STUDENT SCHOLARSHIP

PRAGMATISM, FEMINIST THEORY, AND THE RECONCEPTUALIZATION OF SEXUAL HARASSMENT

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ABSTRACT

In this Article, Julianne Scott examines the judicial recognition of opposite and same-sex sexual harassment to discern how courts conceptualize the discriminatory harm of sexual harassment. Scott argues that the onset of same-sex harassment claims have revealed that courts adjudicate sexual harassment in unprincipled and contradictory ways and do not have a clear understanding of why sexual harassment constitutes sex discrimination. Scott discusses the historical development of sexual harassment law and the early feminist theory arguing that sexual harassment is sex discrimination to show the ways in which feminist theory influenced courts, and also how courts did not completely adopt the feminist notion of sexual harassment. Scott reviews the "new" feminist theories attempting to reconceptualize sexual harassment and argues they are theoretically too complex for courts to adjudicate in a principled manner. Finally, Scott argues that the legislature, courts, and scholars must acknowledge that sexual harassment fits uncomfortably in a system based on formal equality such as Title VII. Either Congress must pass a separate statute based on sexual harassment to give clear guidance to the courts, or the courts must adopt a more broad based, prag-

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matic approach to ensure that sexual harassment is adjudicated in a principled manner.

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 provides:

It shall be an unlawful employment practice for an employer 1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of

> employment, because of such individual's race, color, religion, sex or national origin.[1]

A discrimination claim under Title VII must prove that an individual was discriminated against "because of" race, color, religion, national origin, or sex.[2] The lack of legislative history relating to the meaning of "sex" in Title VII is well known.[3] This lack of legislative guidance and the complex nature of sex and gender has led to considerable debate and controversy over the meaning of "because of sex."

The "because of sex" requirement has recently become particularly problematic in the sexual harassment context. Historically, women sued for sexual harassment. Courts assumed and still assume that when a woman sues a man for sexual harassment the action is "because of sex."[4] If only women sued for sexual harassment, the "because of sex" requirement might have remained unproblematic. It was only a matter of time, however, before courts were confronted with cases in which men sued women, women sued women, and men sued men for sexual harassment. Whether the behavior claimed by the plaintiff was "because of sex," therefore, became central to the success of the lawsuit.

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1. 42 U.S.C.A. § 2000e-2(a)(1).

2. The Supreme Court has recognized several types of discrimination claims under Title VII, including: individual disparate treatment, systemic disparate treatment and adverse impact. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co. 401 U.S. 424 (1971). *See generally* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (3d ed. 1996).

3. *See generally* Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act,* 3 WM. & MARY J. WOMEN & L. 137 (1997). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives by an opponent of Civil Rights legislation in an effort to thwart the bill as a whole. *See* 110 Cong. Rec. 2577–2584 (1964). Legislators who generally supported civil rights argued against the "sex" amendment on the grounds that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. *Id.* at 2577 (statement of Representative Cellar). Courts have argued that the lack of legislative history for the prohibition against "sex" provides no guidance. *See, e.g.,* Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986) ("we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'").

4. According to Katherine Franke, "federal courts entertain hundreds of sexual harassment claims under Title VII [each year] without ever questioning the underlying link between sexual harassment and sex discrimination." Katherine M. Franke, *What's Wrong With Sexual Harassment?,* 49 STAN. L. REV. 691, 692 (1997). Additionally, the Supreme Court has never offered a clear theory for why sexual harassment is sex discrimination. *See id.*

Case law based on these "alternative" sexual harassment claims revealed that courts held divergent and unprincipled views of what constitutes "because of sex." Most importantly, these cases revealed that courts lacked a conceptual understanding of why sexual harassment is discriminatory within the meaning of Title VII. Is sexual harassment sex discrimination because it is sexual in nature? Is it sex discrimination because "sex" in Title VII means gender and in the totality of the circumstances, it is women, not men, who are harassed? Is it sex discrimination because it contributes to the subordination of women? Is it sex discrimination because it reinforces sexual or gender stereotypes?

In 1998, the Supreme Court had the opportunity in the same-sex sexual harassment case *Oncale v. Sundowner Oil Services*[5] to give much needed guidance about the meaning of "because of sex" and why sexual harassment constitutes sex discrimination. The Court heard *Oncale* because of a split among the Circuit Courts over whether same-sex harassment could be actionable under Title VII. Instead of providing guidance, however, the Supreme Court remanded the issue of "because of sex" to the lower court and provided an opinion that further obscured the adjudication of sexual harassment.[6] Although many believe that *Oncale* is a "victory" for allowing a same-sex harassment claim under Title VII, the Court's lack of conceptual understanding of why sexual harassment constitutes sex discrimination leaves the sexual harassment cause of action vulnerable to attack. For example, this lack of understanding has

5. *See* Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998). The question before the Court was whether workplace harassment can violate Title VII's prohibition against discrimination "because of sex" when the harasser and the harassed employee are of the same-sex. *Id.* at 1001. The Court held that as a matter of law this claim was not barred by Title VII and remanded the case for the fact-finder to determine if the conduct was "because of sex." *Id.* at 998. In *Oncale*, plaintiff Joseph Oncale worked for defendant Sundowner Offshore Services on an oil platform in the Gulf of Mexico. He was employed as a roustabout on an eight man crew which included defendants John Lyons, Danny Pippen, and Branden Johnson. Lyons, the crane operator, and Pippen, the driller, had supervisory authority. On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen, and Johnson in the presence of the rest of the crew. Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape. Oncale's complaints to supervisory personnel produced no remedial action. Oncale eventually quit asking that his pink slip reflect that he "voluntarily left due to sexual harassment and verbal abuse." Oncale subsequently filed a complaint alleging he was discriminated against because of his sex. *Id.* at 1001.

6. *Id.* at 998.

opened sexual harassment claims to the following criticisms: (1) they violate the Equal Protection Clause because they protect women and not men,[7] (2) they should not be considered a Title VII claim at all,[8] and (3) they violate the free speech clause of the First Amendment.[9]

In response to the theoretical challenges brought by same-sex harassment cases, feminist scholars have asserted various new theories for why sexual harassment is discriminatory. Although these theories are provocative, they fail to acknowledge the difficulty courts have had in understanding even the simplest theory of why sexual harassment constitutes sex discrimination.

In this Article, I will first discuss the historical development of sexual harassment law and the early feminist theory arguing that sexual harassment is sex discrimination to show the ways in which feminist theory influenced courts, but also how courts did not completely adopt the feminist notion of sexual harassment. Second, I will explore the case law recognizing opposite-sex and same-sex harassment to discern how courts conceptualize sexual harassment and reveal the theoretical and practical flaw in courts' current analyses. Third, I will review the new feminist theories that attempt to reconceptualize sexual harassment and provide a more principled account of sexual harassment.

Finally, I will show that the new conceptions of sexual harassment are theoretically too complex for courts to adjudicate in a principled manner. Courts were unable to fully comprehend, or simply did not embrace the original feminist theory of sexual harassment in the 1970s, and with the new challenge of same-sex harassment, history will likely repeat itself. Until the "checkered" history of sexual harassment and the unprincipled and inconsistent ways sexual harassment is litigated in the courts is

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7. *See* Catharine MacKinnon, Amicus Brief filed in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), 8 UCLA WOMEN'S L.J. 9 (joined by National Organization on Male Sexual Victimization, Inc.; Men Stopping Rape, Inc.; Oakland Men's Project, Inc.; Men Against Pornography; Sexual Exploitation Education Project, Inc.; Men Overcoming Rape; Stop Prisoner Rape, Inc.; Community Against Violence; Emerge; A Men's Counseling Service on Domestic Violence, Inc.; Men Stopping Violence, Inc.; Men's Rape Prevention Project, Inc.; New York City Gay & Lesbian Anti-Violence Project, Inc.; and the National Coalition Against Sexual Assault, Inc.).

8. *See* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990).

9. *See* Eugene Volohk, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997).

acknowledged and dealt with, sexual harassment claims remain vulnerable to attack.

II. HISTORICAL DEVELOPMENT OF SEXUAL HARASSMENT LAW AND EARLY FEMINIST THEORY OF SEXUAL HARASSMENT AS SEX DISCRIMINATION

The first courts to hear claims of sexual harassment held that the behavior did not constitute discrimination under Title VII.[10] Courts considered the behavior to be private and personally harmful, but not a matter of public concern.[11] One court stated, "the purpose of Title VII is not to provide a federal tort remedy for what amounts to a physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley."[12]

Encouraged by recognition of national origin and racial harassment claims, feminists argued that sexual harassment was discrimination under Title VII.[13] Feminists began to highlight women's sexual exploitation on the job and argued that sexually

10. Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163; 10 Fair Empl. Prac. Cas. (BNA) 289 (1975). Plaintiffs in *Corne v. Bausch and Lomb* alleged that they were subjected to verbal and physical sexual advances from their male supervisor. Plaintiffs argued that only women were required to deal with this extra employment condition: submit to the sexual advances of the supervisor, or be terminated. The court held that even if female employees were subjected to verbal and physical sexual advances from a supervisor and, due to such advances, terminated their employment, there was no right to relief under the Civil Rights Act. *Id.* The court focused mainly on the intent of Title VII and held that it would be "ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit." *Id.*

11. *See id.*

12. *See* Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (1976). *See also* Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D.C. Colo. 1978); Barnes v. Train, 13 FEP Cases 123 (D.D.C. 1974) (finding discrimination not because plaintiff was a woman, but because she rejected a sexual affair with her supervisor and thus had an inharmonious personal relationship with him); Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (holding that sexual demands could not have been contemplated as falling within the prohibitions of Title VII, because "the attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions").

13. *See, e.g.,* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (holding, for the first time, that harassment on the basis of national origin violated Title VII). Harassment was also extended to race and religion. *See* Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir 1976) (finding unfair disciplinary and route assignment procedures); Murry v. American Standard, Inc. 373 F. Supp 716, 717 (E.D. La. 1973) (black employee called "boy") *aff'd*, 488 F.2d 529 (5th Cir. 1973); Compston v. Borden, Inc., 424 F. Supp. 157, 160-161 (S.D. Ohio 1976) (supervisor's demeaning religious slurs).

harassing behavior constituted sex discrimination. Feminists such as Lin Farley, Carroll Brodsky, and Catharine MacKinnon began to publicize sexual harassment as a serious problem of sex-based power that affected women's ability to achieve equality.[14] MacKinnon's book, *Sexual Harassment of Working Women: A Case of Sex Discrimination,* was believed to significantly affect efforts to litigate sexual harassment in the courts.[15] The draft of MacKinnon's book was circulated to scholars and activists litigating sexual harassment cases.[16] At that time, no court had held that sexual harassment was sex discrimination.[17] Shortly thereafter, the first court recognized sexual harassment as a cause of action.[18] There is little doubt that feminist activists and scholars played a significant role in persuading courts to recognize sexual harassment under Title VII. It appears from the case law, however, that courts never truly understood the feminist argument of *why* sexual harassment is sex discrimination. Most importantly, courts developed a body of law that protected women, but did not constitute a principled understanding of why sexual harassment is sex discrimination.

In order to understand how sexual harassment law developed in the courts, it is important to understand the original feminist notion of sexual harassment that informed the courts and public of the harm of sexual harassment. Much of the inconsistency in sexual harassment law exists because of tension between the courts' need to fit sexual harassment into traditional Title VII disparate treatment claims and the radical feminist origins of sexual harassment as a cause of action.[19] MacKinnon's *Sexual Har-*

14. *See generally* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB (1978); CARROL M. BRODSKY, THE HARASSED WORKER (1976) (Brodsky's book was one of the first sources to use the term sexual harassment); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

15. *See* Holly B. Fechner, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 U. MICH. J. L. REFORM. 475, 481 (1990) (describing SEXUAL HARASSMENT OF WORKING WOMEN as a "major conceptual breakthrough in feminist theory").

16. *See* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 14, at xi; Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1147 (1989).

17. *See* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 14, at xi.

18. *See id.*

19. In the late 1960s and early 1970s, the women's movement began to gain momentum. Some women's rights organizations began to focus on legal reform as a central strategy for improving women's position in society. The National Organiza-

assment of Working Women illustrates the early feminist approach to sexual harassment theory. The following discussion of early feminist theory and sexual harassment will focus on MacKinnon's work because her work is and has been influential in the recognition of sexual harassment.[20] In fact, MacKinnon's book and theories continue to be widely cited — several of the briefs submitted in *Oncale* cite to MacKinnon.[21]

MacKinnon's *Sexual Harassment of Working Women* asserts two theories by which sexual harassment can be considered sex discrimination: the inequality theory and the disparate treatment theory.[22]

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tion for Women was formed in 1966 to bring public pressure on the EEOC to enforce Title VII's prohibition against sex discrimination in employment. The EEOC, the agency created to enforce Title VII, initially rendered the provision against sex discrimination virtually meaningless. The EEOC was completely ineffective in its enforcement of the act. *See* Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal For Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 504 (1996). NOW members filed suits challenging sex-segregated advertising, lobbied the Department of Labor to include women in its affirmative action guidelines for federal contractors, persuaded the Federal Communications Commission to open up opportunities for women in broadcasting, and helped secure the passage of the 1972 amendments to Title VII to allow the EEOC to fight discrimination more effectively. *See Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971).

20. In fact, 23 years after *Sexual Harassment of Working Women* was written, MacKinnon is still very much involved in the debate. MacKinnon wrote an amicus brief in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), arguing that male dominance in society includes sexual dominance of some men over other men as well as women, and therefore, claims of same-sex sexual harassment should be recognized. *See* Amicus Brief in *Oncale*, *see supra* note 7.

21. *See* Amicus Brief for Respondents in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998) (1997 WL 634147); Amicus Brief for Petitioner in *Oncale* (1997 WL 458826); Amicus Brief for Petitioner in *Oncale*, (1997 WL 531305). It is noteworthy, however, that those who cite MacKinnon do not acknowledge or recognize to which theory of sexual harassment by MacKinnon they are referring.

22. *See* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 14, at 1–7. MacKinnon labels her theory the "difference" approach. *Id.* at 4. For purposes of this Article, the difference approach is labeled by the more commonly used "disparate treatment" approach. *See also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 127 (1989) (arguing that sexuality is a social construct of male power); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987).

A. *Inequality Theory: Sexual Harassment Is Sex Discrimination Because It Is Sexually Subordinating*

The inequality approach asserts that sexual harassment is sex discrimination because it is sexually subordinating.[23] Focusing on women's exploitation on the job, inequality theory characterizes women's situation as a "structural problem of enforced inferiority that needs to be radically altered."[24] The sexes are not simply socially differentiated, but are socially unequal. Sexual harassment, therefore, is a group injury considered in the context of women's social status.

The inequality approach centers upon the analysis that discrimination systemically disadvantages certain social groups.[25] A rule or practice is discriminatory if it participates in the systemic social deprivation of one sex because of sex.[26] The unfairness lies in deprivation because of gender, a deprivation given meaning in the social context of the dominance or preference of one sex over the other.[27] Women are vulnerable and occupy a lower position than men in society. Therefore, when sexual harassment occurs in the workplace it contributes to and continues that subordination.[28] Under the inequality approach, when women are harassed by a man they are harassed "because of sex," because it is the social and economic position of women that leaves them vulnerable to harassment.

According to the inequality theory of sex discrimination, the disparate treatment approach is inadequate to deal with the

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23. *See* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 14, at 174–92.

24. *Id.* at 5. MacKinnon asserts sexual harassment is harmful because:

> Work is critical to women's survival and independence. Sexual harassment exemplifies and promotes employment practices which disadvantage women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women. In this broader perspective, sexual harassment at work undercuts woman's potential for social equality in two interpenetrated ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically. Legal recognition that sexual harassment is sex discrimination in employment would help women break the bond between material survival and sexual exploitation. It would support and legitimize women's economic equality and sexual self-determination at a point at which the two are linked.

Id. at 7. Inequality theory is also known as "anti-subordination" theory.

25. *See id.*

26. *See id.* at 193.

27. *See id.*

28. *See id.* at 174–88.

problem of sex inequality.[29] According to MacKinnon, disparate treatment theory, which requires that likes be treated alike, is not designed to address the substance of most actual sex inequality.[30] MacKinnon states:

> Until this model based on sameness and difference is rejected or cabined, sex equality law may find itself increasingly unable even to advance women into male preserves - defined as they are in terms of socially male values and biographies - for the same reason it cannot get courts to value women's work in spheres to which women remain confined. Such a law can prohibit holding women to feminine standards in the workplace but not holding them to masculine ones. Designed for the exceptional individual whose biography approximates the male one, this approach cannot touch the situation of most women, where the force of social inequality effectively precludes sex comparisons.[31]

For MacKinnon, the harm of sexual harassment is best understood as stemming from the social inequality of women and any attempts to redress it must include that understanding.

MacKinnon's theory is not only complicated, but also quite radical. It is perhaps the radical nature of her theory that prevents courts from fully adopting it. In addition, the Title VII formal equality structure prevents courts from adopting a theory based on inequality. Title VII requires that "likes be treated alike" but MacKinnon's inequality theory is based on women being socially "unlike" men.

B. *Disparate Treatment Theory: Sexual Harassment Is Sex Discrimination Because It Violates Formal Equality Principles*

Disparate treatment theory requires that similarly situated persons be treated similarly.[32] According to this theory, sexual

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29. *See id.*

30. *See* Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1296 (1991). For example, MacKinnon argues that at work, "most women do jobs that mostly women do. So long as the extremity of this segregation can implicitly be considered a sex difference – whether caused by God, the nature of things, history, the market, Congress, or what women are 'interested in' – sex equality law will not be stymied in ending it." *Id.*

31. *See id.*

32. By the logic of the differences argument, if a sexual condition of employment were imposed equally upon both women and men by the same employer, the practice would no longer constitute sex discrimination because it would not be properly based on the gender difference . . . with differences doctrine in its current posture, a sexual condition that disadvantages both sexes, not one, is probably not sex

harassment is discrimination because a man in a woman's position would not be treated the same way.[33] As a practice, sexual harassment singles out women as a gender-defined group for special treatment in a way that adversely affects and burdens their status as employees.[34] Sexual harassment limits women in a way that men are not limited. It deprives women of opportunities that are available to male employees without sexual conditions. In so doing, it creates two employment standards: one for women that includes sexual requirements, and one for men that does not.[35]

Because sexual harassment causes arbitrary differentiation between men and women in the workplace, such that men are not placed in comparable positions to women when they are comparably situated, sexual harassment violates equal treatment.[36] Understood this way, sexual harassment amounts to disparate treatment of women based on their gender and thus violates the equality principle that underlies Title VII.[37]

Although MacKinnon prefers to highlight the harm of sexual harassment under the inequality approach, she recognizes that courts and legislatures generally do not adopt this approach and only apply antidiscrimination laws under the disparate treatment approach.[38] MacKinnon concedes that disparate treatment is not the best approach, but in an attempt to use the existing laws to recognize harms to women, MacKinnon formulated a theory that sexual harassment can also be considered sex discrimination under disparate treatment.[39]

Ultimately, MacKinnon is aware that the "based on sex" requirement is problematic and perceives it as a nuisance, rather than a necessary component to a successful sexual harassment

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> discrimination — it is merely exploitative, oppressive, and an abuse of power. To draw this conclusion does not, as some of the sexual harassment cases have concluded, undercut the major argument. It properly creates an affirmative defense. This "bisexual defense," where applicable, should be pleaded and factually proven, not stated coyly, left for guesswork, or raised as a matter of law.

MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 14, at 203.

33. *See id.*

34. *See id.*

35. *See id.* at 192.

36. *See id.* at 193.

37. *See id.* at 192–206.

38. *See id.* at 126–27.

39. *See id.*

claim. On the issue of the "based on sex" requirement, MacKinnon states:

> Most women who have experienced sexual harassment know that it was done to them, in some sense, as women. Considerations the law requires for determining whether their treatment was based on their sex look like formalistic barriers to recognizing the obvious. Equally apparent to most sexually harassed women is that employers could rectify their situation but instead wink at it, which means that they let it happen. To the victims, employer liability comes down to holding responsible for women's situation the people with the power over it. Whenever an employment requirement, such as engaging in sexual relations as the price of a job, is fixed upon one gender that would not, under the totality of the circumstances, be fixed upon the other, the condition is seen as based on sex.[40]

Under this approach, when women are sexually harassed by men it is "because of sex" because in the totality of the circumstances women are harassed and men are not.[41] MacKinnon's disparate treatment approach is not very different from her inequality approach. This is not surprising because MacKinnon does not believe that the disparate treatment approach can adequately address women's subordination. She attempts to fit her subordination approach into a claim for disparate treatment. Underlying MacKinnon's disparate treatment claim is the notion that women are vulnerable to harassment and are socially more likely to be harassed. Therefore, when women are harassed, there need not be an inquiry into whether or not it is "because of sex." The fact that it occurred to a woman makes it based on sex.

Given that the women's movement was just beginning in the 1970s and the public's consciousness of the harms done to women was not well established, it is not difficult to understand how MacKinnon's theory could be misunderstood or misapplied. Looking back on history, in order to ensure principled outcomes and a clear understanding of the harms of sexual harassment, feminists could have fought for a separate statute dealing with sexual harassment. Given the political climate at the time, however, it would have been next to impossible to pass such a statute. Instead, feminists argued for the next best thing; they tried to convince courts that sexual harassment should be cognizable under a traditional disparate treatment Title VII claim. Although women have successfully brought sexual harassment

40. *Id.* at 57–58.
41. *Id.*

claims under Title VII for the last twenty-three years, significant flaws in the doctrinal development have been revealed. The courts did not fully adopt either of the two theories advanced by early feminists, although assumptions about women's position in society are evident in the doctrine developed by the courts.

III. JUDICIAL RECOGNITION OF SEXUAL HARASSMENT

In 1976, the argument that sexual harassment violated Title VII was finally accepted by a court.[42] Ten years later, the Supreme Court first heard a sexual harassment case and held that despite the lack of legislative history regarding sex, the plain meaning of Title VII, and the intent of Congress to "strike at the entire spectrum of disparate treatment of men and women" gave rise to a cognizable cause of action for sexual harassment.[43] After this Supreme Court holding, there was no question that plaintiffs would have a cause of action for sexual harassment in federal court.

It was not clear, however, on which theory a sexual harassment claim was based. In order to fit sexual harassment into a Title VII claim, courts purported to use a disparate treatment approach. Courts were likely persuaded by the feminist argument that sexual harassment is a serious social problem and should be protected by Title VII, but courts were confined to recognizing sexual harassment as a traditional disparate treatment claim. Although original feminist theory argued that sexual harassment was discriminatory because it disproportionately affected women and perpetuated women's subordination, courts immediately converted this to a "but for" test. The "but for" test became a test based on sexual desire.

A. *Opposite-Sex Harassment*

The majority of sexual harassment cases involve claims by women who allege that they were harassed by men. The first federal case to recognize sexual harassment as a form of sex discrimination, *Williams v. Saxbe*,[44] held that when a rule, regulation, practice, or policy is applied on the basis of gender it is alone sufficient for a finding of sex discrimination.[45] The court rea-

42. *See* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

43. Meritor Savings Bank, FSB v. Vinson 477 U.S. 57, 64 (1986).

44. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

45. In *Williams*, the female plaintiff was fired because she did not give in to the sexual demands of her male supervisor. *See id.* The court held that the retaliatory

soned that "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."[46]

The court analogized sexual harassment to *Phillips v. Martin Marietta,*[47] where it held that a policy allowing the hiring of men with preschool aged children, but not women with preschool aged children for the same position, was sex discrimination. In *Martin Marietta,* a specific policy was applied only to women, despite the fact that it could have also applied to men.[48] In the sexual harassment context, however, the *Williams* court apparently assumed that sexual harassment only applied to women. Under the court's analysis, if a man were harassed in the workplace, the policy would not be discriminatory.[49] The court made no inquiry into whether or not men were also harassed at the worksite. The court's reasoning parallels MacKinnon's theory that women are vulnerable to sexual harassment and men are not. The court assumes that only women are harassed because of their social position. The court then goes on to explain that the existence of sexual desire proves the behavior was "because of sex."[50] This first case illustrates how disparate treatment was determined by sexual desire with underlying inequality theory and not by the *Martin Marietta* different rule test.

In a similar case, *Barnes v. Costle,*[51] the Appeals Court for the District of Columbia reversed the lower court's decision that a termination based on a refusal to submit to sexual demands does not constitute sex discrimination. The appeals court stated,

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actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the parameters of Title VII. *See id.*

46. *Id.* at 657–58.

47. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

48. *See id.* at 543.

49. The court adds in a footnote,

> It is also notable that since the statute prohibits discrimination against men as well as women, a finding of discrimination could be made where a female supervisor imposed the criteria of the instant case upon only the male employees in her office. So could a finding of discrimination be made if the supervisor were a homosexual. And, the fact that a finding of discrimination could not be made if the supervisor were a bisexual and applied this criteria to both genders should not lead to a conclusion that sex discrimination could not occur in other situations outlined above.

Williams v. Saxbe, 413 F. Supp. 654, 659 n.6 (1976).

50. *Id.*

51. Barnes v. Costle, 561 F.2d 983, 994–95 (D.C. Cir. 1977).

"It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job."[52] The court used a similar disparate treatment approach to that used in *Williams* and argued that "but for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited."[53] The court relies on the fact that the supervisor was sexually attracted to the plaintiff to prove that the action was "because of sex:" "she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job."[54]

These early cases concluding that sexual harassment was "because of sex" when based on sexual desire led courts to assume that the behavior was "because of sex" for opposite-sex harassment.[55] In *Henson v. City of Dundee*[56] the court stated:

> In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will there-

52. *Id.* at 989–90.

53. *Id.* at 990. Similarly, in *Heelan v. Johns-Manville Corp.,* the court found sexual harassment to be sex discrimination relying on an emerging body of law of "recent vintage" that recognized that sexual harassment of female employees is gender based discrimination which can violate Title VII. The court states that all three requirements were met and in a footnote notes that evidence indicates that no sexual advances against male employees were made. This, according to the court, satisfies the third requirement, which in modern language is the "because of sex" requirement. Only if one gender is harassed does sexual harassment amount to sex discrimination. Conditions of employment must be imposed on one gender and not the other. *Heelan* shows how some courts early on analyzed "based on sex" to concern only the harasser and victim. The court apparently looks at whether the particular harassing supervisor made sexual advances to men as well. But presumably, if a man is harassed by someone (not necessarily that particular supervisor), then the employer is not condoning a practice that only affects one gender negatively, both genders are affected. Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (1978). *See also* Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784, 54 EP Cases 101, 107 (1st Cir. 1990) (stating that because supervisor did not make sexual advances to male employees, "there can be no question that, but for the fact that Chamberlin is female, she would not have been subjected to sexual harassment").

54. *Barnes*, 561 F.2d at 990.

55. Where sexual harassment is alleged as a result of sexual conduct that involves a male perpetrator and female victim, courts tend to presume that the conduct is "because of" the victim's sex. *See, e.g.,* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992); Jones v. Flagship Int'l., 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990); Stewart v. Weis Mkts, Inc., 890 F. Supp. 382, 390 (M.D. Pa. 1995).

56. 682 F.2d 897, 904 (11th 1982).

> fore be a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment. However, there may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII.[57]

Under this analysis it is the harasser's sexual desire for the victim that proves the conduct was "because of sex." The Supreme Court, in *Meritor Savings Bank v. Vinson*,[58] considering sexual harassment for the first time, did nothing to question the sexual-desire paradigm that had developed in the courts. The Court stated, "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, the supervisor discriminates on the basis of sex."[59]

The Supreme Court, most recently in *Oncale*, confirmed that the "because of sex" requirement is assumed to be satisfied when the harasser and harassee are of the opposite-sex:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same-sex.[60]

The treatise *Sexual Harassment in Employment Law* draws the same conclusion.[61] In a section describing why sexual harassment is sex discrimination, the treatise states:

> An analogy illustrates how easily the quid pro quo case fits within traditional notions of intentional disparate treatment. Suppose that in addition to normal duties of the job, female clerks — but not male clerks — are required to take the boss' children to school, pick up his laundry, balance his checkbook, and do his grocery shopping. There is nothing inherently im-

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57. *Id.* The essence of a disparate treatment claim under Title VII is that an employee or applicant is intentionally singled out for adverse treatment on the basis of a prohibited criterion, namely sex. In proving a claim for hostile work environment harassment due to sexual harassment the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.

58. Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986).

59. *Id.*

60. Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1002 (1998).

61. SEXUAL HARASSMENT IN EMPLOYMENT LAW (Barbara Lindemann & David D. Kadue eds., 1992).

> proper about hiring an employee, male or female, to perform these tasks, even though they are admittedly personal in nature. When, however, they are assigned on the basis of sex, Title VII is violated . . . .
>
> The analysis is exactly the same where the personal tasks are sexual in nature, except that it would be superfluous to require proof that the assignment had been made on the basis of sex, because only a woman can perform sexual tasks for a heterosexual man. Harassment of men by heterosexual women stands on the same footing. So too does homosexual harassment. Only in the case of harassment by a bisexual supervisor is there a theoretical absence of disparate treatment.[62]

The treatise also assumes that only women are harassed and therefore harassment is assigned on the basis of sex, but then goes on to assert that "because of sex" is based on sexual desire.[63]

Many theorists have criticized the sexual desire paradigm developed by the courts, but it was not until same-sex harassment cases developed that serious flaws were revealed. The assumption that a man harasses a woman because of sex was an "evidentiary shortcut" for courts to try and fit sexual harassment into a disparate treatment claim.[64] The assumption was not challenged because women benefited and it was women who were thought to be harmed by sexual harassment. But, the sexual desire paradigm is markedly different than the original feminist theory and it proves inadequate to deal with same-sex harassment. Most importantly, sexual desire is a conceptually flawed way to articulate why sexual harassment is sex discrimination.

As Katherine Franke states:

> To regard sexual harassment as a form of sex discrimination because the harasser would not have undertaken the conduct "but for" the sex of the victim is to understand the harasser to have engaged in sexual harassment primarily because he finds the target physically attractive, would like to have sex with him or her, and/or derives libidinous pleasure from sexualizing their otherwise professional relationship.[65]

Women are vulnerable to sexual harassment for many reasons — not just because men express their sexual desire at the workplace. Women are harassed because they hold jobs in a traditionally male workforce and are unwanted; women are harassed

62. *Id.*

63. *Id.*

64. *See* Franke, *supra* note 4, at 732.

65. *Id.* at 732.

because they are viewed as sexual objects, whether or not the harasser wants to have sex; women are harassed because male norms predominate in the workplace; and also because men have sexual desire for women.

To conclude that harassment only takes place because of sexual desire is to misconstrue the meaning of sexual harassment. It does not adequately account for why sexual harassment is sex discrimination and produces unprincipled and contradictory outcomes in same-sex harassment cases. Although courts assume sexual harassment is "based on sex" in opposite-sex cases, courts do not make the same assumption for same-sex cases. Instead, courts have struggled with why same-sex harassment would be discriminatory.

B. *Same-Sex Harassment*

Courts found it easy to satisfy the "based on sex" requirement for opposite-sex cases, but found it difficult to decide what is "based on sex" for same-sex harassment.[66] Same-sex harassment cases revealed the flaw in using the sexual desire assumption to determine whether or not the conduct was discriminatory and, most importantly, revealed that courts lacked a basic conceptual notion of why sexual harassment was sex discrimination.

A majority of courts use sexual desire analysis developed from the opposite-sex harassment cases to determine if same-sex harassment is actionable.

1. Sexual Desire or Attraction

In *Joyner v. AAA Cooper Transportation*,[67] the Alabama District Court considered whether a male could succeed on a sexual harassment claim when harassed by another male. The plaintiff, Joyner, alleged quid pro quo harassment based on the fact that he repeatedly received homosexual advances from his supervisor, and when he declined the advances he was laid off and not

66. The first case to directly consider same-sex harassment appeared in 1981. *See* Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (holding that unwelcome sexual advances of a male homosexual supervisor toward a male employee are actionable as sexual harassment under Title VII). The majority of cases, however, concerning same-sex harassment have arisen since 1994. *See* Katherine H. Flynn, Note, *Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title VII,* 13 GA. ST. U. L. REV. 1099, 1100 n.10 (1997).

67. Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983).

hired back.[68] The court stated with no analysis at all: "Unquestionably, plaintiff satisfied the first three elements; viz., he was male, he was subjected to unwelcome sexual harassment and since the evidence established the manager's homosexual proclivities, the harassment to which plaintiff complained was based upon sex."[69] The court assumes in this statement that because the defendant had sexual desire for the plaintiff, the action was "based upon sex." Had the plaintiff been another sex, according to the court, he would not have been harassed.[70]

Similarly, in *Wrighten v. Pizza Hut*,[71] the plaintiff was a sixteen-year-old heterosexual male employed at Pizza Hut. His immediate supervisor, who was gay, made sexual advances, graphically described homosexual sex, embarrassed and humiliated Wrightson, and repeatedly touched him in sexually provocative ways. The court held that because the perpetrator was homosexual, the behavior states a Title VII claim.[72] The supervisor only harassed men because he was homosexual and, therefore, he treats members of one sex differently from members of the other sex.[73] The court stated that "[a]s a matter both of textual interpretation and simple logic, an employer of either sex can discriminate against his or her employees of the same-sex because of their sex, just as he or she may discriminate against employees of the opposite-sex because of their sex."[74] The important factor for the court is that the harasser in same-sex cases must be homosexual for a claim to succeed.[75]

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68. *See id.* at 539–40.

69. *Id.* at 542.

70. *See also* Yeary v. Goodwill Indus., 107 F.3d 443, 448 (6th Cir. 1997) (holding harassment by a gay male coworker against a straight male was harassment "because of sex" because, "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 . . . . "); Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495 (E.D. Va. 1996) (holding that the male plaintiff established a claim for same-sex sexual harassment because the facts made it clear that the defendant was a homosexual man); Schoiber v. Emro Mktg. Co., 941 F. Supp. 730, 738–39 (N.D. Ill. 1996) ; Shermer v. Illinois Dep't of Transp., 937 F. Supp. 781, 784–85 (C.D. Ill. 1996); Gibson v. Tanks Inc., 930 F. Supp. 1107, 1109 (M.D.N.C. 1996).

71. Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996).

72. *See id.* at 143.

73. *See id.*

74. *Id.* at 142.

75. *See also* McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996). The fact that homosexuality is crucial to the Fourth Circuit in same-sex cases is illustrated in *McWilliams v. Fairfax*. In *McWilliams*, the plaintiff endured constant harassment, including workers exposing themselves to him, placing a

Not all courts were willing to use the "sexual desire" paradigm to determine liability in same-sex cases. Some courts seemed to acknowledge that sexual desire was used as a procedural shortcut to provide a remedy to women, but could not be applied in same-sex harassment cases. Accordingly, these courts argue that the inconsistent outcomes produced by the sexual desire test requires courts to simply determine whether or not the harassment was sexual in nature.

2. Sexual Nature

The Seventh Circuit in *Doe & Doe v. City of Belleville*,[76] does not agree that the "based on sex" requirement should be determined by the sexual desire of the harasser. In *Doe*, the

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condom in his food, physical assaults such as tying his hands together, blind folding him, forcing him to his knees and placing a finger, in his mouth to simulate an oral sexual act. On one occasion, a coworker placed a broom to McWilliams anus while another exposed his genitals. On another occasion, a worker entered a bus in which McWilliams was working and fondled him. *See id.* at 1193. The court held that McWilliams' hostile environment claim was not valid under Title VII because both the alleged harasser and the victim are heterosexuals of the same-sex and, therefore, the conduct could not be "because of sex." *Id.* at 1196. The court stated that no claim was made that any of the individuals were homosexual. The court elaborated on the requirement that the harasser be homosexual and respondes to the dissenting opinion which argued that the fact of homosexuality should be inferable "from the nature of some of the harassing conduct, or consider it unnecessary to prove homosexuality-in-fact, homosexual innuendo being sufficient." *Id.* at 1195 n.5. The Court continued:

> [W]e believe that were Title VII to be so interpreted, the fact of homosexuality (to include bisexuality) should be considered an essential element of the claim, to be alleged and proved . . . . The (ordinarily different) sexes of the relevant actors always has been an essential element of either form of Title VII sexual harassment claims. If such claims were to reach past different-sex to same-sex situations where homosexuality of one or the other or both of the actors is involved, that added fact would seem equally essential to the statement and proof of such a claim.

Id.

Likewise, cases where the harasser is heterosexual and the victim is homosexual cannot be discrimination under this model because the harasser must be motivated by something other than sexual desire. If the victim is found to be harassed because he is a homosexual, a Title VII claim does not lie. *See* DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 329 (9th Cir. 1979) (finding that homosexual employees do not have a Title VII claim because of their homosexuality because Congress had only traditional sex in mind, thus Title VII does not extend to discrimination on the basis of sexual orientation). *See also* Dillon v. Frank, 952 F.2d 403, 58 Empl. Prac. Dec. (CCH) 332 (6th Cir. 1992) (finding that homosexuality is not an impermissible criteria on which to discriminate with regard to terms and conditions of employment).

76. Doe & Doe v. City of Belleville, 119 F.3d 563, 576 (7th Cir. 1996).

plaintiffs were two heterosexual twins employed for a summer by the City of Belleville. The twins alleged that they were subjected to repeated sexual remarks, gestures, and grabbing by other heterosexual males and were forced to leave the job because the behavior was so unbearable.[77] The Seventh Circuit does not see a reason why the twins must prove that the harassment was based on their gender. The court states:

> A woman employed in a male-dominated workplace with an antipathy toward female workers might find her tools constantly missing, her locker broken into, and her work sabotaged, for example, as part of a campaign of harassment motivated by her gender yet devoid of sexual innuendo and contact. In such a case, the plaintiff necessarily must show differential treatment of men and women, or an animus to her own gender, in view of the fact that the harassment itself does not suggest a nexus to the plaintiff's gender. It is not clear why such proof is needed when the harassment has explicit sexual overtones, however. Arguably, the content of that harassment in and of itself demonstrates the nexus to the plaintiff's gender that Title VII requires.[78]

For the Seventh Circuit the main issue in sexual harassment cases is not whether the employer harassed the employee on the basis of her gender, but whether the claimed harassment affected the terms, conditions, or privileges of the plaintiff's employment, as Title VII uses those words.[79] The court in *Doe* agrees that "sexual harassment traditionally has been explained as sex discrimination by pointing out that the harassed plaintiff is subjected to treatment that members of the other gender are not."[80] Even though the court acknowledges this purpose of Title VII, it

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77. *See id.* at 566–67.

78. *Id.* at 575–76; *See also* Andrews v. City of Philadelphia, 895 F.2d 1482 (3d Cir. 1990) ("[T]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course."); Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) ("Sexual harassment is ordinarily based on sex. What else could it be based on?").

79. *See Doe*, 119 F.3d at 576.

80. *Id.* at 577. The court agrees that the historic imbalance of power between men and women in the workplace offers a very compelling reason why the sexual harassment of a woman by a male superior or coworker should be understood as sex discrimination, it does not agree that Title VII excludes from its purview men who are sexually harassed by other men. "The language of Title VII . . . does not purport to limit who may bring suit based on sex of either the harasser or the person harassed." *Id.* at 572. *See also* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) ("The critical issue, Title VII text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

questions whether it is appropriate to view sexual harassment as sex discrimination only when the plaintiff is able to show that she was harassed because she is a woman rather than a man, or vice versa. The court states:

> The problematic nature of the notion that sexual harassment is actionable only when the harasser is sexually oriented to the victim's gender becomes even more apparent when one considers the disparate results that follow. It suggests, for example, that if the harasser is bisexual, there could be no liability, for the bisexual person does not "discriminate" – he is sexually oriented toward both sexes, and therefore both men and women might fall prey to sexual harassment in the form of unwelcome sexual advances. It also suggests that a man who makes a habit of harassing female co-workers might insulate his employer from liability by occasionally harassing a male worker sexually, even if he preferred to harass women . . . .[81]

The *Doe* court points out the problems with fitting sexual harassment theory into a disparate theory framework. It does seem absurd to allow a woman to sue for sexual harassment when harassed by a heterosexual male, but not when harassed by a bisexual male.

Other circuits not satisfied with the sexual desire or sexual nature test require plaintiffs to prove the harassment stemmed from an imbalance of power.

3. Anti-Male or Anti-Female Environment

Some courts hold that sexual harassment is not discrimination "based on sex" unless the abuse stems from an imbalance of power, such as a person in a powerful position exploiting an unwilling, less powerful person by imposing sexual demands or pressures on that individual.[82] For example, in *Goluszek v. Smith*,[83] the plaintiff was a male employee who had neither married, nor lived anywhere but his mother's home. Goluszek's coworkers routinely asked him if he had ever engaged in oral sex, "showed him pictures of nude women," "poked him in the buttocks with a stick," "accused him of being gay or bisexual, and made other sex-related comments."[84] The court held that Goluszek had no sexual harassment claim because "the discrimination that Congress was concerned about when it enacted Title VII is

81. *Doe*, 119 F.3d at 589–90.

82. *See* Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

83. 697 F.Supp. 1452 (N.D. Ill. 1988).

84. *Id.* at 1453–54.

one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."[85] Because Goluszek was a male in an all-male environment he could not have worked in an environment that singled out males as inferior.[86]

Requiring an anti-male or anti-female environment is most closely linked to MacKinnon's inequality approach to sexual harassment. The discriminatory harm of the behavior lies in the fact that the individual belongs to a group that is subordinated. This theory is vastly different than a traditional discrimination claim that is only concerned with whether one group was treated different from another, not whether he or she is a member of a subordinated group.

Still other courts are only willing to allow a sexual harassment claim if disparate treatment can be shown. While disparate treatment is assumed when women are harassed, it is not assumed when men are harassed. Unfortunately, these courts do not offer any way for plaintiffs to prove disparate treatment.

4. Traditional Disparate Treatment

Some courts attempt to follow the early court rulings on sexual harassment and adhere to Title VII requirements by following the disparate treatment approach — whether one gender was treated differently then another. For example, in *Quick v. Donaldson*[87] the plaintiff alleged that he was sexually harassed by male coworkers who repeatedly grabbed his groin area in a practice known as "bagging."[88] The district court dismissed the employee's claim finding that the purpose of Title VII was to provide a level playing field for members of disadvantaged groups.[89] Because the employee was male in a predominantly

85. *Id.* at 1456.

86. *See id.* In another case, *Garcia v. Elf Atochem North American*, a male employee filed suit against his employer and alleged that he was sexually harassed by a male plant foreman, who was a supervisor, but not the plaintiff's supervisor. The plaintiff asserted that the plant foreman had on several occasions approached the plaintiff from behind, grabbed his crotch area, and made sexual motions. *See* Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994). The Fifth Circuit dismissed the plaintiff's hostile environment claim on the ground that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Id.* at 451–52.

87. 90 F.3d 1372 (8th Cir. 1996).

88. *Id.* at 1374.

89. *See id.* at 1378.

male environment, the district court reasoned, he was not protected by Title VII. On appeal, the Eighth Circuit reversed — rejecting the "power" rationale. The court ruled that the proper test is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. The court held that the motive behind the discrimination is not at issue because an employer could never have a legitimate reason for creating or permitting a hostile work environment.[90]

IV. Reconceptualization of Sexual Harassment as Sex Discrimination Under Title VII

Feminists have responded to the conflict in sexual harassment law by asserting new theories by which sexual harassment can be considered sex discrimination. Although these theories are provocative, they do not take into account the difficulties courts have understanding and adjudicating even the basic notions of discriminatory sexual harassment.

A. *Sexual Harassment Is Discriminatory Because It Is Based on Male Domination*

MacKinnon's theories in the 1970s had a significant influence on courts' willingness to recognize sexual harassment. In her *amici curiae* brief submitted in *Oncale*, MacKinnon expanded her argument that sexual harassment is discriminatory because it is based on male domination. Her early writing focused on men's domination over women, but faced with same-sex harassment, she argues that "male dominance in society includes sexual dominance of some men over other men as well as over women."[91] MacKinnon argues that sexual abuse of men by men is a serious social problem of gender inequality. She extends her original theory that sexual harassment is discriminatory against women given the social context of women as subordinated to men, and argues that men are discriminated by sexual harassment because men are generally dominate and can dominate other men.[92]

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90. *See id.* at 1379.

91. *See* MacKinnon, *Amicus Brief in Oncale v. Sundowner Offshore Services, Inc.*, *supra* note 7, at 17.

92. *See id.*

According to MacKinnon, men are discriminated against based on their sex when sexually harassed by other men. They are targeted as men — usually as certain kinds of men — to be victimized through their masculinity, violated in their minds and bodies as individual members of their gender, as gender is socially defined.[93] MacKinnon agrees that Title VII, as interpreted over time, is aimed at rectifying sex-based power imbalances and stopping male abuse of power in the workplace. But, according to MacKinnon, some men abuse male power over other men as well as over women.[94]

According to MacKinnon, all sexual harassment whether metered out against women or against men is an expression of male domination, and as such is discriminatory. While MacKinnon's theory may be intriguing, it is very unlikely that courts, particularly the Supreme Court would adopt her theory in practice. Although courts were influenced by MacKinnon's early theory, they did not adopt her theory and have made it explicit that some kind of disparate treatment must be shown.[95] As such, MacKinnon's theory offers very little practical value to the sexual harassment debate.

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93. *See id.*

94. *See id.* at 6. MacKinnon argues against the analysis in cases like *Goluszek* which hold that male same-sex aggression is not gendered in the sense Title VII requires:

> Implicit is an insistence that men cannot be sexually dominated in their social status or roles as men. The denial that interactions among men can have a sexual component, and that sexual abuse of men is gendered, are twin features of the social ideology of male dominance with which amici are familiar as experts. In this ideology, men are seen as sexually invulnerable. This image protects men from much male sexual violence and naturalizes the sexual abuse of women, making it seem that women, biologically, are sexual victims. Denying that men can be sexually abused as men thus supports the gender hierarchy of men over women in society. The illusion is preserved that men are sexually inviolable, hence naturally superior, as the sexual abuse of men by men is kept invisible.

Id. at 11.

95. As discussed earlier, courts primarily held that disparate treatment was shown when it was proven that the harasser had a sexual desire for the victim. *See supra* Section II.B.

B. *Sexual Harassment Is Discriminatory Because It Is Based on Preserving Male Control and Entrenching Masculine Norms*

Kathryn Abrams, in her article, *The New Jurisprudence of Sexual Harassment*, argues that sexual harassment should be characterized as a "phenomenon that serves to preserve male control and entrench masculine norms in the workplace."[96] Abrams' account of sexual harassment seeks to recenter women's subordination, but yet seeks to avoid biologism and essentialism.[97] Abrams argues that one grand theory of sexual harassment cannot account for the fact that women's inequality is the product of many "intersecting motives, constructions and modes of treatment" that sexual harassment involves.[98] Sexual harassment is a plural phenomenon:

> There is harassment that secures the workplace as a site of male control versus harassment that secures it as a zone of either male comfort or masculine normative entrenchment. There is harassment that is directed at women as a group, harassment that is directed at individual women as representatives of a group, and harassment that is directed at men and women as individuals. There is sexual harassment that involves the expression of sexual desire, sexual harassment that involves sex but no sexual desire, and even sexual harassment that involves no sex.[99]

According to Abrams, sexual harassment functions to preserve male supremacy and reinforce masculine norms. In some cases, harassment preserves male control where women have entered predominately male fields and call male control into question.[100] For Abrams,

> [A] distinctive feature of these control oriented forms of sexual harassment is that they operate against women as a group. While the harassment may be directed at a particular target who suffers individual employment detriment, most harassment within this category treats individual women as representatives of their sex-based group.[101]

Like MacKinnon, Abrams centers her theory around women's subordination and male domination. While her theory is

96. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1172 (1998).

97. *See id.* at 1217.

98. *Id.*

99. *Id.* at 1215.

100. *See id.* at 1206.

101. *Id.* at 1208.

provocative, it also fails to provide practical guidance. Courts and particularly the Supreme Court have not adopted the "subordination" account of sexual harassment. While Abrams adds to the literature of why sexual harassment is sex discrimination in the theoretical sense, it has little practical significance.

C. *Sexual Harassment Is Discriminatory Because It Contributes to the Technology of Sexism*

Katherine Franke, in her article, *What's Wrong With Sexual Harassment?*, argues that feminist scholars and courts have advanced theories of sexual harassment that when pushed "provide indeterminate and unprincipled outcomes."[102] Professor Franke offers a different theory: "sexual harassment is a sexually discriminatory wrong because of the gender norms it reflects and perpetuates."[103] She argues that the discriminatory wrong of sexual harassment should be understood as a technology of sexism.[104] The sexism in sexual harassment lies in its power as a regulatory practice that feminizes women and masculinizes men. Sexual harassment renders women as sexual objects and men as sexual subjects.[105]

Franke critically analyzes what she considers to be the three theories offered by feminists and courts to advance a claim for sexual harassment: (1) it violates formal equality principles; (2) its sexism lies in the fact that the conduct is sexual; and (3) sexual harassment is an example of the subordination of women.[106] Franke critiques all three theories as being inadequate to conceptualize the harm of sexual harassment. She criticizes the theory that sexual harassment violates formal equality principles because it is inadequate to deal with cases of same-sex harassment.[107] She criticizes courts' inclination to use the shortcut of sexual desire to determine if the conduct occurred "but for" the

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102. *See* Franke, *supra* note 4, at 693.

103. *Id.*

104. "If a technology is a manner of accomplishing a task, or the specialized aspect of a particular field, then sexual harassment is both the manner of accomplishing sexist goals, and the specialized instantiation of a sexist ideology." *Id.*

105. For support, Franke notes that the Supreme Court has already held that when a person is subject to harassment because, in the eyes of the harasser, the target acts in ways inconsistent with the harasser's notion and construction of the target's gender, sex discrimination has taken place. *See id.* at 693, *citing* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

106. *See* Franke, *supra* note 4, at 693.

107. *See id.*

fact of plaintiff's sex.[108] Franke also criticizes the theory that sexual harassment is discriminatory because it is sexual in nature.[109] She argues that this theory inadequately explains why sexual harassment is discriminatory. Finally, Franke criticizes MacKinnon's theory in her early writings that sexual harassment is discriminatory because it is sexually subordinating. Franke argues that a theory based on the notion that sexual harassment is something men do to women is limited and narrow.[110] Ironically, Franke argues that MacKinnon's analysis "is either too complicated or too radical for most judges," but then asserts a theory built upon MacKinnon's analysis with a complicated twist.[111]

First, Franke believes it is both reasonable and efficient to draw the inference in the typical sexual harassment case where a man sexually harasses a woman that "sex discrimination is afoot."[112] When a man harasses a woman it is a "disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects."[113] Franke, however, fails to provide for a theory of why sexual harassment of a man by a woman would constitute sexual harassment. The same analysis that the behavior objectifies women and subjectifies men obviously does not apply. Courts will not let such an apparent hole go unnoticed. Even though Franke criticizes the theory that sexual harassment is something men do to women, by not acknowledging or providing a theory for women harassing men, Franke perpetuates that notion.

Second, although Franke criticizes MacKinnon, she ultimately argues that MacKinnon's subordination account of sexual harassment provides "better purchase on the nature of this problem and avenues for relief than do either the formal equality or sex-equals-sexism approaches."[114] Franke's theory draws upon MacKinnon's subordination theory and then expands it to include the idea that subordination can harm *men* as well as women. Franke fails to suggest why courts would be more willing to adopt, or, be able to understand her theory, if, as she poses,

108. *Id.*
109. *See id.* at 714–25.
110. *See id.* at 725–29.
111. *Id.* at 729, 760.
112. *Id.* at 692.
113. *Id.* at 693.
114. *Id.* at 762.

courts have been unable to understand MacKinnon. Indeed, as shown earlier, courts do not purport to apply the subordination approach to sexual harassment, but rather apply the "but for" disparate treatment approach.

Finally, Franke argues that her account of sexual harassment best explains why sexual harassment is discriminatory in same-sex cases, yet she admits that her theory fails to explain the majority of same-sex cases.[115] For example, in the case of gay quid pro quo harassment where the harasser is shown to be gay and his actual desire for the plaintiff is not challenged, "no larger cultural gender orthodoxy is being policed, perpetuated or enforced."[116] Franke views this behavior as a supervisor exploiting a position of power to satisfy his carnal desires. One might ask, however, how exactly is this case different from the case of a man harassing a woman? Wouldn't judges and juries be able to find that the man was simply exploiting his position of power in order to satisfy his carnal desires when harassing a woman?

When pushed Franke's theory has theoretical problems similar to the theories she criticizes. Without acknowledging it, Franke's theory continues to "assume" that when a woman is harassed "sexism is afoot." She argues that courts should not be allowed to make that assumption unless they have a conceptual understanding of why that behavior is discriminatory, yet she herself does not provide the answer.

V. PRAGMATIC APPROACH TO SEXUAL HARASSMENT

The above description of the doctrinal development of sexual harassment in the courts and the reconceptualization of why sexual harassment is discriminatory is clear evidence that a new approach to sexual harassment is greatly needed. Instead of asserting theoretically complex theories (which themselves have inconsistencies) feminists should advocate a pragmatic approach to sexual harassment. It should be acknowledged that sexual harassment fits uncomfortably in a system based on formal equality. Indisputably, sexual harassment was conceived as a harm done to women. However, providing a claim only available to women will open the claim to attack both under the Equal Protection Clause and under the theory of formal equality. It should also be

115. *See id.* at 766. "These cases raise that uncomfortable, yet inevitable, intellectual moment when grand theory fails to provide a unifying and totalizing approach to a problem." *Id.* at 767.

116. *Id.*

acknowledged that no *one* theory of sexual harassment can explain the numerous ways women, as well as men, are harmed by sexual harassment, even though all of the above theories have some truth to them.

The EEOC has provided us with a pragmatic approach.[117] In 1980 the Equal Employment Opportunity Commission issued guidelines which define sexual harassment as follows:

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's work performance or creating an intimidating, hostile, or offensive work environment.[118]

Although the guidelines are not binding on the courts, they do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.

Focusing on whether the conduct is sexual does not erase other gender discrimination claims that do not require sexual behavior. Other forms of behavior can raise the inference that employees were treated on the basis of sex. Pervasive sexual conduct should raise the inference on its own that gender was implicated.

This approach is supported by the case law. Time and time again courts hold that Title VII protects men as well as women. Applied neutrally, opponents will not be able to argue that sex harassment protects women and not men, or heterosexuals and not gays and lesbians. Most importantly, courts will not assume harassment is because of sex for women because of stereotypes about women's position in society and juries will not have the inenviable task of determining exactly what behavior "entrenches masculine norms," "contributes to the technology of sexism," or "is based on male domination."

A number of *amici* in *Oncale* also argued that sexual harassment should be considered discriminatory because of its sexual nature and because nothing more need be proved.[119] For exam-

117. When Congress established Title VII, it also established the Equal Employment Opportunity Commission (EEOC), an administrative agency, to serve as Title VII's governing body. Congress delegated to the EEOC the administration, interpretation, and enforcement of federal laws prohibiting workplace discrimination, which include Title VII. Court's treat the EEOC's position with great deference, although its position is not binding on the courts.

118. 29 C.F.R. Section 1604.11(a) (1980).

119. *See, e.g., Amici Curiae* Brief for Petitioner, *Oncale v. SundownerOffshore Services, Inc.*, 118 S. Ct. 998 (1998) (1997 WL 471805) (filed by Lambda Legal De-

ple, Lambda Legal Defense and Education Fund (Lambda) filed an *amicus* brief arguing that "whatever the sex of the harasser and the harassed employee, the principle that sexual conduct is per se related to the sex of the person or persons subjected to it is the gravaman of the sex discrimination inherent in sexual harassment."[120] According to Lambda, "gender is powerfully rooted in all sexual behavior, in the workplace as elsewhere."[121] Unwelcome sexual overtures can not be divorced from gender.

Lambda argues that Title VII's prohibitions clearly include a number of situations that are not dependent upon a showing that one group was disadvantaged and the other was not. For example, the use of gender stereotypes, even if both men and women are subjected to stereotypes about their sex, violates Title VII.[122]

Sexual behavior that is severe and pervasive in the workplace is sufficiently linked to gender to be a cause of action under Title VII. Requirements that plaintiffs prove the behavior was "because of sex" inevitably muddle the case law and produces inconsistent and unprincipled outcomes. Sexual behavior in the workplace disadvantages women, perpetuates stereotypes of both men and women, and prevents the realization of social equality.

VI. CONCLUSION

Sexual harassment as a cause of action under Title VII enjoys a large constituency of support. Whether the public at large or judges are aware of the flaws in recognizing sexual harassment as a disparate treatment claim, there is general agreement that sexual harassment is a cognizable claim under Title VII. Rather than argue for complicated, intricate theories of sexual harassment, feminists should advocate adoption of the neutral definition of sexual harassment promulgated by the EEOC. A remedy for sexual harassment has proven to be one of the most significant rights for women to achieve equality in the workplace. It is troubling that this important right has developed in a piecemeal

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fense and Education Fund; American Civil Liberties Union; People for the American Way; NOW Legal Defense and Education Fund; Women's Legal Defense Fund; Gay & Lesbian Advocates & Defenders; National Center for Lesbian Rights; National Women's Law Center; Connecticut Women's Education and Legal Fund, Inc.; Northwest Women's Law Center; and Bay Area Lawyers for Individual Freedom).

120. *Id.* at 4.

121. *Id.* at 5.

122. *See id.* at 9.

fashion in the judiciary. It is time for Congress to step in and give guidance to the courts on how best to adjudicate sexual harassment. There is no question that sexual harassment against women should be considered sex discrimination, and there are strong arguments for recognizing sexual harassment against men as discrimination as well. In order to provide a manageable, intelligible way for courts to adjudicate sexual harassment, Congress should amend Title VII and make explicit that conduct which is "severe," "pervasive," and "sexual" violates Title VII.