summary judgment in favor of department).

<sup>18</sup> *Id.* at 536 (Bauer, J., dissenting).

<sup>19</sup> See Holly Danks, *Defendant Settles Federal Lawsuit over Actions in Workplace*, THE OREGONIAN, Mar. 30, 2000, at 1; *Businesses Aid Violence Victims: Companies Add Up How Much Abuse Costs Them, Offers Help to Employees Who Need It*, AUGUST CHRONICLE (Augusta, Ga.), Apr. 8, 2000, at C9.

the batterer's behavior created a hostile work environment, and that the domestic violence that she experienced at the hands of her partner/co-worker was "because of sex." Because of the settlement, the Court never reached the issue of what would have to be proved to make the case that this domestic violence, or any domestic violence, met the Title VII standard – particularly in a small workplace setting where no other women experienced the same treatment as Valdez.

Clearly, there is work to be done under Title VII to clarify these issues – and an opportunity to provide protection to workplace violence victims under current law. The critical legal issue – one that also arises under VAWA (and even under political asylum law) – is whether domestic violence is inherently "because of sex."

But there is another way in which institutional responsibility should be expanded – to mandate attention to workplace impact of violence against women.

In debating the Violence Against Women Act, Congress compiled an exhaustive record of the economic impacts of violence against women. Many of those impacts occur in the workplace, as abusers stalked their victims or harassed them by phone. Sexual assault victims are also affected – fifty percent of rape victims lose their jobs in the year after the crime.<sup>20</sup> Domestic violence victims often experience absenteeism or lost productivity as a result of the violence.

Because employment is a lifeline that keeps women in a financial position to leave the abuse, it is particularly important from a public policy standpoint to ensure that employers do what they can to assist women in keeping their jobs. One model, already pending in both Houses of Congress, is the Victims Employment Rights Act,<sup>21</sup> an extension of Title VII that bars discrimination by employers against victims of domestic and sexual violence, and gives a cause of action if the employer discriminates. Such discrimination has in the past involved firing women when abusers harass them in the workplace, and refusing to accommodate women who need time to handle orders of protection or require flexible

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<sup>20</sup> Violence Against Women Act of 1993, S. REP. NO. 103-138 (1993).

<sup>21</sup> S. 1069, 106th Cong. §§ 2021-2026 (1999).



hours to frustrate stalkers. A similar provision – called Intro 400<sup>22</sup> – is pending before the New York City Council.<sup>23</sup> Though civil rights attorneys often tend to think of federal law as the appropriate focus of their work, in the wake of recent federalism cases, such state and local civil rights laws are particularly critical.

I want to close with a few words about the current climate for civil rights work. As I mentioned earlier, the *United States v. Morrison* defendants are represented by the Center for Individual Rights. Amicus briefs in the case were filed by an array of conservative legal groups, including the Eagle Forum,<sup>24</sup> the Independent Women's Forum<sup>25</sup> and the Pacific Legal Founda-

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<sup>22</sup> NEW YORK, N.Y., ADMINISTRATIVE CODE § 8-107.1 (2001) (prohibiting employers from discrimination in hiring, firing, compensation and other terms of employment because of a person's status or perceived status as a victim of domestic violence or stalking).

<sup>23</sup> On December 19, 2000, the New York City Council voted to amend Title 8 of the Administrative Code of New York City to add the new section 8-107.1. NEW YORK, N.Y., ADMINISTRATIVE CODE § 8-107.1 (2001). On January 5, 2001, after initial opposition, New York Mayor Rudolph Giuliani signed the measure. Thomas J. Lueck, *Giuliani Acts to Shield Jobs of the Abused*, N.Y. TIMES, Jan. 6, 2001, at B4.

<sup>24</sup> Brief of Amicus Curiae Eagle Forum, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29). The Eagle Forum is a conservative women's organization founded by Phyllis Schlafly, and considers its mission "to enable conservative and pro-family men and women to participate in the process of self-government and public policy making." Eagle Forum, *Join Eagle Forum and Phyllis Schlafly Be Where the Action Is*, at <http://www.eagleforum.org> (last visited Mar. 12, 2001).

<sup>25</sup> Brief of Amicus Curiae Independent Women's Forum, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29). The Independent Women's Forum ("IWF") is a nonprofit organization based in Arlington, Virginia, dedicated to research and public education on policy issues concerning women. The IWF challenges the use of gender-based studies in legal and judicial decision making, and seeks to "[a]ffirm the family as the foundation of society." Independent Women's Forum, *Mission Statement*, at <http://www.iwf.org/about/-mission.shtml> (last visited Mar. 10, 2001).

tion.<sup>26</sup> Civil rights lawyers today face a well-organized opposition virtually every time they go to court, or go to the legislature.

Today, I've mapped out a long term affirmative strategy for expanding women's ability to participate in society as equals and changing the culture that accepts violence against women by first, continuing to integrate violence against women into the public policy debate rather than treating it as a private matter; and second, focusing on holding institutions accountable for failing to address violence, by broadening the analysis of "because of sex" to include more forms of violence against women under Title VII and Title VIII, and enacting new legislation directed at protecting victims of violence from discrimination in the workplace.

But in the current climate for civil rights law and civil rights lawyers, we also need a defensive strategy. While I don't have time to map out that strategy today, let me just underscore that we need to be working on both fronts just to preserve the status quo. Further, these groups on the right have acknowledged their indebtedness to civil rights groups, whose litigation and public education tactics they have liberally copied. I think now, it is time for us to borrow some tactics from the right. One of their most effective strategies has been to use the Federalist Society as a mechanism for shaping legal thought and developing a unified approach. And it strikes me that, not only is that what this conference is about from the civil rights and civil liberties perspective, but wouldn't it be wonderful if it sowed the seeds for a more comprehensive and effective response to the current assault on civil rights in the courts and by the courts.

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<sup>26</sup> Brief of Amicus Curiae Pacific Legal Foundation, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29). The Pacific Legal Foundation ("PLF") is a nonprofit legal foundation that supports "less government and the preservation of free enterprise, private property rights and individual liberties." Pacific Legal Foundation, at <http://www.pacificlegal.org> (last visited Mar. 10, 2001).



# THE SEX DISCRIMINATION ARGUMENT IN GAY RIGHTS CASES

*Nan D. Hunter\**

## INTRODUCTION

The argument that laws that discriminate on the basis of sexual orientation in fact discriminate on the basis of sex is not new. Advocates have been pressing this claim for almost thirty years. Simply put, the argument is that a statute that bars a sexual relationship between two women or two men discriminates on the basis of sex because either partner could have had the same relationship with a person of the opposite sex.

The beginning was not auspicious for the sex discrimination argument. Courts considering challenges in the 1970s to marriage laws concluded, with very little need for discussion, that marriage was definitionally an institution involving only male-female couples, and that therefore even a state Equal Rights Amendment could not undo the prohibition on same-sex marriage.<sup>1</sup> Similarly, courts hearing employment discrimination cases easily concluded that sex discrimination meant discrimination against women or occasionally against men, but not anti-gay discrimination.<sup>2</sup>

That easy dismissal of the sex discrimination argument has begun to erode. The first judicial adoption of this argument came in 1993 in *Baehr v. Lewin*, in which the Hawaii Supreme Court

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<sup>1</sup> See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). *Accord* *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1995).

<sup>2</sup> See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

held that limiting marriage to opposite-sex couples did constitute a *prima facie* case of violating that state's Equal Rights Amendment.<sup>3</sup> In 1999, it was taken up and expanded by Justice Johnson as part of the basis for her concurrence in *Baker v. Vermont*, holding that the Vermont marriage statute violated that state's constitution.<sup>4</sup> Most recently, the Texas Court of Appeals invalidated a same-sex sodomy statute on that ground as well.<sup>5</sup>

The sex discrimination argument has also begun to gain traction in sexual orientation cases arising under statutes. The Supreme Court has ruled that same-sex harassment claims are justiciable under Title VII,<sup>6</sup> in response to same-sex sexual harassment complainants who have sought to frame the allegedly unlawful conduct as sex discrimination, either rather than or in addition to sexual orientation discrimination.<sup>7</sup> Similarly, under Title IX, same-sex harassment has been recognized as a subset of sex discrimination.<sup>8</sup> For example, the Wisconsin state anti-discrimination statute

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<sup>3</sup> 852 P.2d 44, 81-82 (Haw.), *recons. granted in part*, 875 P.2d 225 (Haw. 1993).

<sup>4</sup> 744 A.2d 864, 898 (Vt. 1999) (Johnson, J., concurring).

<sup>5</sup> *Lawrence v. Texas*, No. 14-99-00109-CR, 2000 WL 729417 (Tex. App., June 8, 2000).

<sup>6</sup> *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998); *see also* *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143-44 (4th Cir. 1996) (allowing a Title VII claim to proceed where the male plaintiff alleged discrimination by his allegedly homosexual supervisor not because of the plaintiff's heterosexual orientation, but because he was male).

<sup>7</sup> *See, e.g.,* *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989).

<sup>8</sup> *See* *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081 (D. Minn. 2000); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000); *see also* *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12036 (Mar. 13, 1997) ("The Guidance has been clarified to indicate 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."). In *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), the court found that a school district discriminated on the basis of sex in violation of the Equal Protection Clause when it failed to protect a gay student

includes sexual orientation within its definition of sex discrimination,<sup>9</sup> and an Oregon court interpreted that state's law against sex discrimination to encompass a challenge to the denial of health insurance benefits to the partners of lesbian and gay state employees.<sup>10</sup> One court outside the United States has invalidated a sexual orientation classification on the ground that it constituted sex discrimination under an international covenant.<sup>11</sup> But beyond the principle that one can state a *prima facie* claim in such cases, there is no clarity as to what relationship exists between sex equality law and sexual orientation claims

It is time to pay more attention to this cluster of arguments. Other writers have explored the advantages and disadvantages of the sex discrimination argument for the goal of advancing lesbian and gay rights law.<sup>12</sup> Instead, I would like to try to fill what I see as an unfortunate gap in the analysis. Scholars whose primary field is women's rights have generally ignored the possible repercussions

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from harassment. Schools, the court announced, "are required to give male and female students equivalent levels of protection." *Id.* at 456.

<sup>9</sup> WIS. STAT. § 111.36(1)(d)(1) (1997 & Supp. 2000).

<sup>10</sup> *Tanner v. Oregon Health Sci. Univ.*, 971 P.2d 435 (Or. App. 1998).

<sup>11</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>. The Human Rights Committee, an international body created under the Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"), held that the Tasmanian Criminal Code provisions outlawing private consensual contacts between adult homosexual men was a violation of the ICCPR, as a violation of privacy and the ICCPR's equal protection mandate, because the laws discriminated on the basis of sexual orientation. *Id.* But see Case C-249/96, *Grant v. Southwest Trains Ltd.*, 1998 E.C.J. CELEX LEXIS 6505 (1998) (rejecting the sex discrimination argument on the ground that the limitation of certain benefits to married persons treated men and women equally). See generally Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334 (1997).

<sup>12</sup> See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992); 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).

for sex discrimination law of using that claim in sexual orientation cases, with the prominent exception of Sylvia Law, who wrote the first major article on the topic.<sup>13</sup> I want to initiate discussion of the possible reverberations for feminist law, as well as for lesbian, gay, bisexual and transgender ("LGBT") rights law.

I am going to discuss these cases in terms of the leading paradigms of sex discrimination law. Because I want to focus on constitutional concepts of equality, my most frequent example will be marriage law, where the argument has been most fully developed. I am not going to address claims arising under anti-discrimination statutes, such as the harassment cases.

My beginning point will be the two primary conceptualizations of sex discrimination: formal equality theory and anti-subordination theory.<sup>14</sup> Both of these theoretical approaches have been invoked in the scholarship concerning the use of sex discrimination arguments in LGBT cases, and either is sufficient to sustain a finding that sex discrimination exists. In turn, such rulings in LGBT rights cases are likely to have a significant impact on understandings of how law operates to subordinate women.

Ultimately, though, I am going to argue that neither approach is culturally sufficient to meet the objections of those who assert that the sex discrimination argument is a doctrinal sleight of hand when used to challenge sexual orientation discrimination. To fully answer those objections, one must address the issues that arise in the context of what I will call definition theory. Definition theory is the most provocative of the approaches to these overlapping areas. Because of its provocative nature, definition theory is the least useful in litigation, but also the most powerful in its potential cultural impact.

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<sup>13</sup> Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

<sup>14</sup> See Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861 (1997). For simplicity's sake, I am combining two of Abrams' categories – difference theory and dominance theory – into anti-subordination theory.

## I. FORMAL EQUALITY THEORY

Formal equality is considered the old, boring version of civil rights law. Critics have attacked it for its superficiality and formalism;<sup>15</sup> and despite its usefulness in removing explicit legal barriers for women, it is rarely described positively in feminist scholarship.<sup>16</sup> In fact, claims of sex discrimination in gay rights cases may be the *only* realm in which formal equality theory still has any real intellectual kick.

For an analysis of using sex discrimination arguments in gay rights cases, the starting point for formal equality claims is *Loving v. Virginia*,<sup>17</sup> the case which held that anti-miscegenation laws were unconstitutional. In *Loving*, the Court ruled that laws prohibiting intermarriage violated the Equal Protection Clause because they were based on a racial classification. This, the Court said, was *per se* impermissible – absent a compelling state interest – even if the law operated to bar certain acts both for whites and for persons of color.

In gay marriage cases, courts adopting a formal equality analysis substitute the word “sex” for the word “race” in a critical passage from *Loving*, so that, rewritten, it becomes:

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<sup>15</sup> See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

<sup>16</sup> For a rare endorsement, see Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000) (proposing that formal equality, or anti-differentiation, is an attractive principle, even though it is less fashionable today than the alternate anti-subordination principle, because formal equality does not lead to the separate-but-equal thinking that results from applying the anti-subordination principle, as evidenced by Chief Justice Rehnquist’s concurring opinion in *United States v. Virginia*, 518 U.S. 515, 565 (1996)). A similar disjuncture between equality theories that are successful in litigation and those most favored by scholars occurs in LGBT cases between arguments grounded in more individualist notions of rights and those proceeding from a group rights approach. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 870 (2000).

<sup>17</sup> 388 U.S. 1 (1967).



[W]e reject the notion that the mere 'equal application' of a statute containing [sex] classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all invidious discrimination. . . . In the case at bar, . . . we deal with statutes containing [sex] classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to [sex].<sup>18</sup>

Thus by analogy, *Loving* stands for the proposition that but for the partner's sex, the individual could marry her or him. The same move leads to a similar conclusion as the discriminatory impact of criminal laws that prohibit sodomy only between same sex partners: "the distinction between legal and illegal conduct [is] not the act, but rather the sex of one of the participants."<sup>19</sup> On this understanding, the sex-based classification *per se* is the equality violation.

This theory of equality formed the basis for the Hawaii Supreme Court's ruling that the marriage law amounted to discrimination based on sex<sup>20</sup> and for the invalidation of the Texas state sodomy law by the Texas Court of Appeals.<sup>21</sup> Yet there have always been two problems lurking in the heart of formal equality doctrine about sex. They both manifest themselves in the sexual orientation cases generally and the marriage cases specifically.

The first major problem for formal equality doctrine arises if the two groups in question are not considered similarly situated. For men and women, the argument has always been that commensurability is lacking because of biological difference. In the early 1970s, faced with the argument that "natural" differences justified a wide range of barriers to women, Ruth Bader Ginsburg, then head of the ACLU Women's Rights Project, flipped the meaning of

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<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Lawrence v. Texas*, No. 14-99-00109-CR, 2000 WL 729417, \*3 (Tex. App., June 8, 2000).

<sup>20</sup> *Baehr v. Lewin*, 852 P.2d 44, 81-82 (Haw.), *recons. granted in part*, 875 P.2d 225 (Haw. 1993).

<sup>21</sup> *Lawrence*, 2000 WL 729417, at \*4.

biology in her arguments to the Court in *Reed v. Reed*<sup>22</sup> and *Frontiero v. Richardson*.<sup>23</sup> She argued that the immutability of the sex characteristic and the individual's lack of control over it made using it to justify inferior treatment all the more invidious and unfair.<sup>24</sup> Ginsburg "had effectively taken what had previously been the greatest weakness of equal protection arguments against sex-based classifications and made it the center of the case."<sup>25</sup>

Ginsburg's move was a masterful litigation stroke, but it also left unchallenged – indeed, it strengthened – the link between sexual difference and biology. Her argument forced the Court to examine more closely the legal barriers to individual women who sought the opportunity to disprove a generalization based on their female status, but left open the continued reliance on biological norms in cases involving sex and reproduction, arenas where seemingly no woman could escape the "rule" of nature, at least as the courts interpreted that rule.<sup>26</sup>

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<sup>22</sup> 404 U.S. 71 (1971).

<sup>23</sup> 411 U.S. 677 (1973).

<sup>24</sup> See, e.g., Brief for Appellant, at 5, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-430). Ginsburg began her appeal with an argument that sex, like race, deserved "suspect classification" status because sex and race shared many of the same characteristics:

Although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference.

*Id.*

<sup>25</sup> Donald Braman, *Of Race and Immutability*, 46 UCLA. L. REV. 1375, 1453 (1999).

<sup>26</sup> See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (holding that as long as the rule of nature that the sexes are not similarly situated in certain circumstances is realistically reflected in a gender classification, the statute will be upheld as constitutional; here, a California statutory rape law was found constitutional because the gender classification realistically reflected that females bear all of the risk of pregnancy); *Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974) (holding that the rule of nature that women, unlike men,

The manipulability of biology-based arguments is evident in the opposite uses, depending on outcome, to which they can be put. In women's rights cases, courts have justified different treatment based on a finding of "real" difference, most often involving pregnancy. In the gay marriage cases, courts have justified different treatment because of the absence of biological difference, on the theory that the institution of marriage requires difference.<sup>27</sup> In other words, the biological difference between sexes has been invoked to create an exemption from the equality mandate in pregnancy cases and a prerequisite for it in gay marriage cases.

Judicial reliance on (what judges perceive as) biology reflects and reinscribes a deep naturalization of gender. Thus, when courts like the Hawaii Supreme Court reject the argument that marriage is necessarily only male-female, they are undermining the kind of essentialism that has been most harmful to women. Even simple formal equality claims in gay marriage cases can provide a powerful lift out of some of the essentialist boxes used to hold back women, because they interrogate deeply embedded notions of gender.

One can see the dynamics of the naturalization of gender in the text of now Justice Ginsburg's opinion in the *VMI* case:

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are susceptible to the risk of disability resulting from normal pregnancy does not require a state disability insurance program to cover this condition because the Equal Protection Clause does not require a state to choose between attacking every risk of disability versus not attacking disability problems at all); *see also* Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985). The Pregnancy Discrimination Act established protection for pregnant women in the realm of employment, but not, for example, in family law or criminal law. 42 U.S.C. § 2000e(k) (2000). Thus, *Geduldig* is still good law as an interpretation of the Constitution. Even the Pregnancy Discrimination Act has not always proven reliable in eliminating differential treatment of pregnant women. *See, e.g.,* *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987). *But see* *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

The Court's most recent engagement with the constitutionality of a pregnancy-linked classification ended inconclusively, when the Court found no standing for the party challenging an immigration law that treated children born to unmarried parents differently depending on whether the father or mother was a U.S. citizen. *Miller v. Albright*, 523 U.S. 420 (1998).

<sup>27</sup> *See, e.g., Baehr*, 852 P.2d at 69 (Burns, J., concurring).

Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classification [citing *Loving*]. . . Physical differences between men and women, however, are enduring. . . 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.<sup>28</sup>

The text of this passage moves from "inherent differences" as a discredited basis for certain classifications, to "physical differences" between the sexes, and back to "inherent differences."<sup>29</sup> Are the two terms synonymous? Is this a sly way to exclude psychological differences from the final phrase, which was largely the basis for VMI's argument that women were naturally unfit to be cadets at a co-education facility?<sup>30</sup> Exactly which differences are we to celebrate? Is this a euphemism for heterosexuality? For female bonding? Doesn't the last sentence incorporate two contradictory principles: that these inherent differences, as contrasted to racial ones, are proper grounds for classification – but not for "artificial" constraints on an individual?

Indeed, the *Loving* analogy helps to obscure that contradiction, since it is based on an analogy to race, the realm where indisputably there is no place for a separate but equal doctrine. The Court's decision in *Loving* signaled that the repudiation of separate but equal, which the court began in *Brown v. Board of Education*,<sup>31</sup> was complete. That consensus has not formed as to gender, as to which there is still substantial support for separate institutions. For gender, unlike race, the cultural orthodoxy is difference. What

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<sup>28</sup> United States v. Virginia, 518 U.S. 515, 533 (1996).

<sup>29</sup> *Id.*

<sup>30</sup> See United States v. Virginia, 766 F. Supp. 1407, 1432-35 (W.D. Va. 1991) (listing in detail the evidence presented by VMI during trial, arguing that the "Gender-Based Physiological Differences" and the "Gender-Based Developmental Differences" between male and female students were appropriate reasons for limiting VMI to an all-male educational facility); see also Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 44-45 (1998).

<sup>31</sup> 347 U.S. 483 (1954).

would be the philosophy comparable to race – gender blindness – is not widely accepted in the culture.

Gender is most naturalized in the realm of sexuality. Same-sex marriage cuts to the heart of that naturalization in a very powerful and visible way.<sup>32</sup> Recognition of same-sex marriage would call into question the law in women's rights cases, which have turned on an acceptance of the inevitability of sex roles in sex. Often such cases have permitted the differential treatment of pregnancy, or of women because of the possibility of pregnancy.<sup>33</sup> Although heterosexual couples can reject sex roles in sex, the plausibility that such rejection occurs is more socially visible when same-sex couples are involved. Nonetheless, the potential is that acceptance of same-sex marriage would strengthen the consciousness in cases involving heterosexual women that such roles are not inevitable and ordained by nature.

## II. ANTI-SUBORDINATION THEORY

The second problem with the formal equality model is that it ignores power. Discrimination against men really is not the same evil as discrimination against women, and one would say the same as to "reverse discrimination" against whites, for example. In both examples, the core of the problem is not the absence of abstract equality but the presence of subordinating systems of power.<sup>34</sup> Anti-subordination theory speaks to this: sex discrimination not only classifies, it subordinates a class.

This concept of dominance has been the focus of almost all of the scholarship and almost none of the judicial decisions in the gay rights cases where plaintiffs have asserted a sex discrimination

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<sup>32</sup> I developed this argument in Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991).

<sup>33</sup> See *supra* note 26 (discussing pregnancy in the sex discrimination context).

<sup>34</sup> See Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing that, compared to the anti-differentiation perspective, anti-subordination better explains much of the equal protection doctrine's history and case law, as well as the aversion felt toward race and sex discrimination).

claim. First Sylvia Law<sup>35</sup> and then Andrew Koppelman<sup>36</sup> articulated the argument that anti-gay discrimination subordinates women by its reinforcement of gender normative stereotypes about proper male and female behavior. Koppelman's article specifically answered the argument that reliance on the surface level analogy to *Loving* is insufficient because the Court there did not rely simply on the law's creation of a racial distinction; it held that the distinction did not in fact apply equally to all races, but was framed to enforce a code of white supremacist preservation of a "superior" race.<sup>37</sup> Koppelman argued that a similar enforcement of male supremacy lay behind the prohibition of homosexuality.<sup>38</sup> No judge has taken up that argument as part of the analysis of a gay rights case, but Justice Johnson's opinion in *Baker v. Vermont* provides a suggestive first step.<sup>39</sup>

The standard example in a formal equality approach of how the sex discrimination argument operates is that a court imagines two persons of the same sex; let us call them Thelma and Louise. Either can marry a man, but neither can marry the other. Because neither wants to marry a man and they are barred from marrying each other, they suffer discrimination based on the sex of their partner.<sup>40</sup>

Justice Johnson used a version of this standard story, but one which can be read to illustrate a subtle but significant shift in the narrative. As Justice Johnson framed the example, Dr. A and Dr. B both want to marry Ms. C. Dr. A is male; Dr. B is female. "The statute disqualifies Dr. B from marriage solely on the basis of her

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<sup>35</sup> Law, *supra* note 13.

<sup>36</sup> Koppelman, *supra* note 12; *see also*, J.M. Balkin, *The Constitution of Status*, 106 YALE L. J. 2313, 2361-64 (1997).

<sup>37</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *see also* Koppelman, *supra* note 12, at 222-26.

<sup>38</sup> Koppelman, *supra* note 12, at 234-57.

<sup>39</sup> *Baker v. Vermont*, 744 A.2d 864, 898 (Vt. 1999) (Johnson, J., concurring).

<sup>40</sup> *See, e.g.*, Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 18 (1994) (discussing how the courts have viewed bans on same-sex marriage as sexual orientation discrimination, and not sex discrimination).

sex and treats her differently from Dr. A, a man. This is sex discrimination."<sup>41</sup>

What is slightly different about this framing is that there is a third person in the imaginary construct, Ms. C, who is presumably choosing between Dr. A and Dr. B. This scenario has a different resonance than the more familiar story of two women who are simply excluded from the institution of marriage. In my reading of Justice Johnson's version, the social force of law is not simply to exclude based on sexual orientation or to penalize Dr. B., but to *produce* heterosexuality. One imagines that Ms. C could go either way. If she wants to marry, however, she must choose Dr. A. Implicit in the example is that the harm is in the social coercion of Ms. C and in the forcible imposition of heteronormativity.<sup>42</sup>

Justice Johnson sees the limitation to opposite-sex marriage as a vestige of the "sex-role stereotyping" that pervaded marriage law prior to feminist legal reforms, citing enforced economic dependency and the treatment of married women as legal incompetents as examples.<sup>43</sup> Again, one can see the point as not merely discriminatory treatment, but the role of the law of marriage as a major engine of coercion for almost all women. Under an anti-subordination theory as well as a formal equality theory, one can trace a clear link between how classifications based on sex have produced social regulation of women as well as of non-heterosexuals.

To some extent, this link appears self-evident in everyday life. We all know that eliminating discriminatory laws opens up new

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<sup>41</sup> *Baker*, 744 A.2d at 906.

<sup>42</sup> See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 800 (1989).

<sup>43</sup> *Baker*, 744 A.2d at 908 (Johnson, J., concurring). Justice Johnson offered numerous examples of a woman's dependence on her husband:

Under the common law, husband and wife were one person. The legal existence of a woman was suspended by marriage; she merged with her husband and held no separate rights to enter into a contract or execute a deed. She could not sue without her husband's consent or be sued without joining her husband as a defendant. Moreover, if a woman did not hold property for her "sole and separate use" prior to marriage, the husband received a freehold interest in all her property, entitling him to all the rents and profits from the property.

*Id.* (citations omitted).

life possibilities and creates subtle shifts in perception. Changes in the popular language of marriage mark that evolution: from the traditional terms of “husband and wife” – or even, “man and wife” – that once were universal; to the now common gender neutral word, “spouses;” to the increasingly widespread use of the term that originated with lesbian and gay couples, “partners.”

Nonetheless, there is much resistance to the full elaboration of the gender discrimination argument. If anti-gay discrimination is so harmful to women, for example, one might ask why more women's rights organizations have not been highlighting this argument. All of the feminist organizations support a right to gay marriage, and many have played supportive roles in the litigation.<sup>44</sup> But one has no sense that anyone, including them, feels like this is *their* argument. Granted, any claim is more radical when it touches homosexuality, but many sex discrimination cases involve gender normative stereotypes. Is there a reason beyond political hesitancy that this argument has so much difficulty acquiring traction on the ground?

To many people, including many feminists, the sex discrimination argument in gay rights cases seems too clever by half. For some, that is because it seems to be a dodge around what they sense is really going on, which is the subordination of homosexuality.<sup>45</sup> For many married women, it apparently is highly implausible to believe that legalizing same-sex marriage will have any impact on opposite-sex marriage. Among my straight women students, for example, most support gay marriage out of a sense of solidarity with another oppressed group. To their credit, it is a

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<sup>44</sup> See, e.g., Brief of Amici Curiae National Organization for Women Legal Defense and Education Fund, National Center for Lesbian Rights and Equal Rights Advocates, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

<sup>45</sup> This is the argument made from the opposite policy perspective by the dissenting judge in *Lawrence*. *Lawrence v. Texas*, No. 14-99-00109-CR, 2000 WL 729417, \*5 (Tex. App., June 8, 2000) (Hudson, J., dissenting). “Although [complainants] have attempted to frame their challenge . . . in terms of gender discrimination, their true ground for complaint is that the statute criminalizes certain homosexual conduct that, in a heterosexual setting, would be perfectly legal.” *Id.* at 7.



purely altruistic position. They appear to have no sense that it will do anything for them.

Critics argue that the exclusion of same-sex couples from marriage does not harm women as a class, but gay people as a class. Bill Eskridge points out that the same argument could have been made for anti-miscegenation laws.<sup>46</sup> Those laws had a direct effect only on the mixed-race couples who wanted to marry, not on all African-Americans. Furtherance of the white supremacist ideology that the laws embodied was an indirect effect. Eskridge ultimately returns to the Koppelman thesis, arguing that dominance theory works if the subordination is indirect as well as direct.<sup>47</sup>

Edward Stein has responded to Eskridge and others, asserting that the sex discrimination argument is sociologically, theoretically and morally mistaken.<sup>48</sup> Stein asserts that relying on a sex discrimination theory in a gay marriage case is to ignore the primary basis for the discrimination: homophobia. He analogizes it to a sex discrimination challenge to anti-miscegenation laws, which could be premised on the understanding that "a significant purpose of such laws was to protect white women from black men," but which would misidentify the disadvantaged class (by asserting that it was women) and the belief system underlying the law (by focusing on sexism rather than racism).<sup>49</sup>

There is, however, a crucial distinction between using a sex discrimination argument in the anti-miscegenation cases and using one in the gay marriage cases. The statute at issue in *Loving* explicitly discriminated based on race. Although I would agree with Stein that sex and race are deeply interconnected in U. S. culture, the law on its face did not draw a sex-based distinction. It could have; a legislature could have chosen to specify differential penalties when an inter-racial marriage involved black men and

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<sup>46</sup> WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 220-21 (1999).

<sup>47</sup> *Id.* at 221.

<sup>48</sup> Edward Stein, *Sexual Orientation and the Law: A Critique of Two Arguments for Lesbian and Gay Rights*, in *HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY* 43-53 (Jules Coleman & Scott Shapiro eds., forthcoming 2001) (copy on file with the *Journal of Law and Policy*).

<sup>49</sup> *Id.* at 43.

white women, for example. Although that might have been the deepest fear of white legislators, they did not incorporate that distinction into those statutes.

In the gay marriage cases, on the other hand, the explicit classification drawn by the statutes is one of sex. Although the arguments used to justify the statutes might be homophobic, the legislators have not chosen to classify based on sexual orientation. The unlikelihood that they will – the improbability of states adopting laws that prohibit homosexual persons from marrying – speaks to the deeply imbricated nature of sex and sexual orientation. Legislators may well understand their actions as penalizing homosexuals rather than women, and especially as penalizing open homosexuality, but the fact that what seems the most direct and obvious mechanism for doing so is a distinction based on sex rather than sexual orientation illustrates how this situation is different from that of Stein's hypothetical sex discrimination challenge to anti-miscegenation laws.

It is also worth pointing out that, however favored by progressive scholars, anti-subordination theory is not the law. The anti-subordination language of *Loving* was dicta;<sup>50</sup> the reliance on color-blindness and formal neutrality in constitutional jurisprudence has increased, not decreased, since that decision.<sup>51</sup> If courts were to assert the inadequacy of anti-subordination reasoning as a doctrinal bar to sex discrimination claims in gay marriage cases, that rationale would reek of intellectual dishonesty.

Most significant for women as a class, rather than LGBT people as a class, is the function of sex-based distinctions to produce and enforce norms that privilege masculinity. Although

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<sup>50</sup> The Court held that use of an explicit racial classification was sufficient to find the law unconstitutional. See *Loving*, 388 U.S. at 10-11.

<sup>51</sup> See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (detailing the modern Court's progression from the explicit recognition of racial differences in cases like *Brown v. Board of Education*, where the Court endorsed the distinction to right a prior wrong; to the modern Court's more explicit attempts to adopt a purely race-neutral approach, rejecting any law relying on any types of racial classifications, even those establishing corrective elements, such as affirmative action).

such norms may also constrain some men, what matters for purposes of this analysis is that they constrain all women.

### III. DEFINITION THEORY

Gender-linked stereotypes about sexuality are not just about behavior. They are about what people perceive as definition, and that definition turns on the naturalness and the thoroughness of male-female difference. Thus there is some truth to the trope of the early gay marriage cases that the claim could not succeed because of the very definition of marriage. The use of sex discrimination arguments in these gay rights cases profoundly challenges the definition of gender, and will inevitably resonate in women's rights cases.

I think that there are two logics possible for answering the definition argument directly. The first, which I reject, is to argue that heterosexual sexual behavior itself is intrinsically determined by gender roles. Sexuality is a knowledge/power system that is gendered and through which gender flows, but I do not believe that sexual practices are a simple function of gender. The social organization and understanding of sexual practices cannot be reduced to a function of gender.<sup>52</sup>

The other logical response, which I embrace, is what I will call definition theory. It is precisely the act of defining male and female, masculinity and femininity, which inscribes gender.<sup>53</sup> Koppelman discussed the function of gender polarities in perpetuating a dominance system, noting that polarities enable hierarchy.<sup>54</sup> Definition theory takes that point deeper. It is in the process of definition that the difference is constructed.

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<sup>52</sup> See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267-319 (Carole S. Vance ed., 1984).

<sup>53</sup> See, e.g., ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN *passim* (1989) (studies from biology); THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD *passim* (1992) (studies from history); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 6-7 (1990) (cultural studies).

<sup>54</sup> Koppelman, *supra* note 12, at 202, 234-38.

Katherine Franke has most fully developed this idea as it applies to the operations of law.<sup>55</sup> Franke argues that the process of definition, “[t]he authority to define particular categories or types of people and to decide to which category a particular person belongs,” is a social practice that reflects dominant power structures, not self-evident facts of nature.<sup>56</sup> In the realm of sex distinctions, she examines a series of cases that turn on an “ideology of sexual difference,”<sup>57</sup> despite apparently contradictory facts.<sup>58</sup> Her conclusion is that “[b]iology is both a wrong and

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<sup>55</sup> See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Id.*

<sup>58</sup> Franke describes a number of seemingly inconsistent rulings, including the following:

In *Corbett v. Corbett*, 1971 P. 83 (1970), an English court was asked to determine whether or not April Ashley was a woman at the time of her marriage to Arthur Corbett, a man. Born a man, but having undergone a successful sex-reassignment surgery, Ms. Ashley had “‘remarkably good’ female genitals,” had female hormonal levels, and “‘passed easily as a woman.” Franke, *supra* note 55, at 45. Yet, at all times, she had male chromosomes; thus, the court determined, “‘an individual’s sex is permanently fixed at birth and cannot be later changed. . . .” Franke, *supra* note 55, at 46. In deciding that Ms. Ashley was, at the time of the marriage, “‘a man,” the court noted plainly: “‘these submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender.” Franke, *supra* note 55, at 47.

In *City of Columbus v. Zanders*, 266 N.E.2d 602 (Ohio Mun. 1970), in the context of criminal sumptuary laws, a Columbus, Ohio, court convicted a pre-operative male to female transgendered person who was arrested three times for dressing as a woman. Zanders was fulfilling part of his pre-operative therapy. The court upheld the conviction, although noting that the sumptuary laws operated to reinforce gender norms, on the ground that the law prevented the cross-dresser from perpetrating a fraud on the general public. Franke, *supra* note 55, at 66. A year later, however, the Ohio Supreme Court struck down the same statute for lack of a scienter requirement. *City of Columbus v. Rogers*, 324 N.E.2d 563 (Ohio 1975); Franke, *supra* note 55, at 68. The removal of the law permitted a biological male such as Zanders to appear publicly as a woman.

And in *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994), the court was asked to allow the plaintiff, a woman, access to the Citadel, an exclusively male military college. The court considered that there were “‘some real differences between men and women,” and thus there were some legitimate reasons for accommodating those differences. *Id.* at 563. The court focused, however, not on

dangerous place to ground antidiscrimination law because it fails to account for the manner in which every sexual biological fact is meaningful only within a gendered frame of reference.”<sup>59</sup>

Janet Halley has made a comparable point about the definition of sexual orientation and the roles of law in constructing and enforcing homo- or heterosexuality.<sup>60</sup> Halley points out that the legal definition of homosexuality changes depending on context; as one moves from sodomy law discourse to adoption laws to military regulations, the same individual might be first defined into, then out of, the category of homosexual.<sup>61</sup> In some instances (but not others), the disjuncture between gender role behavior and anatomical sex is determinative.<sup>62</sup> In the gay marriage cases, those constitutive forces of law – the construction of sex and of sexual orientation – converge.

I will admit that the phrase “definition theory” is provocative, perhaps unnecessarily so. Either of the other approaches is doctrinally sufficient to sustain a sex discrimination claim, and this is the most controversial framing of a justification. I use it to intentionally invoke what opponents of gay marriage have relied on as their primary argument, the assertion that the very definition of

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any “real” differences – meaning biological or even gender-based. Rather, the court focused on the need for privacy in public restrooms. Franke's response: “Yet there are no significant differences in male and female anatomy that require separate and distinct sanitary facilities. Although privacy may be an important cultural value, it is not a ‘real difference’ of the kind courts demand when it requires that separate facilities be justified by real and demonstrative differences.” Franke, *supra* note 55, at 82. Ultimately, however, the court held for the plaintiff, and Shannon Faulkner entered the Citadel. *Faulkner*, 858 F. Supp. at 569.

<sup>59</sup> Franke, *supra* note 55, at 98.

<sup>60</sup> Janet E. Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 948-56 (1989); Janet E. Halley, *The Construction of Heterosexuality*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 82-102 (Michael Warner ed., 1993).

<sup>61</sup> Halley, *The Politics of the Closet*, *supra* note 59, at 948-56.

<sup>62</sup> See Patricia Klein Lerner, *Jailer Learns Gay Culture to Foil Straight Inmates' Crime*, L.A. TIMES, Dec. 27, 1990, at B1 (describing the process of segregating gay inmates in a men's prison in Los Angeles to protect them from the general prison population, and guarantee them the same rights and privileges of other prisoners).

marriage requires an opposite-sex couple. The point is not whether marriage has always been understood to be defined that way,<sup>63</sup> or even that the definition relies on an impermissible classification, as “voter” once was defined as white or male. The more fundamental claim is that current marriage law actively creates and enforces gender hierarchy by constructing the social meaning of male-female difference.<sup>64</sup> Although Franke does not invoke marriage as an example of her theory, in many respects it is the prime example of “an ideology of sexual difference.”

An argument that marriage can exist without sexual difference implies that gender polarity is not essential for a (perhaps the) primary social unit. Such dispensability indicates that gender's perceived salience and importance have been more the product of social structures and processes than of biology or nature. That notion can be simultaneously discomfoting and liberatory for women (as well as for men).

Perhaps in part as a result of the ambivalence among women, a curious divergence is developing between judicial reasoning and social perception in the LGBT cases decided on sex discrimination grounds. Despite holdings based on a finding of sex discrimination, the rulings are accepted (to the extent that they are) and described in popular media as being about “gay rights.” The problem with this development is not only that the courts duck a confrontation with the anti-gay animus which is at work, as discussed *supra*, but the potential liberatory impact of such rulings is sharply truncated. The primary challenge, therefore, may be to feminist rights advocates: to claim the full meaning of such rulings and to interpret them socially, as well as legally, as victories for women.

## CONCLUSION

As long as there is no federal statutory protection<sup>65</sup> or height-

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<sup>63</sup> For a strong argument that this belief is incorrect, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 15-44 (1996).

<sup>64</sup> See Hunter, *supra* note 32.

<sup>65</sup> See Steven A. Holmes, *Civil Rights Dance Lesson: The Tiny Step Forward*, N.Y. TIMES, Sept. 15, 1996, at D5 (reporting on a Senate vote resulting in the defeat of the Employment Non-Discrimination Act, which would have

ened constitutional scrutiny for sexual orientation claims,<sup>66</sup> lawyers will continue to press the sex discrimination argument in LGBT cases. Whether conceptualized as formal equality, anti-subordination or definition theory arguments, sex discrimination claims in LGBT rights cases will have major ramifications for “traditional” sex discrimination claims brought by women to challenge policies preferring men. Here, necessity is the mother of re-invention. And the possibility of re-inventing our understanding of what sex discrimination means is both a risk and an opportunity for women's rights advocates.

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provided federal employment protections for lesbians and gay men).

<sup>66</sup> See Toni M. Massaro, *Gay Rights Thick and Thin*, 49 STAN. L. REV. 45 (1996); see also Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 WM. & MARY J. WOMEN & L. 323 (2000).

# TALKING ABOUT HARASSMENT

Vicki Schultz\*

I am delighted to be here with such a distinguished and wonderful group of people to celebrate the thirty-fifth anniversary of the Harvard Civil Rights-Civil Liberties Law Review. It is a great opportunity for all of us to talk to each other about what has been happening in the field of sex harassment law.

I do not think it is fair to say, as some people have suggested, that the fundamental rethinking of harassment law that is going on right now is a backlash against women, or feminists.<sup>1</sup> There are many feminists and gay rights activists and queer theorists of good will who are going back to square one to figure out whether harassment law is doing the work it should be doing.<sup>2</sup> I am such

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\* Professor, Yale Law School; Evelyn Green Davis Fellow, Bunting Fellowship Program, Radcliffe Institute for Advanced Study, 2000-2001. I would like to thank the *Harvard Civil Rights-Civil Liberties Law Review* for inviting me to appear on this panel, which was chaired brilliantly by Professor Janet Halley. I would also like to thank my fabulous research assistant Jamie Kohen for her able assistance with sources.

<sup>1</sup> Catharine A. MacKinnon, *Harassment Law Under Siege*, N.Y. TIMES, Mar. 5, 1998, at A29 ("The insidious argument that sexual harassment law turns 'all sex into harassment' epitomizes the current backlash."). Cf. Tamar Lewin, *Debate Centers on Definition of Harassment*, N.Y. TIMES, Mar. 22, 1998, at A1 (describing the so-called "Seinfeld" case, see *infra* note 45, as an apparent case of backlash against sexual harassment law); Kate Zernike, *A New Sexual Harassment Dynamic*, BOSTON GLOBE, May 18, 1998, at A1 (describing the current backlash of men filing harassment claims).

<sup>2</sup> See DRUCILLA CORNELL, *THE IMAGINARY DOMAIN* 190-96 (1995) (criticizing earlier theories of harassment for protecting "good girls" from sexual advances, rather than placing all women in charge of their own sexual desire); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205-12 (1998) (criticizing earlier theories of harassment for negating women's sexual agency); Katherine M. Franke, *What's Wrong With Sexual Harassment?* 49 STAN. L. REV. 691, 729-62 (1997) (criticizing earlier theories of harassment for neglecting same-sex sexual harassment).



a person.<sup>3</sup> I have come to believe that we need to fundamentally change the way we think about harassment. In my view, we need to move away from the model that has prevailed over the last twenty years. In an earlier work I have referred to this model as the sexual desire-dominance model,<sup>4</sup> but today I am going to call it the sexual model for short.

Under the sexual model, the quintessential case of harassment involves a powerful, typically older male boss who makes unwanted sexual advances toward a less powerful female subordinate. The Anita Hill-Clarence Thomas controversy, the Tailhook incident, the Stroh's Brewery lawsuit, the Paula Jones case – in fact, almost all of the harassment cases that have been publicized widely in the news media – conform to this sexual model.<sup>5</sup> I have come to believe that this is a fundamentally misguided way to think about sex harassment. It has taken me a great deal of time and effort to come to this position, and I have only a few minutes today to talk to you about why.

One problem with the sexual model is that it is top-down; indeed, the entire conception of dominance and subordination that is used in some of the literature is top-down.<sup>6</sup> Top-down models

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<sup>3</sup> In both the scholarly and popular literature, I have developed a fundamental critique of one version of sex harassment law. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683 (1998) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*]; Vicki Schultz, *Sex Is the Least of It: Let's Focus Harassment Law on Work, Not Sex*, THE NATION, 19 Vol. 266, May 25, 1998, at 11; see also Ellen Yarosnefsky, *More Than Sex: Why the Courts Are Missing the Point; An Interview with Vicki Schultz*, MS. MAGAZINE, May 1998, at 56-61.

<sup>4</sup> Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1692-711.

<sup>5</sup> For a description of how Hill-Thomas, Tailhook, and the Stroh's cases conformed to the sexual paradigm, see Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at nn.19-45 and accompanying text; see also *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996), *aff'd*, *Clinton v. Jones*, 520 U.S. 681 (1997).

<sup>6</sup> See, e.g., CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 137 (1989) (arguing that "sexuality is the dynamic of control by which male dominance – in forms that range from intimate to institutional, from a look to a rape – eroticizes and thus defines man and woman, gender identity and sexual pleasure" and that sexuality is "that which maintains and defines male supremacy as a political system"). Cf. Ruth Colker, *Anti-Subordination Above*

assume that power follows from formal roles and that it flows from those who occupy higher positions down onto those who occupy lower positions. Yet power is not always contained in formal structures, and it can circulate in many unexpected directions. In the workplace, many women (and men) experience horizontal harassment that involves exclusion by peers, not simply vertical harassment that involves coercion from bosses. Indeed, the day-to-day interactions through which co-workers create relationships that mark some people as insiders and other people as outsiders are a crucial part of the dynamic that sustains sex segregation and hierarchy in the workplace. Harassment is not always about who is on top and who is on bottom; it is also about who is "in" and who is "out."

I want to move our legal and cultural understanding of sex harassment toward a model that places exclusion from work, rather than abuse of sexuality, at the forefront. The sexual model treats harassment as a way for men to use *work* to appropriate *sex* from women. But we can also see harassment as a way for men (or women) to use *sex* to appropriate *work* for themselves. Some men resort to sexual assault, along with other behaviors that intimidate and exclude women, as a way to claim the best jobs as masculine terrain.

Work is one of the most important distributional goods that exists in our society; it provides the foundation for citizenship, economic security, community, and self-esteem.<sup>7</sup> Indeed, work is central to most people's sense of themselves,<sup>8</sup> including their sense

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*All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (proposing a framework for evaluating sex discrimination based on eradicating the subordination of women to men).

<sup>7</sup> I discuss these issues in more detail in a recent essay. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000). For references to the literature documenting the significance of work, see *id.* at 1886-92, 1908-10, 1930-31; see also William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1, 19-21, 90 (1999) (emphasizing the importance of work to equal citizenship); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530-33 (1997) (describing the importance of work to personal identity, community, and equal citizenship).

<sup>8</sup> For a more thorough elaboration of this point, see Schultz, *Life's Work*, *supra* note 7, at 1890-91.

of themselves as men or women. So, it should not surprise us that some men will try to monopolize good jobs to safeguard their economic superiority and to secure their manly identities. Male workers can define their jobs as the domain of those who are suitably "masculine," for example, by driving away the women and even men who do not fit the projected masculine image, or by marking those who remain as different and inferior.

Once we make this shift away from the sexual model toward a work-centered model, we can see many issues through a different lens. Take, for example, the issue of sex segregation and harassment among school children. I once wrote an article in which I argued that occupational segregation by sex – or, the sex-type of the work people do as adults – cannot be attributed to sexism in early childhood socialization.<sup>9</sup> The standard explanation for occupational segregation is that people are raised to prefer jobs that are coded as "feminine" or "masculine" – girls want to be nurses, boys want to be doctors – and they just follow in that trajectory when they grow up. I hope I persuaded some readers that this explanation fails: most people end up doing jobs that have very little to do with what they thought they would do when they were children, and the sex-type of the jobs to which they aspire as children does not predict the sex-type of the jobs they hold as adults. I still insist that I was right about that point.

But I do think I failed to appreciate how early in life the process of shaping gender identity by claiming certain activities as "masculine" (or "feminine") begins. I now have a four-year-old, and I have spent a lot of time in preschools and on playgrounds. I have seen first-hand how some groups of children try to claim certain play activities and playspaces as gendered, in the same way that some adults try to claim lines of work and workplaces as gendered. For example, at my daughter's preschool, when the teachers created a fantasy play structure that was a construction site, a group of the older boys claimed the site as a "boys" space

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<sup>9</sup> 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, 1798-839 (1990) (arguing that early childhood socialization toward femininity and masculinity cannot explain the sex segregation of employment among adults).

and coded construction as a “boys” activity. Whenever the girls entered the site, these boys warned them away or ostracized them by hitting them, pressing their toy power tools against them, calling them “stupid,” and refusing to play with them. Before long, even the girls who loved to play with construction toys at home internalized the message that, at school, construction was not for them. Although I have been amazed (and dismayed) to observe this process occur among young children, in hindsight I suppose it was predictable. Play serves the same functions for children that work serves for most adults. Through play, children explore their world, bond with others, obtain social recognition, express their creative energies, and develop their sense of themselves. So, just as work is one of the main activities through which people create their senses of themselves as (certain kinds of) “men” and “women,” so, too, play is a central medium through which children begin to define themselves as (certain kinds of) “boys” (in this case, “bad boys”) and “girls.” Through this process, the psychological and institutional habits of exclusion begin. Once we see children’s interactions from this perspective, it seems clear that we should be more concerned with these non-sexual, exclusionary patterns of behavior than with some of the comparatively benign, sexually themed incidents that have captured the attention of the schools and the national news media.<sup>10</sup>

We should focus our energy on the same sorts of patterns of gender-based exclusion among adults in our nation’s workplaces. This is one of my major critiques of the sexual model: it has led courts and commentators to focus obsessively on *sexual* conduct, while deflecting our attention away from arguably more common, *non-sexual* forms of gender-based hostility and abuse that women (and many men) endure every day in workplaces all over the country. For my *Yale Law Journal* piece, I read hundreds and hundreds of harassment cases – almost every lower federal court sex harassment hostile environment case that was decided between

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<sup>10</sup> See, e.g., Cynthia Gorney, *Teaching Johnny the Appropriate Way to Flirt*, N.Y. TIMES MAG., June 13, 1999, at 43 (describing an incident in which a schoolboy shapes a milk bag into a replica of a penis). Gorney also describes an incident in which a North Carolina school suspended a six-year-old boy for kissing a girl classmate on the cheek. *Id.* at 45.

the Supreme Court's 1986 decision in *Meritor*<sup>11</sup> and its 1993 decision in *Harris*,<sup>12</sup> as well as a large random sample of cases decided thereafter.<sup>13</sup> Over and over again, I kept seeing the same pattern: when women entered fields that had been defined traditionally as "men's work," some of the men became very threatened by the women's presence.<sup>14</sup> These men did all sorts of things to drive the women away or to mark them as less competent. The cases involve everything from genuine assaults – such as shoving file cabinets onto the women, pulling knives on them, or hitting, kicking and groping them<sup>15</sup> – to everyday micro-aggressions – such as excluding the women from social interactions and training,<sup>16</sup> or picking on them constantly.<sup>17</sup> Work sabotage is incredi-

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<sup>11</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing for the first time that a sex-based hostile work environment constitutes a form of sex discrimination under Title VII).

<sup>12</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>13</sup> See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1710 n.127 (describing methodology).

<sup>14</sup> This pattern is well documented in my earlier article. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1721-32, 1758-62 (describing harassment cases that conform to this pattern and reviewing the sociological and ethnographic literature that documents and explains this phenomenon). Many cases decided after the article was published still conform to this pattern. See, e.g., *Conner v. Schrader-Bridgeport Intern, Inc.*, 227 F.3d 179 (4th Cir. 1999) (female automotive factory worker); *Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999) (female guard at jail); *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999) (female factory worker); *Richmond-Hopes v. City of Cleveland*, 168 F.3d 490 (6th Cir. 1998) (female electric meter service installer); *Durham Life Insurance Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999) (female insurance salesperson).

<sup>15</sup> See, e.g., *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991) (male technician held a knife to plaintiff's throat, shoved her into a file cabinet, threatened to bang her head into the ground, and grabbed her pelvic area and breasts); *Kirkland v. Brinias*, 741 F. Supp. 692 (E.D. Tenn. 1989), *aff'd*, 944 F.2d 905 (6th Cir. 1991) (fifty-year-old male busboy hit, kicked, and sexually groped the waitresses); see also Kirstin Dowley Grimsley, *A Hostile Workplace: Into an Abyss of Sex Harassment At Eveleth Mine*, WASH. POST, Oct. 27, 1996, at A01 (male miner slashed a gash in female miner's pant leg, drawing blood; another pressed his body against a female miner and then put his hands around her throat).

<sup>16</sup> See, e.g., *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509,

bly common.<sup>18</sup> In some cases, men actually altered work machinery in ways that threatened women's safety; one woman had a hole drilled in her arm.<sup>19</sup> In less dramatic cases, men stole women's case files,<sup>20</sup> overburdened them with work, and engaged in more mundane activities to create the impression that the women were not doing their jobs well and did not belong there.<sup>21</sup> In some

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540-41 (3d Cir. 1993) (involving a law firm associate who claimed that she was denied the opportunity to work on large complex cases and was subsequently denied partnership on the ground that she lacked the capacity to handle such matters); *Heim v. Utah*, 8 F.3d 1541, 1543 (10th Cir. 1993) (involving a construction technician who claimed that she was denied the opportunity to obtain construction experience in the field); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 212 (7th Cir. 1986) (involving an auto mechanic trainee who claimed that she was denied the ability to learn to do brake repair and was subsequently fired on the ground that she was not productive at such work).

<sup>17</sup> See, e.g., *Cross v. Alabama Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1497 (11th Cir. 1995) (psychiatric facility employees referred to as "rather dumb," "stupid," or "just a woman"); *Davis v. Boeing Helicopter Co.*, No. 88-0281, 1990 U.S. Dist. LEXIS 11990, at \*4 (E.D. Pa. Sept. 12, 1990) (involving a female aircraft assembler who was promoted to electrician and who claimed that her supervisor "harassed her and made it impossible for her to complete her work by checking her progress every few minutes"); *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438 (S.D. W. Va. 1985) (foreman harassed female employee by "picking on [her] all the time" and treating her differently from the male employees).

<sup>18</sup> See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1713-28, 1734-38, 1748-55.

<sup>19</sup> See MARY MARTIN, *HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES* 33-34 (1988) ("[The men] didn't want the women to replace them, so they pulled stunts. Someone cut the chain holding up a big motor mount I was welding. It fell down on me and burned my arm to the bone."); *id.* at 257 ("I had to start checking all the parts on my machine because Dick would loosen stuff on it, which could kill you.").

<sup>20</sup> *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1473 (3d Cir. 1990) (black female police officer contended her coworkers stole or hid her case files in an attempt to harass her).

<sup>21</sup> See, e.g., *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 910 (1st Cir. 1988) (reporting an allegation that a coworker "had falsified a medical record in an attempt to create the impression that the plaintiff and [another employee] had mishandled a case"); *Berkman v. City of New York*, 580 F. Supp. 226, 233 (E.D.N.Y. 1983), *aff'd*, 755 F.2d 913 (2d Cir. 1985) (involving female firefighters who were inadequately trained by officers who instead set out

settings, of course, men resorted to sexual assaults and crude sexual advances to threaten the women and undermine their perceived professionalism. But in most cases, such sexual misconduct was part of a larger pattern to exclude the women or to communicate the message that they are different or inferior.

The sexual model has created another related problem. It encourages people to think of harassment as a form of behavioral misconduct in which individual bad actors engage, rather than as a set of social relations that are embedded in a larger context of structural inequality in the workplace. As a result, sex harassment policies have become stand-alone policies that are completely divorced from the larger policies designed to achieve gender integration. I did some research a couple of years ago and interviewed a number of managers and management consultants. Almost all of them defined sex harassment primarily, if not exclusively, in terms of sexual misconduct. They had adopted isolated policies and procedures for dealing with sex harassment, rather than dealing with it as an aspect of a broader anti-discrimination program. Unfortunately, they did not see eradicating harassment as part of a larger, more affirmative project of creating a company culture that is gender-integrated and welcoming to both sexes. These findings were surprising to me, because harassment is really just a type of

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deliberately to undermine their physical capacity to do the job, and then terminated them at the end of their probation period); *Beeman v. Safeway Stores, Inc.*, 724 F. Supp. 674, 675 (W.D. Mo. 1989) (reporting an allegation by a female grocery store manager that her boss harassed her by "making daily checks upon her work, . . . belittling her performance, . . . reprimanding her in meetings that lasted up to three hours, . . . making long lists of things for her to do, . . . [and] asking her to accomplish work tasks that were impossible to accomplish within the allotted time"); *Downum v. City of Wichita*, 675 F. Supp. 1566, 1569-70 (D. Kan. 1986) (involving a female firefighter who claimed she was rushed through training to be a dispatcher and made to do the job before she was ready); *Hosemann v. Technical Materials, Inc.*, 554 F. Supp. 659 (D.R.I. 1982) (plaintiff's coworkers sabotaged her work and "always . . . tried to make her do her work poorly"); *Accardi v. Superior Court*, 21 Cal. Rptr. 2d 292, 297 (Ct. App. 1993) (reporting a female police officer's allegation that her department undercut her performance by "deliberately overburdening her with double work assignments; denying assistance when she requested it; [and] deliberately circumventing established procedures when she was assigned to duty as a court officer in order to make her work more difficult").

discrimination. The whole concept of hostile work environment harassment emerged when judges realized that after many companies had ceased discriminating overtly, more covert barriers to integration had emerged. Rather than managers refusing to hire racial minorities or women, they could simply look the other way while incumbent workers drove the newcomers away.<sup>22</sup> Once we understand that harassment is just a subtle type of discrimination designed to maintain traditional patterns of segregation, it seems clear that harassment policies should be integrated into more comprehensive organizational policies to achieve desegregation. Such policies must take into account the specific history and culture of the firm, the professional field in question, and the particular job setting.

Rather than facilitating such a fine-tuned sociological approach, the sexual model lends itself to a free-floating, trans-contextual analysis. Defining sex harassment as a form of sexual violation – the “unwelcome sexual advance” – that transcends the particular organizational context makes it possible to essentialize the concept of harassment. Such an approach can translate readily into the proposition that men's sexual advances inherently violate women's dignity or equality. There is reason to be concerned that this is happening around the globe, as some nations have imported the sexual model of harassment that is now being questioned by feminists in the United States, and incorporated it into their own legal and cultural traditions.<sup>23</sup> Following close on the heels of legal developments in the United States, for example, the European Union took steps to condemn and outlaw workplace sex harassment as a violation of women's dignity, while defining harassment in sexual terms strikingly similar to those promulgated by the United States EEOC.<sup>24</sup> Austria passed a law that adopts both the sexual

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<sup>22</sup> This pattern of management acquiescence in co-worker harassment is described in Martin, *supra* note 19; Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 37-38 (1990).

<sup>23</sup> See Vicki Schultz, *Sexual Harassment*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 7-8 (forthcoming 2001).

<sup>24</sup> See Mia Cahill, *The Legal Problem of Sexual Harassment and Its International Diffusion: A Case of Austrian Sexual Harassment Law*, 10-11



substantive definition and the privatized enforcement mechanisms of the American approach;<sup>25</sup> France criminalized what we would think of as *quid pro quo* harassment.<sup>26</sup> These legal approaches failed to connect harassment to a larger system of workplace gender inequality that relegates women to inferior jobs; they simply accept the gender segregation of work as a "neutral" background condition rather than defining it as the structural context in which harassment flourishes (and which it fosters).

I encountered this same lack of understanding when I taught a session on sexual harassment at a conference on global constitutionalism a few years ago at Yale.<sup>27</sup> Apart from the one U. S. Supreme Court Justice who was present,<sup>28</sup> many high-level jurists from around the world simply did not appear to comprehend what I was saying about the link between sex segregation of employment and hostile work environment harassment. They viewed sex harassment exclusively as a form of sexual imposition (akin to rape), and many of them used legal discourses that defined sexual advances against a woman as a violation of her basic human dignity. Now, it's not that I don't believe sexual advances can ever infringe on interests we might think of as dignitarian in nature; of course they can.<sup>29</sup> But to legally equate sexual advances toward women with inherent violations of women's dignity strikes me as

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(2000) (unpublished manuscript, on file with the *Journal of Law and Policy*) (showing that the European Union definition of sexual harassment relied greatly on the definition from the EEOC guidelines, especially the emphasis on conduct of a sexual nature).

<sup>25</sup> *Id.* at 14-15, 22-23.

<sup>26</sup> See Abigail C. Saguy, *Sexual Harassment in France and the United States: Activists and Public Figures Defend Their Definitions*, in *COMPARING POLITICS AND REPERTOIRES OF EVALUATION IN FRANCE AND THE UNITED STATES* 19 and n.34 (Michele Lamont & Laurent Thevenot, eds., 2000) (manuscript forthcoming, on file with the *Journal of Law and Policy*) [hereinafter Saguy, *Sexual Harassment in France*].

<sup>27</sup> *Conference on Global Constitutionalism, Equality: International Norms, Session on Sexual Harassment*, Yale Law School, New Haven, Connecticut, 1998.

<sup>28</sup> Justice Stephen Breyer attended the conference, and he clearly understood my point.

<sup>29</sup> See, e.g., Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997).

a reductionist, potentially dangerous move that feminists should evaluate very carefully.

A related problem with harassment law's focus on sexual misconduct is that it invites inquiry into the sexual history and sexual self-presentation of the person who was harassed. In current harassment doctrine, for example, the law asks whether the sexual advances or conduct were "unwelcome." Now, under a work-based model of the type that I am advocating, we would not need such an unwelcomeness standard, because it would make no sense to ask whether someone had welcomed being subjected to an environment that interfered with their ability to pursue their work. "Did the harassee welcome being driven out of her job?" "Did she welcome being made to look incompetent?" These are not questions that would be on our radar screen. But once we have a model that focuses on sexual advances and other sexual activity, we do have to have something like an unwelcomeness standard because we don't want to prohibit all sexual activity.

Some sexual advances and other forms of sexual activity are desired and invited, even in the workplace. Yet, once we have an unwelcomeness standard, we know from past experience that courts will abuse it and allow inquiry into whether the victim behaved in such a way as to welcome her own harassment.<sup>30</sup> In the hostile work environment context, there are shocking cases, such as one case in which the court deemed a woman to have "welcomed" such actions as having her head pushed in the toilet, being shocked with a cattle prod, being maced, and being hit and punched in the kidneys – simply because she had had the temerity to use profanity, tell off-color jokes, flirt, and go without a bra.<sup>31</sup> There is a

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<sup>30</sup> See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 826-35 (1991).

<sup>31</sup> See, e.g., *Reed v. Shepard*, 939 F.2d 484, 486-87 (7th Cir. 1991) (holding that the "unwelcomeness" requirement was not met where a female jailer claimed that she was "handcuffed to the drunk tank and sally port doors, . . . that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that . . . [she was] handcuffed to the toilet and her face pushed into the water, and maced," all on the ground that she had used profanity, told off-color jokes, engaged in sexual horseplay and flirting, and failed to wear a bra underneath her T-shirt); see also *Weinsheimer v. Rockwell*, 754 F. Supp. 1559, 1565 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991) (rejecting sexual harassment claim on the ground that the unwelcomeness

problem when the victim has to meet an image of a Sunday school teacher in order to win a harassment case.<sup>32</sup> The law separates the good girls from the bad girls, and punishes the latter.<sup>33</sup>

When the law has this sexual focus, it is not only women who are harmed. The focus on rooting out unwelcome sexual advances permits those who enforce the law to condemn not just bad girls, but also other people whom our culture views as the walking embodiments of dangerous or offensive sexuality. We can predict who such people will be: women and men of color, working class men and women, gay men and lesbians, bisexuals and transgendered people, and other sexual minorities.<sup>34</sup> The courts can deem

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requirement was not met where plaintiff had engaged in sexual banter and joking and had used "abusive and vulgar language" in speaking to her boyfriend on the telephone at work).

<sup>32</sup> I believe Anita Hill fell victim to this phenomenon. At first, her credibility was high because she came across as a prim, school teacher type. Eventually, however, "[h]er veracity, her motives, her private life, and even her sanity would come under assault. It would require an intense effort, but Hill's apparently pristine character would . . . be completely transformed." JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 280 (1994). By the time the Senate hearings were over, "[s]he had been portrayed as, among other things, a political zealot, a sexual fantasist, a scorned woman, possibly a closet lesbian, and a pathological liar who had lifted bizarre details from *The Exorcist* in a desperate effort to destroy Thomas." *Id.* at 305.

<sup>33</sup> I have analyzed this problem in greater depth elsewhere. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1744-45.

<sup>34</sup> See, e.g., Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993) (documenting the role of homosexual identity in the state's regulation of sexuality); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992) (arguing that the regulation of sexuality threatens reinforcing or increasing the social penalty accruing to disfavored sexualities). Cf. Carlin Meyer, *Sex, Sin and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1119-20 (1994) (noting that, in the context of pornography regulation, "judges, jurors, and most members of the public are likely to find most explicit or 'deviant' sexual depictions repellant and view as degrading not only sexual portrayals that descriptively, humorously, playfully, or ironically depict subordinated women, but also those that are explicitly intended to challenge that subordination"); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1145-47 (1993) (stressing that censorship of pornography would likely be used against homosexuals, feminists, and those perceived to have deviant sexuality, and

such people outside the bounds of legal protection extended to harassees – or, worse yet, stigmatize them as harassers.

A good example of this kind of targeting of a sexual minority is the double standard courts have adopted with respect to gay men (or those presumed to be gay) in sex harassment cases.<sup>35</sup> The courts have characterized male bosses who make sexual advances toward men as harassers, on the ground that the boss would not have been attracted to and therefore would not have made a similar advance toward a woman. This reasoning, of course, presumes that the bosses are homosexuals who have desire only for men, and uses that presumption as the basis for finding them guilty of sex harassment.<sup>36</sup> By contrast, however, the courts have almost never

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reporting allegations that Canadian customs censors have singled out gay and lesbian, as well as radical, bookstores).

<sup>35</sup> See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1777-1785 (analyzing in detail this double standard); see also Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) [hereinafter Yoshino, *The Epistemic Contract*] (arguing that courts have set up a two-tiered system of justice for homosexual and heterosexual harassers).

<sup>36</sup> See, e.g., *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (“When a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male – that is, ‘because of . . . sex.’”); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (“We hold that a same-sex ‘hostile work environment’ sexual harassment claim may lie under Title VII where a homosexual male (or female) employer discriminates against an employee of the same sex or permits such discrimination against an employee by homosexual employees of the same sex.”); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (holding that same-sex sexual harassment claims could be actionable if and only if the defendant is shown to be homosexual).

There is a more theoretical objection to this line of reasoning – indeed, to the entire edifice of “but-for” reasoning that undergirds the cause of action for quid pro quo harassment perpetrated by those presumed to be exclusively heterosexual or homosexual. This “but-for” reasoning first emerged in early cases involving heterosexual male supervisors who fired women who refused their sexual advances. In these cases, the courts faced a dilemma: just what was it about this situation that constituted discrimination “because of sex” within the meaning of Title VII? Early courts held that the male supervisor’s sexual advance amounted to discrimination because of sex because the supervisor had made an advance toward a woman that he would not have made toward a man.

extended protection from sex harassment *to* gay men (or men who are presumed gay), even when they are subjected to overt, gender-based harassment at the hands of straight (or presumably straight) men.<sup>37</sup> (I am talking about men here because most of the cases with which I am familiar involve men. But I suspect that this pattern would hold in cases involving women as well.)<sup>38</sup>

This problem of the normalization of some kinds of sexuality at the expense of others<sup>39</sup> raises the prospect that the conventional sexual model of harassment law may tread too heavily on free expression – especially the sexual expression of unpopular groups. Of course, this is a complex subject about which people of good

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*See, e.g., Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). Although it may not be obvious at first blush, this reasoning actually identifies as the source of sex discrimination the *sexual attraction or desire* presumed to underlay the supervisor's sexual advance. For, according to the courts' logic, the only reason the heterosexual supervisor made an advance toward the woman that he would not have made toward a man is that the supervisor felt an attraction or desire for her that he would not have felt for a man. The courts applied the same logic to male supervisors who made advances toward men who worked for them, reasoning that the supervisors (who they presumed were homosexual) would not have felt desire for and therefore would not have made advances toward women – only for men. This reasoning is objectionable on many levels. As my colleague Kenji Yoshino has pointed out, it negates the possibility of bisexual desire. *See Yoshino, The Epistemic Contract, supra* note 35. Even more fundamentally, one might object, as I do, to the fact that it singles out sexual desire as the source of legal prohibition – or, put colloquially, it outlaws desire.

<sup>37</sup> *See, e.g., Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (holding that harassment of a gay male employee by male co-workers and male supervisor was not harassment "because of sex"); *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, \*15 (6th Cir. Jan. 15, 1992) (male worker harassed by male co-workers who thought he wasn't "macho" enough); *see also Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997) (man accused of being gay harassed by straight male co-workers); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (same). For analyses that question and complicate the courts' presumptions about the sexual orientations/desires of harassers and even the harassees, *see Yoshino, The Epistemic Contract, supra* note 35.

<sup>38</sup> *See, e.g., Johnson v. Cmty. Nursing Services*, 985 F. Supp. 1321 (D. Utah 1997) (female supervisor made sexual advance toward female employee); *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995) (same).

<sup>39</sup> *See* MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).

will can disagree. But it is not only conservatives who should be worrying about this issue;<sup>40</sup> I believe feminists and liberals should also be doing so.<sup>41</sup> We should make sure that harassment law does not give employers an incentive – or excuse – to fire ordinary workers for engaging in benign sexual expression in the name of protecting women.

Corporations have long had an incentive to suppress and control sexuality in the workplace. With the emergence of Taylorism in the early twentieth century, managers sought to sanitize their companies of emotionality and the other messy stuff of human life they saw as interfering with the rational functioning of the firm:<sup>42</sup> reproduction, birth, death, sickness, disease, love, and sexuality.<sup>43</sup>

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<sup>40</sup> For some insightful analyses of this problem by conservative commentators, see Kingsley Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?* 85 GEO. L.J. 627 (1997).

<sup>41</sup> For some good analyses by scholars with a feminist perspective, see J. M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997).

<sup>42</sup> Taylorism is a theory of management introduced by Frederick Winslow Taylor, who introduced ideas of scientific precision into the world of worker management. See John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents*, 107 YALE. L.J. 1467, 1488 (1998) ("Taylor developed a series of new managerial techniques, including standardized and minutely controlled processes of production and maintenance, and stopwatch time-study to replace workers' informal know how with ostensibly scientific rationality."); see also ROBERT KANIGEL, *THE ONE BEST WAY: FREDERICK WINSLOW TAYLOR AND THE ENIGMA OF EFFICIENCY* (1997); ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 20-22 (1977).

<sup>43</sup> There is evidence that the old bureaucratic paradigm is in the process of being replaced. See Vicki Schultz, *Life's Work*, *supra* note 7, at 1919-28 (documenting the shift from the old bureaucratic workplace to newer, more fluid forms of work organization); Katherine V.W. Stone, *The New Psychological Contract* at 3 (Jan. 31, 2000) (unpublished manuscript, on file with the *Journal of Law and Policy*) (discussing the shift to a new employment regime characterized by less employment security and more emphasis on "general skills training, upskilling of jobs, networking opportunities and contact with firm constituents for employees at all levels of the firm, micro-level job control, market-based pay,

This same reasoning persists today. As I have heard many people put it, "Well, of course we should eliminate sexual harassment, because when people are at work, they have no business fooling around; they should be working."<sup>44</sup> Sex harassment law may provide an extra push for management to ban sexual interaction across-the-board, without worrying about whether it is welcome or unwelcome (even though the company would not be held liable for conduct that was not unwelcome). This incentive may explain why we are beginning to see policies that are disturbing from a gender-equality perspective: policies prohibiting men and women from traveling together on business, policies preventing male supervisors from meeting with their female staff behind closed doors, and even policies prohibiting dating or sexual joking among employees.<sup>45</sup>

We need a feminist approach to sex harassment that avoids these pernicious effects and articulates an alternative normative vision. Even if we could banish all hints of sexuality from the workplace – the place where we spend most of our waking hours – this would not represent progress. On the contrary, I think it is part of a feminist vision of progress to be able to express ourselves freely and to be more fully human while we are at work. Now, of course, we all have to respect other people, and we need to get along well enough to work together to achieve common goals. But we should not allow some people to censor what their co-workers say simply because they are offended. When people are being fired for sexual harassment simply because they show a dictionary

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and firm-specific dispute resolution institutions for ensuring fairness"). It remains to be seen whether the new, more fluid forms of work organization will take a different approach to matters of emotionality, sexuality, and the like.

<sup>44</sup> Sociologist Abigail Saguy has documented a strand of American feminist thought that also emphasizes this same productivity-oriented rationale for regulating sexual harassment. See Saguy, *Sexual Harassment in France*, *supra* note 26 at 15-16.

<sup>45</sup> Tamar Lewin, *Debate Centers on Definition of Harassment*, N.Y. TIMES, Mar. 22, 1998, at A1 (noting that some employers "have tried to de-sexualize the workplace, adopting codes forbidding intra-office dating, touching or staring"); Kate Zernike, *A New Sexual Harassment Dynamic*, BOSTON GLOBE, May 18, 1998, at A1 (noting that "companies have ruled out travel involving two colleagues of the opposite sex" and many "have banned romantic relationships").

definition of the word “clitoris” to a female co-worker,<sup>46</sup> we should be concerned that feminism is being used in the service of Fordism.<sup>47</sup>

Feminists should aspire to do much more. We should aspire to create a world in which people do not have to suspend our basic humanity while we are at work. We should aspire to create a world in which women as well as men, sexual minorities as well as those in the sexual mainstream, can be perceived as sexual beings and competent workers at the same time – a world where sexuality, humanity, and authority coexist for all. To do this, we must create workplaces in which women as well as men, people from all walks of life, occupy the structural positions of equality and authority that are necessary to endow us with us with the capacity to engage in free and equal expression – including sexual expression.

I could say more about how my approach to harassment gets us closer to these goals. The basic idea is to create a body of law that gives companies the incentive to fully integrate their workplaces along sex/gender lines, but does not spur them to censor benign sexual expression in the name of protecting women from sexual harassment. But I'm out of time.

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<sup>46</sup> Miller Brewing Company was assessed \$26.6 million in damages after the company fired a male executive whom a female employee had accused of sexual harassment. See James L. Graff, *It Was a Joke! An Alleged Sexual Harasser Is Deemed the Real Victim*, TIME, July 28, 1997, at 62. The executive had related to the employee an episode of Seinfeld in which Seinfeld cannot remember the name of the woman he is dating, but he knows it rhymes with a part of the female anatomy. *Id.* When the employee did not get the joke, the executive photocopied a dictionary page defining “clitoris” and handed it to her. *Id.*

<sup>47</sup> Stone, *The New Psychological Contract*, *supra* note 43, at 9-11 (describing Fordism's impulse to rationalize and standardize the organization of work).