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Masculinities at Work

Inequality is systemic. As a system, it reproduces itself like a mythical monster: when you hack off its head, it grows two others.[1]

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[1] Liisa Rantalaiho, *Contextualising Gender*, *in* GENDERED PRACTICES IN WORKING LIFE 16, 20 (Liisa Rantalaiho & Tuula Heiskanen eds., 1997).

I

THE PERSISTENCE OF MEMORY

In Salvador Dali's famous painting, *The Persistence of Memory*,[2] clocks appear to melt away, a reminder of the passage of time, the distortion of memory, and the "dynamic stasis"[3] of life. Against a stark landscape, one of the molten clocks rests on a semi-formed, fetus-like creature. The undeveloped creature appears more fish-like than human, except for its long, apparently feminine, eyelashes. This surrealist painting serves as an apt metaphor for the relationship of women to work. While at least some women have made remarkable progress at work, the vast majority of women workers continue to lag significantly behind their male colleagues,[4] their careers as undeveloped and unchanged by time as Dali's watery creature. Since 1964 when Congress first enacted Title VII of the Civil Rights Act,[5] which banned employment discrimination based on sex, women have moved rapidly into management, law, medicine, and blue-collar positions previously reserved for men;[6] simultaneously, a large

[2] Salvador Dali, *The Persistence of Memory* (1931), The Museum of Modern Art, New York, *available at* http://moma.org/collection/depts/paint_sculpt/blowups/paint_sculpt_ 016.html (last visited Sept. 21, 2004). It is appropriate that Salvador Dali's work be used to represent the fluidity of gender. He himself was interested in gender. He painted himself as a little girl when he was a young child. *See* MAX GERARD, DALI. . . DALI. . . DALI. . . 37 (1974).

[3] In this article, I use the term "dynamic stasis" to convey the concept that conditions of women at work change (are dynamic) and simultaneously remain the same (static).

[4] *See* Judith Lorber, *Using Gender to Undo Gender: A Feminist Degendering Movement*, *in* 1 FEMINIST THEORY 79, 79-80 (Gabriele Griffin et al. eds., 2000).

[5] Title VII, in its relevant part, states:

> (a) It shall be an unlawful employment practice for an employer –
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

[6] In 1962, 43% of women between the ages of twenty-five and fifty-four were in the paid workforce. That number rose to approximately 74% in 1990. In 1990, 75% of mothers with school-age children were in the labor force and 58% of mothers of pre-school aged children were either in the workforce or were looking for work. KATHLEEN GERSON, NO MAN'S LAND: MEN'S CHANGING COMMITMENTS TO FAMILY AND WORK 4 (1993).

majority of women work in segregated jobs,[7] earning much lower wages than men[8] and enduring persistent sexual harassment.

Time has changed women's opportunities at work while in many ways not changing other things at all; limitations on the ability of women to achieve equality stubbornly persist.[9] Like

[7] *See* William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759, 759, 761, 779 (1986) (noting that job segregation is the principal source of gender differences in labor market outcomes); *see also* JUDITH LORBER, PARADOXES OF GENDER 195-213 (1994) (demonstrating the extreme gender segregation in the paid U.S. workforce—60% to 70% of men or women workers would have to change occupations to reach equality—and how gender segregation causes the devaluation of work that women do); Naomi Cassirer & Barbara F. Reskin, *High Hopes: Organizational Position, Employment Experiences, and Women's and Men's Promotion Aspirations*, 27 WORK & OCCUPATIONS 438, 440 (2000) (citing strong empirical support for the propositions that "segregation concentrates the sexes in different and unequal jobs," that "[p]redominantly female jobs" have "shorter promotion ladders" than jobs occupied mostly by men, that "women are less likely than men to advance on the job," that "predominately female jobs tend toward the lower tiers of organizations," and that "women are less likely than men to supervise others").

[8] According to the most recent census data for full-time workers during 2002, women earned 77% of wages earned by men. Dr. Daniel H. Weinberg, U.S. Census Bureau Press Briefing on 2002 Income and Poverty Estimates (Sept. 26, 2003), *at* http://www.census.gov/hhes/income/income02/prs03asc.html (last visited Sept. 17, 2004); *see also* R. W. CONNELL, MASCULINITIES 226 (1995) (noting that men still make a median income that is 197% of women's median income); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 67-68 (2000) (documenting studies on lawyers, managers, and academics demonstrating that women are still dramatically under-represented in the upper echelons of male professions; for example, in 1990, women were nearly half of the recruits to prestigious law firms in New York, but men comprised 89% of the partners; median income of men ten years out of law school is 40% higher than that of women at the same position in their careers; in 1990, the top ranking partners in businesses on Wall Street were 99% male; only two women were CEOs of Fortune 1000 companies by 1994; in 1990, women one year out of top business schools earned 12% less than men who graduated with them, and this differential increased over time; in academia, women represented only 31% of full-time faculty in higher education in 1995 and held fewer than 15% of tenured academic posts; women are tenured at a rate of 42% and men at a rate of 72%); Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 579, 597-98 (2001) (noting the existence of a "sizable pay gap between men and women that is not likely to be eliminated in this generation," and suggesting that empirical research demonstrates that pay inequities are, at least in part, the result of unconscious discriminatory processes that favor men at work, rather than by rational markets).

[9] *See* David A. Cotter et al., *The Glass Ceiling Effect*, 80.2 SOC. FORCES 655, 669 (2001) (demonstrating through an empirical study that a "glass ceiling" does exist for women); *see also* David J. Maume, Jr., *Glass Ceilings and Glass Elevators: Occupational Segregation and Race and Sex Differences in Managerial Promotions*, 26 WORK & OCCUPATIONS 483 (1999) (finding in an empirical study that white men in female-dominated professions tend to get promoted out of the female-dominated jobs much faster than white women, black women or black men); Judith Newmark,

Dali's undeveloped creature, many women do not fully realize their potential or their expectations. The relatively few women who have succeeded in the marketplace have become symbols of the progress of women, a progress that is illusory to many of their peers.[10] By lending a false assurance that workplaces have abolished inequalities, these symbols powerfully impede further progress.[11]

There is no question that Title VII has opened doors to women of all colors in all walks of life, but the law has failed to accomplish equality for women at work.[12] Explanations for this failure range from the biological "natural" order of things[13] to "wo-

Women in Theater: Add It All Up, ST. LOUIS POST-DISPATCH, Oct. 12, 2003, at C3 (noting the difficulties women have in theater); *Some Things Better, Some Worse for Working Women, Survey Finds: Hourly Wage Nearly Equals That of Men, But Not Salary*, BALT. SUN, Oct. 1, 2003, at 1D (noting that women's hourly salaries are approaching those of men but that women earn an average yearly salary of $36,716 to men's $52,908); Anne Summers, *Glass Ceiling Needs A Bit Of Leverage*, SYDNEY MORNING HERALD, Oct. 13, 2003, at 13 (arguing that private industry's discrimination against women in Australia despite anti-discrimination laws accounts for the low rate of women executive managers—8.8% in Australia's top 200 companies).

[10] *See* Cotter, *supra* note 9, at 655. Simultaneously, some men have attempted to enter the private realm of women, staying at home with their children while the children's mothers go to work. These men find it difficult to justify their choices to prospective employers. *See* Kemba J. Dunham, *Stay-at-Home Dads Fight Stigma*, WALL ST. J., Aug. 26, 2003, at B1 (describing the skepticism and fear exhibited by male managers and personnel directors when interviewing stay-at-home-dads). Other men who are gay or perceived as effeminate suffer from sexual and gender-based harassment at work.

[11] For an interesting discussion of the success of white women which often results in subordination of others, see Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 257 (2002) (arguing that white women compensate for their powerlessness as women by using their privileged positions to subordinate others, reforming the systems that oppress white women).

[12] *See* CONNELL, *supra* note 8, at 226 (noting that in almost all nations in the world, men monopolize the most prestigious posts in government and business); *see also* Kris Maher, *Career Journal: Women in Medical Field Face Challenges Getting Top Jobs*, WALL ST. J., Oct. 21, 2003, at D6 (noting that while approximately half of the medical school graduates are women, only about 13% of full professors at medical schools are women, and 7% of medical school deans are women and that only 16% of corporate officers at the ten biggest U.S. pharmaceutical companies are women); LORBER, *supra* note 7, at 195-96 (demonstrating that even in women-dominated fields, white men dominate positions of authority, e.g., while elementary school teachers are predominantly women, principals and superintendents are predominantly men).

[13] *See, e.g.*, KINGSLEY R. BROWNE, BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY (2002); Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995) (arguing that biology accounts for differences in temperament and behavior

men's choice"[14] to the economic concept that women have invested less in their education and have therefore reaped less in their careers.[15] These explanations, however, are incomplete and incorrect. While childbirth is natural, there is little biological evidence to account for men's domination at work, in politics, and at home.[16] While many women "choose" to forego careers to spend time with their children, these "choices" are often ordered by necessity, societal expectations, and lack of opportunities.[17]

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that result in the glass ceiling and the gender gap in wages) [hereinafter Browne, *Sex and Temperament*].

[14] *See* Browne, *Sex and Temperament*, *supra* note 13, at 1086-89 (attributing the glass ceiling and the gender gap to women's choices resulting from their biological differences in temperament from men, including women's unwillingness to take risks, and their less aggressive and competitive natures); Richard A. Epstein, *Liberty, Patriarchy and Feminism*, 1999 U. CHI. LEGAL F. 89, 106-11 (1999); *see also* EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 314 (7th Cir. 1988) (upholding the district court's decision that, by using generalized evidence of the differences between women's and men's job interests in sales positions, Sears had successfully rebutted the EEOC's statistical evidence of men and women's differential placement into, and wages earned in, commissioned and non-commissioned sales jobs).

[15] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 337 (4th ed. 1992). For a rebuttal of Gary Becker's human capital theory which presumes that women are more qualified to do housework and that women look for jobs that require them to expend less effort because they choose to do work for their families, see Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1894-98 (2000); *see also* Cassirer & Reskin, *supra* note 7, at 458 (demonstrating in an empirical study that women have lower promotion aspirations than men primarily because of segregation across organizations, with women in less favorable positions for promotion than men, and because of the unequal promotion histories experienced by women).

[16] *See* CONNELL, *supra* note 8, at 64. At best, the "evidence" is that there is a biological theory that supports the observed differences between women and men as a group. These differences describe men and boys as more competitive, aggressive, risk-taking, and interested in status, and women and girls as more empathic, risk-adverse, and nurturing. The biological behavioralists argue that these differences are consistent with the Darwinian theory that male animals protect their own genetic material, seeking to reproduce by distributing their sperm widely, while female animals, who invest considerable effort in gestation and birth of young, protect their genetic material by nurturing their young. *See* Browne, *Sex and Temperament*, *supra* note 13, at 985-1003, 1026-35. These observed differences are equally as compatible with a theory that gender is socially constructed or with a theory that a combination of biology and social influences create differences. Furthermore, the "evidence" supporting the biological basis of temperament and behavior does not permit a society that purports to believe in equality to ignore the difficulties that women encounter in an economic environment that is male-dominated, aggressive and competitive, controlled by men, and based on men's "biological strengths." CONNELL, *supra* note 8, at 64.

[17] *See* Schultz, *supra* note 15, at 1894-98; 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, 1811-12, 1816, 1821-28, 1832-33 (1990); Joan Williams, *From Difference to Dominance to Do-*

While some women have "chosen" lower education levels, even those with educations equal to those of men find it difficult to keep up with men at work.[18] Finally, while many women tolerate sexual harassment at work, few have "chosen" the harassing conditions, lower pay, and retaliation that continue to occur daily in workplaces.[19]

This Article focuses on the study of "masculinities," a body of theoretical and empirical work by sociologists, feminist theorists, and organization management theorists. This work, much of which employment law scholars have ignored,[20] studies the role of "masculinities," which are often invisible, in creating structural barriers to the advancement of many women and some men at work. Masculinities comprise both a structure that reinforces the superiority of men over women and a series of practices associated with masculine behavior, performed by men or women, that aid men in maintaining their superior position over women.[21] In

mesticity: Care as Work, Gender as Tradition, 76 CHI.-KENT L. REV. 1441, 1472-79 (2001) (demonstrating, through the work of Pierre Bourdieu's "reflexive sociology," that the concept of women's choice to become the marginalized caregiver is inaccurate: instead, our "choice" is constrained by structures such as institutional arrangements, perceptions, and identities); *see also* Cass R. Sunstein, *Introduction to* BEHAVIORAL LAW AND ECONOMICS 1 (Cass R. Sunstein ed., 2000) (noting that human preferences are constructed, not elicited from social situations).

[18] For an account of the persistence of inequality at work and home between women and men in Finland where the women have equal educations and experience and there exists an elaborate structure of social support for child care, see generally GENDERED PRACTICES IN WORKING LIFE (Liisa Rantalaiho & Tuula Heiskanen eds. 2000).

[19] *See* IRENE PADAVIC & BARBARA RESKIN, WOMEN AND MEN AT WORK 121-46, 149 (2d ed. 2002) (noting that women are paid less and suffer harassment and retaliation at work). In the 2002 fiscal year, the EEOC received 25,536 charges filed under Title VII alleging sex-based discrimination. *See* EEOC Sex-Based Discrimination Statistics, *available at* http://www.eeoc.gov/stats/sex.html (last modified Mar. 8, 2003).

[20] Mary Becker advocates looking at masculinities research to help build a substantive feminism, but does not specifically apply masculinities theory to employment discrimination. *See* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 24 (1999). Joan Howarth discusses capital punishment as an enactment of white masculinities. *See* Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183 (2002).

[21] I am aware that defining "masculinities" themselves is controversial because I risk the possibility of employing an essentialist definition. Furthermore, even in referring to "men" and "women" or to heterosexuals or homosexuals, I participate in the practice scorned by some gender and masculinities theorists of reinforcing the rigid bilateral nature of gender (male vs. female, heterosexual vs. homosexual) without giving sufficient pause to the concept that gender is fluid and changeable. *See generally* Judith Lorber, *Beyond the Binaries: Depolarizing the Categories of Sex,*

their less visible form, masculinities reinforce stereotypes of the proper role and behavior of women and men at work. Some of these practices include aggression, competitiveness, informal networking, and regarding women as sexual objects, caregivers, or "aggressive bitches."

Masculinities are not merely practices by individual actors. Rather, masculine identities and norms are associated with the very definition of work, the identity of certain jobs as feminine and masculine, and the value attributed to those jobs. These practices harm women at work, permitting powerful heterosexual white men to define what work is, while denying that the workplace is gendered.[22] Without an understanding of masculinities theory, the gendered structure at work is invisible to many, particularly those who benefit from it. Even if visible, it can be dismissed as the natural order.

In their more blatant form, masculinities include physical and verbal abuse of male victims who are homosexual, or otherwise do not conform to masculine stereotypes. The harm to gender non-conforming men is obvious: they are pushed, prodded, threatened, ridiculed, and even raped at work. Harm suffered by women as a result of the men's treatment is less visible but also real. The degradation of men occurs through taunts and practices that compare the male victims to women or that ascribe traits to the victims that are considered "feminine." This behavior, which assigns to women or the feminine the most humiliating characteristics, offends women's dignity. Moreover, by openly abusing men who do not conform to gender stereotypes, men police the social and gender order at work, reinforcing the definition of certain jobs as masculine and, thus, closed to gender non-conforming men and most women.[23] Even the women who

Sexuality and Gender, 66 SOC. INQUIRY 143 (1996). While I am mindful of these flaws, I am willing to risk this criticism in order to attempt to explain to an audience with interest in the law the basics of masculinities theory.

[22] *See* Patricia Yancey Martin, *"Said and Done" Versus "Saying and Doing": Gendering Practices, Practicing Gender at Work*, 17 GENDER & SOC'Y 342, 357 (2003).

[23] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776 (1998) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*]. Schultz argues in *The Sanitized Workplace* that institutional structures cause unequal treatment of women. Vicki Shultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) [hereinafter Schultz, *The Sanititized Workplace*]. The most salient of these structures is the segregation of women at work along both vertical and horizontal lines. Vertical segregation occurs when women are concentrated in jobs at the lowest rungs of the organization, typically with male supervisors. Horizontal segregation occurs where

adopt the masculine characteristics that are "necessary" for the job, as defined by the hegemonic masculinity[24] at work, are pun-

certain jobs are considered to be the exclusive or near-exclusive domain of men. In workplaces where vertical and/or horizontal segregation occur, women are more likely to be harassed by men who often, but not always, use sexuality as the means to harass. In horizontally segregated workplaces, when a woman enters the previously all-male position, men often sexually harass the woman in order to "shore up the masculine content and image of their jobs." *Id*. at 2140. Similar behavior occurs in all-male jobs when men who do not conform to gender norms—are viewed as effeminate or gay—are hired. In vertically segregated positions, Schultz argues that unlike the women in male-dominated jobs who are considered to be "out of place," the women who refuse to conform to stereotypically female behavior are often harassed. *Id*. at 2066.

Schultz notes that in vertically segregated settings:

> [M]ale bosses sometimes subject women to demands for sexual favors and other non-job-related services (such as serving food and cleaning up), to demeaning and abusive comments linked to their womanhood, and to paternalistic forms of control and authority that would not be imposed on men. In addition, employers often exploit women's sexuality by making it an instrument of managerial control or by building sexualized requirements directly into the job.

Id. at 2141-42; *see also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (arguing that the law should recognize and remedy the structures that cause discrimination).

[24] Multiple masculinities exist. Robert Connell defines "hegemonic masculinity" as the "masculinity that occupies the hegemonic position in a given pattern of gender relations." CONNELL, *supra* note 8, at 76. It is "the configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women." *Id*. at 77. The concept is historically mobile, will be challenged, will ebb and flow and new hegemonic masculinity will appear. *Id*. In other words, hegemonic masculinity is the masculinity that is accepted at a particular place at a particular time. *Id.*

Sociologist Stephen Whitehead notes that in common everyday usage, the term "masculine" means those characteristics pertaining to men. Stephen Whitehead, *Disrupted Selves: Resistence and Identity Work in the Managerial Arena*, 10 GENDER & EDUC. 199, 203 (1998). Whitehead calls it "something that men have." *Id*. But, Whitehead notes, a study of history and societies will demonstrate that what is considered masculine varies with the times, the geography, and the society. Because masculinities are ever changing and not fixed, Whitehead observes that one could argue that they really don't exist at all. Whitehead contends, however, that this conclusion would be a mistake because there is "more to masculinities than this . . . . [M]en's power, or at the very least their potential to have power over women and 'others', is substantially invested and accommodated within *dominant* notions and expressions of masculinity." *Id*.

Citing to other sociologists, Whitehead notes that there are three models of masculinities: hegemonic, subordinated, and conservative. *Id*. Hegemonic masculinities are the predominant, most acceptable, prevailing expressions of manliness in any given society at a given time. *Id*. The hegemonic character of this behavior would cause subordination and/or marginalization of other ways of being male—such as being gay. *Id*. This notion itself, however, may be too neat, too essentialist. *Id*. at

ished because they do not comport with the stereotypes traditionally attributed to women.[25] Finally, and perhaps most importantly, the abusive behavior toward gender non-conforming men reinforces the gendered institution of work, an institution that privileges heterosexual white men over women and homosexual men.[26] While these behaviors are very harmful to the victims, courts have been reluctant to recognize that they occur "because of sex." Consequently, much of this behavior escapes sanction by Title VII.

Part II briefly evaluates masculinities research, focusing particularly on evidence of masculinities in the workplace. Part III analyzes the law of sex stereotyping as sex discrimination and proposes pragmatic applications of masculinities theory to interpret Title VII's prohibition of sex discrimination in new ways. It interprets the U.S. Supreme Court's stereotyping doctrine, established in *Price Waterhouse v. Hopkins*,[27] to permit courts to admit expert evidence of masculinities theory to determine whether a person is subject to disparate treatment[28] at work; it also argues that masculinities will help a jury determine whether a hostile work environment[29] exists because of sex. The Article concludes

205. Individuals are constituted and identified through discourse which can be either dominant or subordinate. Masculinities, therefore, do not exist outside the social. The power men or women exert is only because of their taking part in dominant discourse. This view makes "masculinities" fragile. The power dynamics occur in times when change might occur. *Id*.

25 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (finding that an "aggressive" female employee was subject to sex stereotyping with suggestions for charm school, a soft-hued suit, or a new shade of lipstick in her evaluation as a candidate for partnership).

26 *See* Deborah Kerfoot & David Knights, *Managing Masculinity in Contemporary Organizational Life: A 'Man'agerial Project*, 5 ORG. 7 (1998). I do not suggest that sexuality is the only basis for hierarchies among men. Studies show that male hierarchies also exist on a number of physical traits such as tall vs. short and handsome vs. ugly, class traits such as rich vs. poor, and race—minority vs. majority.

27 *Price Waterhouse*, 490 U.S. at 256.

28 A plaintiff proves a case of disparate treatment by demonstrating that the defendant intentionally discriminated against the plaintiff because of his or her membership in a class protected by the anti-discrimination statutes (sex, race, color, religion, national origin, disability, or age). As used here, the term "disparate treatment" signals a case in which a plaintiff is denied a workplace benefit, such as hiring or promotion, or suffers an adverse job action, such as a discharge or demotion, because of his or her membership in the class. For a more nuanced description of disparate treatment, see *infra* Part III.A.

29 A plaintiff proves a hostile work environment case by demonstrating that he or she is harassed because of membership in a protected class (sex, race, color, national origin, religion, disability, or age). In a hostile work environment case, the plaintiff does not have to suffer the withholding of a benefit, such as promotion or hiring, or

that masculinities theory can further the courts' understanding of the gendered nature of work as an institution. If applied to disparate treatment and sexual, sex, and gender harassment cases,[30] masculinities theory will aid courts to break the dynamic stasis of women at work by interpreting cases consistent with the spirit and purpose of Title VII to grant all persons, whether women, men, or in between, equal rights to compete in the marketplace.

II

THEORETICAL AND EMPIRICAL EXPLANATIONS OF MASCULINITIES

A. Gender: Invisible Yet Pervasive

Prevailing popular thought sees gender as a fixed phenomenon deriving naturally from biological sex.[31] Many believe that there are two biological sexes, male and female,[32] whose anatomical features prescribe a person's gender. Persons who have the anatomical features of men are "male" or "masculine," whereas persons who have the anatomical features of women are "female" or "feminine." This binary view of gender focuses almost exclusively on the reproductive purposes of male and female bodies, considering males and females as complementary reproductive opposites who join together to propagate the race. According to this view, gender is fixed and derivative of our biological reproductive differences; it defines who we are, how we act, and what roles we play in society.[33] Sociobiologists support this view, see-

an adverse job action, such as discharge or demotion, in order to prove that a hostile work environment exists. If the harassment is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's work, as perceived both by the plaintiff and a reasonable person, a hostile work environment exists, and the plaintiff has a cause of action. For a more nuanced discussion of hostile work environment, see *infra* Part III.C.2.

[30] I use the terms "sexual, sex, or gender harassment" cases to refer to hostile work environment cases because of the victim's biological sex or failure to conform to gender norms. *See infra* Part III.C.2. The means by which this harassment is accomplished may or may not involve sexual behavior.

[31] For an example of this concept in the popular press, see Andrew Sullivan, *The He Hormone*, N.Y. TIMES, Apr. 2, 2000, at 46 (describing the rush of masculine and aggressive energy one gets when one is injected with testosterone).

[32] Connell notes that this view is shared by a wide spectrum ranging from Christian fundamentalists, to Jungian psychoanalysts, to the men's movement, and to even the "essentialist" school of feminism. CONNELL, *supra* note 8, at 45.

[33] This traditional view prevails in the courts' treatment of "sex" in Title VII. Often, courts use the terms "sex" and "gender" interchangeably. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 239-41 (1989). However, recently a few courts

ing the body as a machine that produces difference between the sexes.[34] This view leads to the conclusion that gender "differences" are natural, inevitable, and static.[35]

Masculinities theorists disagree.[36] These scholars see gender as complicated and negotiable. Gender is not a natural occurrence resulting from biology, but a socially constructed phenomenon.[37] Gender is an institution,[38] a social structure that is reinforced by a set of practices.[39] As a social structure, gender is

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have recognized that there may be a difference between gender and sex. *E.g*., Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that Title VII encompasses both sex *and* gender). Courts ordinarily do not distinguish the two.

[34] *See* CONNELL, *supra* note 8, at 48 (discussing the work of Edward Wilson, a well-known sociobiologist).

[35] Sociologist Judith Lorber argues that society has artificially constructed binary concepts of gender, male and female, heterosexual and homosexual. Lorber, *supra* note 21, at 144. Lorber contends that adopting these binary concepts reinforces the socially constructed polarity of normal and deviant groups, one dominant and one subordinate. *Id*. at 145. Lorber notes that there are many societies that recognize more than two genders. Some societies have a third gender called "berdaches or hijras or zaniths" who are biologically male but who are socially women. Some African and American Indian societies have a gender status called "manly hearted women" who are biological females but who fill the social role as men. *See* LORBER, *supra* note 7, at 17.

[36] *See, e.g.*, CONNELL, *supra* note 8, at 48-65. *See generally* David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER, WORK & ORG. 2 (1994); Kerfoot & Knights, *supra* note 26; Lorber, *supra* note 21. *See also* LORBER, *supra* note 7, at 1 ("I see gender as an institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, is built into the major social organizations of society, such as the economy, ideology, the family, and politics, and is also an entity in and of itself.").

[37] *See* Kerfoot & Knights, *supra* note 26, at 8; *see also* 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, 38-72 (1995) (demonstrating that historically society, medicine, and law erroneously conflate sex and gender).

[38] *See* Patricia Yancey Martin, Presidential Address to Southern Sociological Society, (Mar. 2003) (on file with the author).

[39] *See* Martin, *supra* note 22, at 344 (arguing that gender is an institution and that gender practices are an aspect of the institution); *see also* JUDITH BUTLER, BODIES THAT MATTER 230-31 (1993) (speaking of gender "performativity" to convey the notion that a person can "perform" gender; because gender springs from social concepts, rather than from biological imperatives, gender "performances" are "contestable" or changeable); Kerfoot & Knights, *supra* note 26, at 11; Candace West & Don H. Zimmerman, *Doing Gender*, *in* 1 GENDER & SOC'Y 125, 147 (1987) (describing gender as a "powerful ideological device, which produces, reproduces, and legitimates the choices and limits that are predicated on sex category").

In *Masculinities*, Connell criticizes the sociobiologists' predetermination theory, noting a lack of biological evidence and the existence of a great cross-cultural diversity in gender, a diversity that would not exist if biology predetermined our gender.

ever enduring but at the same time changeable.[40]

B. Masculinities at Work: Gender and Organizations

In organizations, gender interacts with other social structures such as class and race to determine who is dominant and who is subordinated, who is powerful and who is not.[41] Men are united

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For example, Connell notes that there are cultures where rape does not occur; in other cultures, homosexuality is a majority practice at least at particular stages in life. CONNELL, *supra* note 8, at 48.

Connell conceives of gender as an ordering of social practice based on reproductive capacity or processes of reproduction rather than on biology. This ordering includes sexual arousal, intercourse, childbirth, infant care, bodily sex difference and similarity. *Id*. at 71. The categories of male and female count only because society has decided they do. Connell states that gender exists to fill in the gaps that biology leaves open. *See id*. at 71-72.

Connell also disagrees with the social scientists who see the body merely as a "landscape" to be drawn on by society or who see gender as merely a perspective or a place from which one speaks. *Id*. at 51. Instead, Connell argues that while our gender is not biologically predetermined, and while gender is socially constructed, our bodies play a material role in this construction. *Id*. at 52. He argues that humans engage in "body-reflexive practices" that form, and are formed by, structures which have historical weight and solidity. *Id*. at 65. He focuses on the active, dynamic nature of gender as a set of practices that emerge from our bodies and social influences and at the same time create and influence other actions by other people. *Id. Cf.* BARBARA J. RISMAN, GENDER VERTIGO 22-24 (1998) (arguing that gender is a set of behaviors and reactions, and not only behaviors; it is also embedded in institutions and structures); *see also* LORBER, *supra* note 7, at 244-45 (describing face-to-face interactions that are "doing gender" with men "doing dominance," and women "doing deference").

[40] *See* RISMAN, *supra* note 39, at 6-7, 28-31, 34-44 (conceptualizing gender as a social structure).

[41] *See* Lorber, *supra* note 21, at 143-46 (arguing that categories of male, female, homosexual or heterosexual actually represent power rather than sex, sexuality, or gender, and determine which group will dominate and which group will be subordinate); *see also* Collinson & Hearn, *supra* note 36, at 10 (noting that a study of masculinities should focus on the asymmetrical power relations between men and women in employment and unpaid domestic work); Kerfoot & Knight, *supra* note 26, at 8, 9-10 ("[W]hat distinguishes masculine identities is the instrumental pursuit of the control of social relations.").

> [M]asculine power and feminine passivity reflect and reinforce identities that sustain and magnify many of the broader social and sexual inequalities in contemporary society. Management is one site where this sexual inequality is sustained through a dominant competitive masculinity that limits the potential for women and some men to participate fully in organizational life.

Id. at 10. *See generally* STEPHANIE WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996). Joan Williams argues, however, that gender is not only about power; it also is constitutive of our identities. Williams, *supra* note 17, at 1470-71.

by violence,[42] dominant sexuality, and social and economic privilege.[43] Masculinities and femininities are aspects of gender, consisting of multiple and changing gender practices that tend to reinforce the structural soundness of gender.[44]

Not all men practice masculinities, and some women do. Moreover, the occasions on which men and women practice masculinities vary with the individuals. Even though not all men practice masculinities and those who do, do so to varying degrees, men's collective power is maintained by the perpetuation of hegemonic forms of masculinities.[45] The majority of men gain from the hegemony[46] because they "benefit from the patriarchal

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[42] *See* CONNELL, *supra* note 8, at 83-84. Connell argues that men sustain their dominance by violence through intimidation of women, verbal abuse, physical attacks, rape, and murder. *Id*. at 83. Moreover, he holds that men who attack think they are justified; this justification or authorization comes from their ideology of supremacy. *Id*. They draw "gender boundaries" by exercising heterosexual violence against gays. *Id*. They also use violence to assert reactionary gender politics, such as killings of abortion doctors. *Id*. He proposes a theory of "crisis tendencies," which create an escalation in violence. *Id*. at 84. The theory is that when men feel that their authority is threatened, they respond with violence. Today, he argues, there are increasing threats to men's supremacy, ranging from the global movement toward emancipation of women to the growth of the number of women contributing to production and the pressure arising from the failure of women to gain equal pay to the growing acceptance of gay and lesbian couples in Western culture. *Id.*

Law professor Joan Howarth notes:

> Masculinities are formed by race and class, in part by competition between men as well as through separation from women and from "feminine" men, or homosexuals. These formations are urgent and unsettled, and often policed and defended through violence. Lawbreaking, victimhood, and our responses to them perform gender, creating men and women. Capital punishment is an important chapter in this story. . . .
>
> The death penalty makes a statement about the power of violence and the meaning of death. It is an expression of public policy and political will that attempts to make sense of violence by recreating it.

Howarth, *supra* note 20, at 192, 195 (citations omitted).

[43] *See* CONNELL, *supra* note 8, at 82; Collinson & Hearn, *supra* note 36, at 11.

[44] Joan Howarth states:

> [G]ender is neither simple nor static. It is complex and contingent; it can be lost. That is, some females are not seen as women just as some males are not understood to be real men. We cannot talk about gender without talking about race, class, age, and other qualities. The gender-blind version of formal gender equality, of course, sees none of those individual characteristics or any others beyond biological assignment as male or female.

Howarth, *supra* note 20, at 222 (citations omitted).

[45] *See* Collinson & Hearn, *supra* note 36, at 11.

[46] Collinson and Hearn note:

> [T]he failure to recognize the embeddedness, flexibility and dominance of these multiple masculinities within conventional power relations in organizations is a major reason for the ineffectiveness of many equality initia-

dividend, the advantage men in general gain from the overall subordination of women."[47]

> tives. The possibility of sabotage by men at various hierarchical levels (and sometimes women too) in the construction of many programmes, has only recently begun to be addressed. Buswell and Jenkins, for example, contend that equal opportunity programmes often become merely a vehicle for men managers 'to talk to other men' and to deny that gender inequalities continue to exist. Such programmes not only unite men, but also individualize and divide women, particularly between 'full-time achievers and the rest.'

Collinson & Hearn, *supra* note 36, at 11 (citations omitted) (quoting C. Buswell & S. Jenkins, Equal Opportunities Policies, Employment and Patriarchy, Paper Presented at the Labour Process Conference (Mar. 1993)).

Collinson and Hearn argue that a study of masculinities should concern both the discursive and the material. While it is necessary to avoid essentialist tendencies to categorize, "[a] phenomenological focus upon the accounts, meanings and gendered self-identities of employees themselves is . . . an important concern in the analysis of gender, women and men in employment." Collinson & Hearn, *supra* note 36, at 10. Besides this phenomenological focus, there should also be a focus on the asymmetrical power relations between men and women in employment and in unpaid domestic work.

Collinson and Hearn acknowledge that there is an unresolved tension between analyzing the dynamics of multiplicity and diversity and the analysis of men's structured domination. Masculinities are not fixed. They change according to time, culture and class. By the same token, a study cannot ignore that men as a group are dominant in almost all areas of working organizations. *Id*. at 11.

[47] CONNELL, *supra* note 8, at 79; *see also* Collinson & Hearn, *supra* note 36, at 11; Martin, *supra* note 22, at 343. Field research by Stephen Whitehead demonstrates that men have different needs and different ways of coping with hegemonic masculinities at work. Nonetheless, it seems that because of hegemonic masculinities men are better able to adjust to the ultracompetitive workplace. *See* Whitehead, *supra* note 24, at 200.

Connell notes:

> Men gain a dividend from patriarchy in terms of honour, prestige and the right to command. They also gain a material dividend. In the rich capitalist countries, men's average incomes are approximately *double* women's average incomes. (The more familiar comparisons, of wage rates for full-time employment, greatly understate gender differences in actual incomes.) Men are vastly more likely to control a major block of capital as chief executive of a major corporation, or as direct owner. For instance, of 55 US fortunes above $1 billion in 1992, only five were mainly in the hands of women—and all but one of those as a result of inheritance from men.

CONNELL, Masculinities, *supra* note 8, at 82. On average across all countries of the world, Connell notes, "men are ten times more likely than women to hold office as a member of parliament." Moreover, time studies show that in rich countries women and men work on average the same number of hours in a year. The only difference is whether the work is paid work or not. *Id*.; *see also* JENNIFER L. PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS 175-77 (1995).

Research demonstrates that men in predominately female jobs are promoted out of those positions much more quickly than women. *See* Cassirer & Reskin, *supra* note 7, at 453. Women who work in predominately female jobs often have men as their supervisors. *Id*. at 451; *see* Maume, *supra* note 9, at 501 (demonstrating that working in a female-dominated occupation enhances mobility for white men. Where

Research on masculinities and institutions demonstrates that "definitions of masculinity are deeply enmeshed in the history of institutions and of economic structures. Masculinity is not just an idea in the head, or a personal identity. It is . . . merged in organized social relations."[48]

Sociologist Patricia Yancey Martin[49] observes that workplaces are often bureaucratic institutions that are "fundamentally con-

after twelve years, 44% of white men in a female-dominated position will have been promoted out of the female-dominated position, only 17% of black men, 15% of white women, and 7% of black women will have received promotions out of the female-dominated job.) This ability of white men to be promoted out of the female-dominated jobs is known as the "glass escalator." *See id*.

[48] CONNELL, *supra* note 8, at 29. Connell supports this conclusion with numerous examples from a number of historical texts. *See id*. at 29-30.

Sociologist Stephen Whitehead agrees, stating that the discourses of managerialism are not gender-neutral. He notes that "under the particular condition of gender dynamics prevailing in most organisations, the discourses of masculinity speak not only a gendered language, but also privilege certain bodies—usually male." Whitehead, *supra* note 24, at 205. Whitehead also notes that the discourses of managerialism convey messages of gender authority and create a potential to "signify a particular gender validation." *Id*.

Sociological research demonstrates that business organizations also mold what is "masculine" depending on the needs of the business. "Economic circumstance and organizational structure enter into the making of masculinity at the most intimate level." CONNELL, *supra* note 8, at 36. For example, Connell notes, in factories and hard labor, the companies exhaust the worker's bodies. This is not a necessary condition of this type of work, he argues, but occurs because of the way in which the workplace is managed and controlled, given the economic pressure. *Id*.

Practices are not isolated individual acts, but are configured, according to Connell. When we talk of femininity or masculinity, we are talking about configurations of gender practice. *Id*. at 72. He states:

> The state, for instance, is a masculine institution. To say this is not to imply that the personalities of top male office-holders somehow seep through and stain the institution. It is to say something much stronger: that state organizational practices are structured in relation to the reproductive arena. The overwhelming majority of top office-holders are men because there is a gender configuring of recruitment and promotion, a gender configuring of the internal division of labour and systems of control, a gender configuring of policymaking, practical routines, and ways of mobilizing pleasure and consent.

Id. at 73.

[49] *See* Patricia Yancey Martin, '*Mobilizing Masculinities': Women's Experiences of Men at Work*, 8 ORG. 587 (2001). Martin uses feminist standpoint theory to observe workplaces. Feminist standpoint theory uses women's perspectives to describe men's behavior at work. This viewpoint provides the perspective of an individual who is often in a position of less power at work. *See id*. at 592-93. Martin conducted her research by studying seventeen for-profit organizations; her research included observation and extensive open-ended interviews of workers in operational or managerial settings, taking place between 1992 and 1995. *Id*. at 594. Martin excluded from the article cases where the women believed the men intended to harm them. *See id*.

structed of gender."[50] She concludes that gender practices occur at work not because "infected" workers bring their gendered notions to the workplace, but rather because "paid work as currently conceived, organized, and practiced springs from and is shaped by gendered conceptions."[51] These conceptions are obvious when one considers that the "so-called empty-position" in an organization will assume the "body and life of a man, not a gender-free person,"[52] meaning that one automatically envisions a man in the open position. Martin asserts that this construction is harmful to many women and most men.[53] She observed in her

Dr. Dorothy E. Smith originally proposed feminist standpoint theory to remedy the failure of sociology to recognize its masculinist assumptions. *See* DOROTHY E. SMITH, THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY 85-86, 98 (1987). Smith notes that traditionally, women at home and at work have occupied the position of dealing with the material or the objectification of the abstract. For example, women serve as homemakers, receptionists, and clerical workers; these workers perform the material work connected with the men's abstract work. The role of women, therefore, has been to mediate for men between the conceptual and the material. *See id*. at 83-84.

While sociology was considered a means of organizing an abstract view of society using a neutral viewpoint or standpoint, Smith argued, it was impossible to have a totally neutral standpoint. *See id*. at 98. She advocated a new methodology—one that acknowledges the standpoint of the observer who actually participates in creating the reality to some extent. *See id*. Feminist standpoint research would, therefore, acknowledge that it was written from women's standpoint, and not attempt to assume a position of total neutrality. Feminist standpoint theory would be abstract but would also include participation in actual concrete settings, making use of material means. *See id*. at 85.

Judith Lorber notes that feminist standpoint theory argues that because women produce children and are responsible for material work in the home, women are much more connected with their bodies and the material world than men. Even women who are highly educated are much more responsible for housework. Men who are highly educated, however, concentrate on more abstract and intellectual endeavors. Women's connection to the concrete world and to their emotions makes their world view unitary and complete. *See* Lorber, *supra* note 4, at 80 (citing Nancy C.M. Hartsock, *The Feminist Standpoint: Developing the Ground for a Specific Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, *in* FEMINISM AND METHODOLOGY 159 (Sandra Harding ed., 1987).

[50] Martin, *supra* note 22, at 345.

[51] *Id*. at 344-45.

[52] *Id*.; *see also* Dale T. Miller et al., *Gender Gaps: Who Needs To Be Explained*? 61 PERSONALITY & SOC. PSYCHOL. 5 (1991) (observing that a tendency to consider males and male traits the "norm" in all situations in which women do not predominate may explain the persistence of stereotypes of women).

[53] *See* Martin, *supra* note 22, at 345. Martin recounts the research of Professors Maier and Messerschmidt into the space shuttle *Challenger* case where the male managers refused to listen to warnings of the engineers about flawed O-rings. This refusal, due to a fear of losing a government contract, led to the death of seven astronauts. *See id.* (citing Mark Maier & James W. Messerschmidt, *Commonalities, Conflicts and Contradictions in Organizational Masculinities: Exploring the*

field work that "[c]oncepts that are key to organizational life such as competence, leadership, effectiveness, excellence, rationality, strength, and authority (among others) are moreover *conflated* with the practicing of gender in ways that differentially affect women and men."[54]

Power plays a crucial role in this dynamic. Because some positions at work have more power, *persons holding those positions can often admit or deny that gender is being practiced*.[55] While women are often powerless to insist that gender plays a role in the organizational hierarchy, the men's denial "does not erase the harm women experience from men's excluding them, making them feel out of place, or requiring them to 'act like men.'"[56] In fact, and perhaps even more important, Martin concludes that *men's superior power permits them to define what they do as work*, even though women would define it as "behaving like men."[57]

Women and men who wish to survive at work must adapt to the hegemonic masculinity practiced at the workplace. Sociologists Deborah Kerfoot and David Knights in *Managing Masculinity in Contemporary Organizational Life: A "Man"agerial Project*,[58] note that masculinities must be "adopted or complied with if a person seeks to have any influence as a manager."[59] The form of masculinity practiced in the business world is "aggressively competitive, goal driven and instrumental in its pursuit of success."[60] This predominant masculine managerial style tends

Gendered Genesis of the Challenger *Disaster*, 35 CANADIAN REV. OF SOC. AND ANTHROPOLOGY 325 (1998)).

[54] Martin, *supra* note 22, at 345 (emphasis added).

[55] *See id*. at 357.

[56] *Id*.

[57] *See id*. at 357. Sociologist Joyce Fletcher noted the same in her field studies of an engineering firm in the Northeastern United States. The men talked endlessly at meetings about problems and showed off, but were unable to solve the problems; the women saw the behavior as "frustrated engineers having fun talking technical." JOYCE K. FLETCHER, DISAPPEARING ACTS: GENDER, POWER, AND RELATIONAL PRACTICES AT WORK 90 (1999). Fletcher noted that this behavior was characterized by men as "work" and it reinforced the masculinist cultural norms of the institution such as self-promotion, autonomy, and individualism. *Id*.

[58] Kerfoot & Knights, *supra* note 26.

[59] *Id*. at 8.

[60] *Id*. at 7. Kerfoot and Knights define "masculine" as a socially constructed consensus of what it means to be a man. *Id*. at 11. They observe that what is "masculine" may change over time. *Id*. They note, however, that its current manifestations include "physical presence, competitive strength and sexual prowess." *Id*. It is fre-

to privilege men over women socially and at work.[61]

Social scientists who study masculinities and gender in organizations recommend that masculinities be made visible,[62] that a degendering process eliminate the perceived "natural" differences between the sexes,[63] that more research on masculinities

quently expressed in situations where males "bond" in a form of false intimacy such as rivalry or rowdiness. *Id*.

According to Kerfoot and Knights, gender identity is "constituted through relations of power." *Id*. at 12. Masculinity is not fixed; it is fluid, contingent, and shifting throughout an individual's life. The authors note that once we recognize masculinity as a fluid, unfixed phenomenon, we can explore gender identity in a more sophisticated manner which eschews the simple dualism of masculine and feminine. *See id*. With this understanding, Kerfoot and Knights examine the cultural, predominant masculinity that is privileged in everyday life and its connection with managerial work. Not only men, but also women in organizations often attempt to mimic these masculine behaviors in order to gain credibility and to succeed at work.

61 *See id*. at 14; *see also* Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 79-84 (2000) (arguing that men should adopt a male feminism that acknowledges the various axes of privilege men enjoy, and urging a redefinition of discrimination with this privilege in mind); Martin, *supra* note 22, at 357. *See generally* WILDMAN, *supra* note 41. The masculinities research contradicts the assumptions made by traditional economic theory. According to economic theory, persons will act to enhance their own wealth; therefore, discrimination is not a rational response to the presence of women and persons of color in the workplace who enhance the firm's value. *See generally* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (1971). *But see* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 61-69 (1992) (arguing that discriminating at work will likely produce greater efficiency).

Law and economics professor Richard McAdams has another conclusion. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Protection on Race Discrimination*, 108 HARV. L. REV. 1003 (1995). In the context of race discrimination McAdams has argued that employment discrimination is rational. *Id*. at 1008. He notes that a group will cooperate to the economic detriment of another group in order to raise the status of the first group. *Id*. at 1083-84. This cooperation breeds conflict with other groups, emphasizing racial differences and supporting greater exclusivity and greater success of the dominant group. *Id*. Discriminating against a particular group of persons enhances or benefits the discriminating group by reinforcing its superior status. *Id*. Law professor Vicki Schultz, in *Reconceptualizing Sexual Harassment*, raises a similar possibility in the area of sex discrimination. Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 23, at 1759. Men may treat women differently in order to enhance their own status and the status of the job itself. *Id*.

62 Masculinities theorists conclude that masculinities are pervasive yet invisible at work because often a masculinist managerial atmosphere is perceived as "neutral." Before improving the work atmosphere concerning the prevalence of masculinities at work, the existence of a gendered environment at work and rewards for masculine behavior must be revealed, studied, and discussed. *See, e.g.*, CONNELL, *supra* note 8; LORBER, *supra* note 7.

63 Engaging in a degendering process is closely linked to the concept of making masculinities visible. The paradox is that feminists need to make gender visible while simultaneously articulating the possibilities of a non-gendered social order.

take place,[64] and that business students and managers receive education concerning masculinities.[65] In this Article, I propose another solution: that employment discrimination law redefine sex discrimination by incorporating masculinities theory and field research.

While there are many opportunities to use the social science research on "masculinities" to interpret employment discrimination law, in Part III I propose the use of masculinities research to focus on the gendered differential treatment women and men re-

See Lorber, *supra* note 4, at 81. A number of sociologists argue that one reason hegemonic masculinities continue to thrive is the overemphasis of the differences between men and women. *See, e.g.*, CONNELL, *supra* note 8, at 231-34; LORBER, *supra* note 7, at 294-302; Lorber, *supra* note 4, at 83; RISMAN, *supra* note 39, at 157-62 (arguing that gender should be irrelevant to all aspects of our lives.)

Judith Lorber argues that the long-term goal should be to erase gender altogether. She calls it the "feminist degendering movement." *See* Lorber, *supra* note 4, at 80. Lorber argues that like racial segregation, gender segregation has no moral place in society. Lorber argues that feminists need to abolish the gender lines, challenging the notion that it is legitimate to make gender-based divisions in the first place. *Id*. A field study by sociologist Tony Blackshaw reinforces this position at least when it comes to lower middle-class workers. *See* TONY BLACKSHAW, LEISURE LIFE: MYTH, MASCULINITY AND MODERNITY 72-73 (2003) (describing his study of the leisure practices of "lads" in the city of Leeds in England). Blackshaw notes that it is important to the lads to maintain their sense of difference from women. *Id.* at 73. Lads contruct their masculine identities by differentiating themselves from women and showing that they do not aspire to having feminine identities. *Id*.

Robert Connell, like Judith Lorber, believes that the exaggerated difference between the sexes causes inequalities between males and females. CONNELL, *supra* note 8, at 230. Connell argues that those who defend patriarchy know that they can defend injustice by appealing to the difference between masculine and feminine, defining separate spheres and places for men's and women's bodies. Bodily difference becomes a social reality through practices, and social organization constitutes difference as dominance. Difference and dominance mean not only separation but also "intimate supremacy," realized violently through domestic violence and rape. *Id.* at 231-32. Like Lorber, Connell concludes that a degendering strategy is necessary to dismantle hegemonic masculinity. Without this strategy, it will be impossible to have degendered, rights-based politics of social justice. *Id.* at 232; *see also* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1036-37 (2002) (arguing a constitutional right to be free of differential government treatment because of sex or gender).

[64] While there has been substantial theoretical research on masculinities, there is less empirical research on the subject.

[65] *See* Amanda Sinclair, *Teaching Managers About Masculinities: Are You Kidding?*, 31 MGMT. LEARNING 83, 83-84 (2000). Sinclair notes that in business schools there is pressure to cabin the discussion of gender, focusing on women's issues and diversity and avoiding the study of masculinities. This accepted approach, Sinclair contends, focuses on white women or members of minority groups as the "other." *Id*. It engenders discussions blaming women for not "fitting into" organizational culture, ignoring the masculine environment in organizations that can create significant difficulties for most women and some men. *See id*.

ceive at work and to determine two questions arising in sexual harassment law: whether harassment is sufficiently "severe or pervasive" to create a hostile work environment, and whether the harassment occurs "because of sex."

III

EMPLOYING "MASCULINITIES" TO PROVE SEX DISCRIMINATION

A. Disparate Treatment And Harassment Creating Hostile Work Environments

In order to accommodate changing times, employment discrimination law has developed a number of theories of discrimination as well as various methods of proof.[66] The two dominant theories of discrimination are disparate treatment and disparate impact. Disparate treatment requires a showing of the defendant's discriminatory motive in making an adverse employment action;[67] disparate impact, a separate theory that I do not address in this Article, occurs when an employer's policy or practice creates a disparate impact on members of a protected class, and the employer cannot prove that the practice or policy is job-related and consistent with business necessity.[68]

Under disparate treatment theory, a plaintiff proves her case by demonstrating that she received differential treatment at work because of her protected characteristic, which, under Title VII, includes sex, race, color, national origin, and religion.[69] For example, a woman who applies for a position as an airline pilot who is refused a job because the company does not hire women pilots is obviously treated differently, and adversely, when compared with a man who has the same qualifications for the job and is hired as a pilot. If the man gets the job and the woman does not, the woman has a cause of action using the disparate treatment theory of discrimination.

Even if the airline does not openly discriminate against women

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[66] For a description of the methods of proving intentional discrimination, see Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 446-65 (2000).

[67] *Id.* at 446-48.

[68] 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

[69] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a description of disparate treatment, see generally Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

because of their sex, a woman may successfully sue the airline if the airline applies more exacting standards to her application, hires her but pays her less than similarly qualified men, or promotes similarly situated men but does not promote her. In *International Brotherhood of Teamsters v. United States*, Justice Stewart explained:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.[70]

A number of ways of proving disparate treatment have evolved. Where the employer directly admits that it is using a protected characteristic to make an employment decision that is adverse to the plaintiff, the plaintiff may prove the employer's illegal discriminatory intent by direct evidence.[71] Where, however, the employer does not admit that it is using a protected characteristic to make a decision, the plaintiff may prove the employer's motive by circumstantial evidence, including anecdotal evidence of the treatment of other members of the plaintiff's class, statistics concerning the differential treatment of the members of the protected class, the employer's failure to adhere to its own policies, derogatory comments about members of the protected class as workers, and/or comparisons to treatment of persons who are not members of the protected class.[72]

Harassment based on a protected characteristic that causes a hostile work environment for the plaintiff is a subtype of disparate treatment; like other cases of disparate treatment, the plaintiff who alleges illegal harassment must prove that her differential treatment is caused by her membership in the protected group.[73] Unlike other cases of disparate treatment, however, in a harassment case the plaintiff does not necessarily prove that she suffered an adverse job action such as failure to hire or to promote, discharge or demotion.[74] Rather, the victim of harassment can prevail if she proves that the harassment itself was sufficiently severe or pervasive to alter the terms and conditions

[70] 431 U.S. 324, 335 n.15 (1977).
[71] *See* McGinley, *supra* note 69, at 213-14.
[72] *See* McGinley, *supra* note 66, at 451.
[73] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
[74] *See id*.

of her employment.[75] Once the harassment rises to this level of severity, it creates a hostile work environment and is actionable.[76] While harassment is a type of disparate treatment, this Article distinguishes harassment creating a hostile work environment from the ordinary disparate treatment case where an employer makes an adverse employment decision because of the employee's membership in a protected class. I make this distinction because harassment cases are proved in ways that are different from other disparate treatment cases. Nonetheless, this Article demonstrates that masculinities play a role in both traditional disparate treatment and in hostile work environment cases. In the former, masculinities affect employer decision-making and lead to differential treatment of employees that is based on the employee's sex or gender. In the latter, the masculinities themselves, either alone or combined, create severe or pervasive harassment that alters the terms and conditions of the employee's work, creating an illegal hostile work environment because of sex or gender.

B. Predominant Masculinities At Work: Reinforcing Dynamic Stasis

David Collinson and Jeff Hearn examine five masculinities they have observed in the workplace: authoritarianism, paternalism, entrepreneurialism, informalism, and careerism.[77] Authoritarianism is characterized by an intolerance of dissent or difference, an unwillingness to engage in dialogue, and a preference for coercive power, control, and obedience.[78] Managers enact paternalism, a masculine method of control similar to that of the father in the traditional family, by emphasizing personal trust

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[75] Pa. State Police v. Suders, 124 S. Ct. 2342, 2347 (2004); *Harris*, 510 U.S. at 21.

[76] *See Harris*, 510 U.S. at 21.

[77] Collison & Hearn, *supra* note 36, at 13-16.

[78] Collinson and Hearn state:

> Based upon bullying and the creation of fear in subordinates, authoritarianism celebrates a brutal and aggressive masculinity; a criterion by which self and others are judged. It is therefore a primary source of identification with and differentiation from others. Hostility is aimed at those who fail to comply with this aggressive masculinity, for example, women, and men as individuals or in groups that possess little institutional power and status [e.g. black people]. In dismissing these groups as 'weak', those who invest in authoritarianism try to differentiate and elevate their own masculine identity and power.

Id. at 13.

and loyalty.[79] The effect is to ensure the subordinate's cooperation and to enhance the manager's power.[80] Entrepreneurialism is a highly competitive managing style that elevates efficiency and managerial control over other values.[81] It requires subordinates to work long hours, be mobile geographically, and to meet tight deadlines, a schedule that eliminates many women and some men who have family responsibilities.[82] Many men use in-

[79] *Id*.

[80] *Id*.

[81] *Id*. at 14. Sociologist Stephen Whitehead observes entrepreneurialism in his fieldwork studying further education in England and Wales. Whitehead, *supra* note 24, at 206-07 (describing the change in British further education from a model of intellectual pursuit to a model of competitive entrepreneurialism and observing the effects on male managers); *see also* Deborah Kerfoot & Stephen Whitehead, *'Boys Own' Stuff: Masculinity and the Management of Further Education*, THE SOC. REV. 436, 443 (1998) (describing the entrepreneurialism present in further education: a highly aggressive and competitive culture).

[82] Collinson & Hearn, *supra* note 36, at 14. It also disadvantages families; in a workplace that values entrepreneurialism, it is taboo to talk of pregnancy and children and other domestic commitments. Using the example of certain sales forces to illustrate entrepreneurialism, Collinson and Hearn state: "[R]esearch suggests that a deep-seated antagonism to women's conventional domestic commitments frequently pervades this organizational function. Only those women who can comply with the male model of breadwinner employment patterns are likely to be acceptable within this dominant discourse." *Id*.

Law professor Kathryn Abrams argues that the concept of the "ideal worker" as a person who has no family responsibilities is deeply ingrained in the concept of masculinity. Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 760 (2000) (book review). She notes that there is a complicated relationship between masculinity and provider status that is "associated with primary commitment to market work." *Id*. She notes:

> While men have slowly and incrementally expanded their role in childcare over the past two or three decades, it has been far more difficult to loosen their attachment to "primary provider" status within the family, a role that usually calls for "ideal-worker" performance. Sociologist Michael Kimmel, for example, observes that some men's widely cited willingness to give up their jobs to spend more time with their children is "more often rhetorical than real; few men would actually switch places with their non-working wives if given the opportunity." This is partly because, within many corporate cultures, "investing more energy into the home is a form of treason"—a view that throws the normative weight of American capitalism into the effort to preserve the link between masculinity and provider status. But even where governmental and corporate cultures have become increasingly accommodating, men may struggle with conceptions of masculinity that have been instilled in a broad range of social settings. Evidence of this tendency is found in studies of paternal leaves in Norway and Sweden, countries that have striven to facilitate men's access to and use of paternity leaves by means of a broad range of governmental regulations. In these contexts, men take less frequent and shorter leaves and engage in different kinds and styles of parenting activities.

formalism to build relationships based on shared interests. Within the informal relationships, men differentiate themselves from women and men who do not fit the gender mold. Often the informal mechanism will include humor, sex, cars, sports, women, and/or drinking. Informalism can create an uncomfortable environment for many women and gender-nonconforming men.[83] Careerism is enacted by many middle-class white men whose upward mobility is key to their masculine identity; often they work long hours on tight deadlines,[84] and depend on their wives' support to make their careers work.[85] Women at work find it difficult to compete with these men because even women with very competitive jobs are generally more responsible for home and child care than men in equal positions.[86]

Id. (footnotes omitted) (quoting Michael S. Kimmel, *What Do Men Want?*, HARV. BUS. REV., Nov. - Dec. 1993, at 50, 55).

[83] It often excludes women who are equals, subordinates, and even superiors. Women who are executives often complain they have to listen to endless sexual and sports references in informal and formal settings at work. Collinson & Hearn, *supra* note 36, at 14-15. Collinson and Hearn note that men have a tendency to feel more at ease with other men, a characteristic called "male homosociobility." *Id*. at 15. Judith Lorber speaks of the importance to men of "homosociality." This is evidenced by the separation of men and boys from women and girls that begins in childhood. Men feel more comfortable in the presence of other men. *See* LORBER, *supra* note 7, at 232.

[84] Collison & Hearn, *supra* note 36, at 15-16. Identities and the dignity of middle-class white (and perhaps other) men are intertwined with their role as breadwinner. This is extremely important to understand when considering how to reformulate the societal expectations. *See* ROBERT S. WEISS, STAYING THE COURSE: THE EMOTIONAL AND SOCIAL LIVES OF MEN WHO DO WELL AT WORK (1990) (demonstrating through interviews with men how important men's work is to their identity); Williams, *supra* note 17, at 1445, 1477. It must be, in part, this identity that makes it so difficult to achieve equality at work. *Cf*. Abrams, *supra* note 82, at 760-61 (arguing that equality for women and men can not be achieved unless we break the bond between masculinity and provider status).

[85] LORBER, *supra* note 7, at 175.

[86] *See* Williams, *supra* note 17, at 1452, 1471 (demonstrating that women still do a large percentage of the work at home; men who participate in the child care tend to do the "fun" or "spiritual" work while women do the menial tasks); *id.* at 1462-66 (describing the different elements of "care work" that must be performed in a family, and noting that most of it is done by women: growth work, housework and yard work, household management, social capital development, emotion work, care for the sick, and daycare). Williams notes that much of this work is defined as "care," a definition that ignores the work involved. *Id*. at 1460-62.

Law professor Mary Becker makes an eloquent statement about the double bind that mothers experience in our society and at work:

> If you decide not to be a mother, some people will regard you as not a "real" woman. But if you do become a mother, you are likely to be seen as essentially a mother. This is particularly damaging in the workforce, where being a mother is incompatible with being an ideal worker, as Joan Wil-

When these five masculinities, either alone or taken in combination, lead to adverse employment actions against women or benefit their male colleagues over women, they should create a cause of action under Title VII's disparate treatment theory. The observations of Collinson and Hearn, Martin, Jennifer Pierce, and other scholars in masculinities theory can aid judges and juries in recognizing that these behaviors at work are not gender-neutral and often cause disparate treatment between men and women because of their sex.

For example in *Gender Trials*,[87] sociologist Jennifer Pierce examined the relationships of male and female paralegals and lawyers in a large law firm and in the legal office of a large

> liams so aptly terms it. But this is only the tip of the iceberg with respect to disincentives to mother. Mothers earn less money than other workers, even after considering the fact that mothers work fewer hours because of the demands placed on them by caretaking. And the depression in mothers' wages is life long; it does not end when childhood ends.
>
> Mothers who work for wages work more hours than other workers when caretaking is included. Mothers have less power in marriages than women who are not mothers. Working mothers of young children are often sleep-deprived as well as leisure-deprived. Mothers who work for wages are subject to work-place rules designed for ideal workers without caretaking responsibilities. Mothers lose jobs because of pregnancy or absences associated with pregnancy or caretaking (such as the need to stay home with a sick child). Mothers who work for wages are bombarded with messages that they are inadequate as mothers, despite mounting evidence that children in quality daycare do as well or better than children raised by stay-at-home mothers on every imaginable indicator of well-being. At divorce, mothers are at risk of losing custody of the children for whom they have cared and are likely to become poor because of the inequitable distribution of assets at divorce. In general, mothers are disproportionately poor, because being a mother depresses one's ability to work for wages and increases one's needs, given their need to provide for dependent children. Quality daycare for the children of working mothers is expensive and beyond the reach of mothers who are not at least solidly middle class. Our intensive mothering norms, which Williams describes, place impossible pressures on working mothers, with the result that many working mothers feel that they are doing an inadequate job as mothers and an inadequate job as workers.
>
> Mothers who do not work for wages are at even greater risk of poverty in the event of divorce. They are also more likely to be depressed. The work they do is not valued much in their culture; they are often seen (by themselves and others) as "only" moms.

Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1526-27 (2001).

[87] *See* JENNIFER L. PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS (1995).

corporation.[88] Pierce found that male attorneys practiced informalism by including male paralegals in social events and outings, but excluding female paralegals.[89] Due to informal relationships developed with male attorneys, male paralegals received better work assignments, letters of recommendation, or affirmation; all of these benefits were less available to the female paralegals.[90] If a female plaintiff is able to demonstrate that a male counterpart with her same job title receives a promotion or other significant preferential treatment because of informal relationships developed with superiors, relationships denied to the plaintiff, she should be able to prove intentional discrimination because of her sex.

Plaintiffs bringing lawsuits alleging disparate treatment can make similar arguments about paternalism, entrepreneurialism, careerism and authoritarianism if they lead to differential treatment of women and men at work.

C. Sex Stereotyping as Disparate Treatment

The Supreme Court first articulated the stereotyping doctrine in *Price Waterhouse v. Hopkins.*[91] Ann Hopkins, a successful accountant at the defendant firm, was denied partnership because the partners perceived her to be too masculine and aggressive.[92] Her mentor explained to her that she could improve her chances of election to partnership if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."[93] The Court explained that Title VII forbids stereotyping that would place women in a double bind in a competitive work environment:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." An

[88] *Id*.; *see also* Jennifer L. Pierce, *Emotional Labor Among Paralegals*, 561 ANNALS 127 (1999).

[89] *See* PIERCE, *supra* note 87, at 145-46.

[90] *See id*. at 146.

[91] 490 U.S. 228 (1989); *see supra* notes 25, 27 and accompanying text.

[92] *Price Waterhouse*, 490 U.S. at 250.

[93] *Id*. at 272 (O'Connor, J., concurring) (quoting 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

> employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[94]

The Court concluded that the evidence of sex stereotyping tainting the decision-making process in *Price Waterhouse* was sufficient to prove that sex was a motivating factor in the refusal to promote Hopkins.[95] Justice O'Connor concurred, decrying the use of stereotyping in employment and treating it as if it were direct evidence of conscious discriminatory intent:

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisonmaking process that her gender was a major reason for the rejection of her partnership bid.[96]

Thus, under *Price Waterhouse*, adverse decision-making resulting from an employee's failure to adhere to sex stereotypes is discrimination because of sex. The narrowest reading of *Price Waterhouse* would limit its holding to the discrete situation of a woman or man whose job required the assumption of other-sex characteristics but who was penalized for taking on those characteristics—the so-called "double bind." In a concurring opinion in *Hamm v. Weyauwega Milk Products*, Judge Posner opined that "sex stereotyping" should not be regarded as a form of sex discrimination but merely serves, as in *Price Waterhouse*, as evidence of sex discrimination.[97] This reading of *Price Waterhouse* is exceedingly crabbed. Even if a woman or man is not placed in a double bind, a requirement that she or he adhere to stereotypical sex characteristics in order to avoid an adverse employment action must be discrimination because of sex unless the defendant meets its burden of proving that those sex characteristics are

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[94] *Id*. at 251 (citations omitted); *see also* Bellaver v. Quanex Corp., 200 F.3d 485 (7th Cir. 2000) (reversing district court's grant of summary judgment because a reasonable jury could conclude that the defendant discharged the plaintiff because of sex stereotyping where there was evidence that she was aggressive but that men who were aggressive were not discharged).

[95] 490 U.S. at 255-56.

[96] 490 U.S. at 272-73 (O'Connor, J., concurring).

[97] 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring).

a bona fide occupational qualification for the job in question.[98] The question in *Price Waterhouse* was not the double bind experienced by Ann Hopkins, but rather whether discriminating against her because of her failure to conform to gender stereotypes was discrimination "because of sex." The Supreme Court unequivocally answered "yes" to this question.[99]

Masculinities research demonstrates that workplaces are structured around gender and saturated with gendered practices that are based on stereotypes of the proper roles of men and women. To the extent they alter the terms and conditions of a plaintiff's employment, these structures and practices should be actionable under Title VII.

Limiting a woman's career possibilities and structuring work assignments and expectations on stereotypes of whether the job is "female" or "male" are invidious practices that absent the study of masculinities can be invisible, but nonetheless very harmful to women. Stereotyping can be redressed by Title VII in three ways. It can be interpreted as it was in *Price Waterhouse* as intentional discrimination that causes adverse employment actions because of sex. Second, stereotyping can contribute to a hostile work environment because of a person's sex. Finally, stereotyping can be a "neutral employment practice" arising from unconscious motives, and, as noted by Justice O'Connor in *Watson v. Fort Worth Bank & Trust*, can be redressed as a subjec-

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[98] A "B.F.O.Q." is an affirmative defense that has been interpreted very narrowly by the courts. Title VII provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . or for an employer, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. 2000e-2(e)(1) (2000); *see* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (explaining that the bona fide occupational qualification exception under Title VII is intended to be an extremely narrow exception to the general prohibition against discrimination on the basis of religion, sex, or national origin) (citing 29 C.F.R. § 1604.2(a) (2004)). *But see* Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) (finding that grooming codes that impose limits on hair length of male employees but no similar limits on female employees did not constitute discrimination on the basis of sex); Jespersen v. Harrah's Operating Co., Inc., 280 F. Supp. 2d 1189, 1192-93 (D. Nev. 2002) (granting summary judgment in favor of the employer that a policy requiring female employees to wear makeup but prohibiting male employees from doing so did not constitute unlawful discrimination because of sex), *aff'd*, 392 F.3d 1076 (9th Cir. 2004).

[99] 490 U.S. at 255-57.

tive practice under the disparate impact cause of action.[100] This Article deals with both forms of intentional discrimination: traditional disparate treatment, in which an adverse employment action occurs because of sex stereotyping, and that in which the prevalence of masculinities at work creates a harassing environment for women or gender-nonconforming men because of their sex, altering the terms and conditions of their employment.[101]

1. Masculinities Theory: Stereotypes and Disparate Treatment

a. Stereotype: Woman as "Aggressive Bitch"

Many studies note the presence of the double bind for women who are attempting to operate in traditionally male jobs.[102] Particularly where women hold positions of leadership, studies show they are judged differently.[103] Very assertive women are viewed especially negatively for the same behavior that, if seen in men, would be praised.[104]

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100 487 U.S. 977, 991 (1988) (plurality opinion).

101 In a subsequent article, I address whether masculinities comprise employment practices that create a disparate impact on women at work. *See* Ann C. McGinley, Masculinities in Disparate Impact Litigation (Nov. 11, 2004) (unpublished manuscript, on file with author).

102 *See, e.g.*, VIRGINIA VALIAN, WHY SO SLOW?: THE ADVANCEMENT OF WOMEN (1998) (discussing studies concerning the lack of advancement of women at work and attributing much of the problem to "schemas" or mental constructs that attribute certain characteristics to women).

103 *See, e.g*., Dore Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL. 48, 54-55 (1990); *see also* VALIAN, *supra* note 102, at 131; Martha Foschi et al., *Gender and Double Standards in Assessment of Job Applicants*, 57 SOC. PSYCHOL. Q. 326, 337 (1994) (applying "expectation states theory" to show that male group members evaluate women more harshly than equally competent men and concluding that this theory permits men to maintain the status quo); Madeline E. Heilman et al., *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 J. APPLIED PSYCHOL. 935, 939 (1989) (studies demonstrating that male managers rated men as having more of the characteristics of successful managers than women).

104 Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 16-18 (1992); *see also* FLETCHER, *supra* note 57, at 108 (explaining that female engineers believed that if they acted in a "masculine" fashion—confrontationally—the men would hold it against them). Female engineers in Fletcher's study were expected to act relationally—to be feminine and good listeners. Ironically, however, the men devalued the women for acting in a relational style. *Id*.; *see* LORBER, *supra* note 7, at 244. Cecilia Ridgeway attributes this reaction to women leaders as a result of "status beliefs." Status beliefs are shared cultural beliefs about the competence of one group vís-a-vís another. Assumptions about the ranking of one group over another are legitimated by presumptions of differences in competencies among people in different groups. She notes:

In *Price Waterhouse*, Ann Hopkins was considered too aggressive, abrasive, and lacking in interpersonal skills.[105] The Court noted "that some of the partners reacted negatively to Hopkins' personality because she was a woman."[106] For example, one partner described her as "macho" while another stated that she "overcompensated for being a woman."[107] Another partner told Hopkins to take a charm school course; others criticized her use of profanity.[108] Still another said that the male partners disliked Hopkins' use of profanity only because she was a woman.[109] While Hopkins' mentor advised her to walk, talk, and dress in a more feminine style, another partner noted that Hopkins, who used to be a "somewhat masculine" and "tough-talking" manager had matured into a "much more appealing lady [partner] candidate."[110] Susan Fiske, a well-known social psychologist, testified that because Hopkins was the only woman and the evaluations were subjective, it was likely that the sharp, critical remarks—even those that were gender-neutral—were most likely influenced by sex stereotyping.[111]

Like Ann Hopkins, the female lawyers in Pierce's *Gender Trials* study suffered because of sex stereotyping.[112] Female litigators in an aggressive profession were criticized for not being tough enough to do the job.[113] In contrast, aggressive women

> When gender status beliefs are effectively salient in a situation, as they are in mixed-sex and gender-relevant contexts, they create implicit performance expectations for women compared to similar men that shape men's and women's willingness to speak up and assert themselves, the attention and evaluation their performances receive, the ability attributed to them on the basis of their performance, the influence they achieve, and consequently, the likelihood that they emerge as leaders. When women do assert themselves to exercise authority outside traditionally female domains, as they must do to be high-status leaders in our society, gender status beliefs create legitimacy reactions that impose negative sanctions on them for violating the expected status order and reduce their ability to gain compliance with [their objectives.]

Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. SOC. ISSUES 637, 652 (2001).

105 Price Waterhouse v. Hopkins, 490 U.S. 228, 234-35 (1989).

106 *Id.* at 235.

107 *Id*.

108 *Id*.

109 *Id*.

110 *Id*.

111 *Id.* at 235-36.

112 *See generally* PIERCE, *supra* note 47.

113 *See id.* at 113-14.

litigators were labeled "shrill" or "unladylike."[114] These women were expected to behave in a manner that conforms to concepts of feminine behavior while simultaneously performing the job well: a job that, as it is configured, requires the exercising of masculinities. Kerfoot and Knights observe that women at work who adopt competitive masculinities in order to achieve success as managers suffer a number of other tensions at work, "not the least of which is the conscious management and denial of the expression of their own sexuality and its consequences for their life experience and relations."[115]

As the Court ruled in *Price Waterhouse*, making adverse employment decisions because a woman does not conform with stereotypically female behavior or patterns of dress is discrimination because of sex. Masculinities theory supports this position and further demonstrates that many women suffer by trying to live up to the ideal of the masculinized job of aggressive, competitive litigator or business dealer.[116]

b. Stereotype: Woman as Caregiver

Researchers in masculinities theory have observed that women at work experience differential treatment based on the stereotype of a woman as caregiver.[117] In fact, many jobs become "feminized" because they require skills that are modeled after the stereotypical notion of woman as mother and caregiver. Furthermore, women who do not comport to the female stereotype as caregiver are punished. Even when performing the same job, men are not ordinarily required to exhibit the same amount of caregiving.

Kerfoot and Knights recognize that expecting women to act as

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[114] *Id*.

[115] Kerfoot & Knights, *supra* note 26, at 10 (citing DAVID COLLISON ET AL., MANAGING TO DISCRIMINATE (1990)); *see also* Ridgeway, *supra* note 104, at 648-49, 652 (observing that when women leaders adopt assertive, self-directed, or autocratic styles they were judged more harshly than men who use the same styles).

[116] This fact should lead to the examination of the assumptions underlying the job of litigator and whether the criteria of aggressiveness and hyper-competitiveness are truly related to the job in question and necessary to the business. This examination, however, more appropriately occurs by use of the disparate impact theory of discrimination, a study I undertake in a subsequent article. *See* McGinley, *supra* note 101.

[117] *See generally* PIERCE, *supra* note 87; Kerfoot & Knights, *supra* note 26; Martin, *supra* note 22.

caregivers offers "comfort" to many men and few women.[118] Masculinity derives in large part from an "identity that generates and sustains feminine dependence and, along with it, support for a masculine self that is continuously feeling threatened and vulnerable as a consequence of the failure, potential or otherwise, to maintain control."[119] The authors note that the masculinity that predominates in managing tends to displace intimacy, rewarding the emotionless, rational manager. This suppression of intimacy, however, does not replace emotion. Instead, it leads to a build-up of emotions that are often expressed at work in a more "virulent and violent" form, such as anger and rage.[120]

When this emotion is expressed, the masculine manager appeals to the dependent feminine "carers" who are expected to soothe, comfort, and empathize in order to "restore emotional stability to a masculinity that is damaged by this deviation from rational control."[121] These "carers" are often subordinates such as secretaries, assistants, clerical workers, and other support staff. Their role is to assess the mood swings of the manager and to act as buffers or gatekeepers between the manager and others, smoothing relationships and relieving stress.[122] This role of a subordinate as a "soother" who mediates conflicts and protects the manager from stress caused by others, answering telephones, taking messages, and rescheduling meetings, is a job for a person who is passive and willingly sacrifices his or her own emotional needs in order to further those of the manager and of the organization. Kerfoot and Knights observe that this role is the model of what is the "ideal feminine womanhood." While not all women act in this passive way, Kerfoot and Knights observe that passivity pervades the expectations of women and silences women's authority.[123]

They note that women in organizational and social settings often attempt to realize the ideal of womanly feminine passivity. This ideal denies the value of a woman's self and autonomy and defines meaning through care of others.[124] While many women

118 *See* Kerfoot & Knights, *supra* note 26, at 8-9.
119 *Id*.
120 *Id*. at 9.
121 *Id*.
122 *Id*.
123 *See id*. at 10.
124 *Id*. at 14. Kerfoot and Knights assert:

> This subordination of self to another is part of what it is to achieve socially

may desire to take greater control at work and a role in the hierarchy of decision making:

> [T]his feminine passivity and some less assertive masculinities find no language with which to express such demands. Meanwhile the hyperactivity of competitive masculinity has the effect of maintaining a tight control over organizational life but can be so unreflective as to be unaware of what is absent and more particularly, what is "missing" in relationships.[125]

In *Gender Trials*, Pierce observed that male lawyers expect female paralegals to listen to them complain about their cases, soothe their tempers, and smooth their ruffled feathers.[126] Female paralegals are expected to absorb the male lawyers' aggressive behavior and criticism without complaining.[127] If the female paralegals fail at this mission, they are sanctioned.[128]

The emotional labor required of the female paralegals includes deference to the attorneys' expertise, and caretaking.[129] Neither deference nor caretaking is reciprocal. Emotional labor, similar to the work a wife traditionally performs for her husband, creates stress in the individual paralegal. She must manage her feelings of frustration and resentment at being treated as stupid, even though she may know more than the beginning lawyer for whom she works.[130] While busy attorneys can be interrupted only as they choose, lawyers frequently interrupt female paralegals, causing stress concerning the paralegal's time management.[131] The paralegal is "invisible."[132] Attorneys regularly ignore their pres-

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> accepted womanhood, in turn bound up in an idealized form of femininity. Part of the 'bargain' for many women, then, is to become the social chameleon, to disappear from view, to never seem 'pushy' or occupy social space. Both in employment and in mixed-sex social encounters, many women often merge into the background or simply provide a sounding board of support through which male partners or bosses are able to express a masculine assertiveness. Femininity, then, is an ideal that in reinforcing a sense of responding to the demands of others leaves no space for an active and autonomous subject who can place equal demands upon those whose labour and identity are serviced by contemporary heterosexual arrangements.

Id.

125 *Id*. at 10.

126 PIERCE, *supra* note 47, at 86-102.

127 *Id*.

128 *Id*. at 88, 92.

129 *Id*. at 86-102.

130 *Id*. at 94-95.

131 *Id*. at 95-96.

132 *Id*. at 96-98.

ence when they do not need them to do work for them, an attitude that is noted and resented by the paralegals.[133]

Pierce notes that paralegals' job evaluations depend in large part on their demeanor and ability to treat others pleasantly even in very stressful situations.[134] Besides alleviating the anxieties of attorneys, witnesses and clients, the paralegal must express gratitude for the attorney to others and act as the interpreter of the moods and feelings of the attorney.[135]

Male paralegals received different and better treatment. Male paralegals had more responsibility.[136] They were often mistaken by outsiders and clients for attorneys.[137] They had greater access to power and authority than the female paralegals, and were presumed to be on their way to law school.[138] Female paralegals, in contrast, were mistaken for secretaries, and in some instances, were asked to type documents for the attorneys.[139] While male paralegals performed emotional labor, it was of a different sort from that expected of the women. Instead of expecting the male paralegals to soothe them, the attorneys engaged the male paralegals as political advisors or to provide the male attorneys with gossip or political information.[140]

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133 *Id*. at 91-98.

134 *See id*.

135 *Id*. at 98-99. Dr. Pierce concludes:

> Paralegals are expected to utilize certain feminized components of emotional labor: deference and caretaking. These emotional requirements reflect the traditional female roles of wife and mother. Much like the traditional wife in relation to her husband, the paralegal defers to the attorney's authority and affirms his status by submitting to and smoothing over his angry outbursts, being non-critical vís-a-vís his written work and professional habits, submitting to constant interruptions, and being treated as if she were invisible. And like the "perfect mother" who tends to the needs of the family while suppressing her own, the legal assistant is expected to be pleasant, cheerful, and reassuring, to express gratitude to others for her boss, and to serve as an arbiter of his feelings to others. While many people of both sexes may harbor a "fantasy of the perfect mother," what is distinctive here is that the fantasy itself is embedded in the culture of working relations within law firms. It is male litigators who can expect to receive nurturing and support from women paralegals and not the reverse.

Id. at 102; *see also* MARY F. ROGERS & C.D. GARRETT, WHO'S AFRAID OF WOMEN'S STUDIES?: FEMINISMS IN EVERYDAY LIFE 26 (2002) (noting that women are expected to be "nice" and often live in "circumstances that inhibit expressions of anger").

136 PIERCE, *supra* note 47, at 98-99.

137 *Id*. at 145.

138 *Id*.

139 *Id*.

140 *Id*. at 147.

Even women in high-powered jobs are expected to perform emotional labor for their male counterparts. In *Mobilizing Masculinities: Women's Experiences of Men at Work*, Patricia Yancey Martin describes Sara, the only woman working with approximately one hundred men.[141] Although Sara is not the subordinate of her male colleagues, they expect her to perform the emotional roles of mother and sounding board.[142] The men talk to her about their wives, children, families and personal lives, asking for her sympathy and explanations as to their wives' behavior.[143] This counseling costs Sara extensive work time.[144] Even though Sara graduated with a PhD from an elite university and does cutting-edge patent work, the men's treatment of her as a woman rather than a true scientist diminishes Sara's self-esteem.[145]

Martin and Pierce's observations of male-female interactions in organizations support the theory posited by Kerfoot and Knights.[146] Pierce's research establishes the masculinization and feminization of traditional jobs in the workplace. The jobs of attorneys, especially those of litigators, were characterized by masculine ideals and behavior identified by Kerfoot and Knights as aggression, competitiveness and repression of emotion, leading to outbursts of anger; meanwhile, the jobs of their subordinates, the paralegals, were feminized. As traditional wives and mothers, female paralegals deferred to and took care of their male attorneys. The structure of the relationship at work, therefore, reflected the socially accepted structure of the roles of men and women. Even more notable is that the men working in the feminized paralegal jobs were able to transcend their job titles. Unlike the women, the men were not expected to act as caregivers to the extent the women were. Moreover, they benefitted from the hegemonic masculinity by being mistaken for lawyers and being invited to informal gatherings with the lawyers.

Judging women's job performance more harshly than men's because of the women's failure to act in the stereotypically female manner is differential treatment because of her sex. To the

141 Martin, *supra* note 49, at 599.
142 *Id*.
143 *Id*.
144 *Id*.
145 *See id*.
146 *See* PIERCE, *supra* note 47, at 86-89.

extent that an employer refuses to hire, fails to promote, or fires a woman because of her inability or unwillingness to perform emotional labor that is not required of men in the same job, the employer discriminates against her because of her sex. A woman placed in this position should be able to prove, through the use of the *McDonnell Douglas*[147] test, that the employer violated Title VII. She can prove her prima facie case by demonstrating that she is a woman, is qualified for the position, and that she either applied and was not hired or promoted, or was fired from the job. She must also prove either that men holding the same job have fewer and different requirements of emotional labor or that other women who were willing to perform the emotional labor were hired, retained, or promoted. An employer would likely attempt to use the woman's inability to get along with others as a legitimate non-discriminatory reason for its adverse employment decision. The plaintiff's response, armed with expert evidence of masculinities present at work, is that the employer's reason is not legitimate because it is based on sex: men in the same jobs are not judged by the same criteria.

Even in a workplace where there are no men working in the particular job and caregiving is required, the plaintiff should offer masculinities research to demonstrate that specific job criteria are based on sex stereotyping. Once this premise is established, the evaluations of one's performance in the job are based on sex. For example, a secretary who is penalized for failing to take care of her boss in stereotypically feminine ways such as by bringing him coffee, buying gifts for his wife, or soothing his anger should offer expert evidence of masculinities theory to demonstrate that making employment decisions based on these factors is discrimination because of sex unless the employer can prove that these

[147] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *McDonnell Douglas* was the first case that articulated the method of proving discrimination by inference. Under the *McDonnell Douglas* construct, the plaintiff proves a prima facie case by proving that he is a member of a protected class, has applied for a position for which he is qualified, is rejected for the position, and the position remains open or was filled by a person who is not a member of the protected class. *Id*. After the plaintiff makes out the prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment decision. *Id*. Once the defendant offers evidence of a legitimate, non-discriminatory reason, the burden of production shifts back to the plaintiff and merges with the plaintiff's ultimate burden of persuasion to prove that the defendant's proffered reason is a pretext for discrimination. *Id*. at 802-03; *see* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

criteria are bona fide occupational qualifications.[148]

There is no question that there are certain jobs for which caretaking is a legitimate criterion. For example, an employer has the right to expect a soothing, caring personality from a kindergarten teacher or a nurse. In order to avoid violating Title VII, however, an employer should apply this expectation equally to women and men in the workplace. Moreover, an employer who refuses to hire a man as a nurse or kindergarten teacher because of the employer's stereotype that women are more caring and soothing illegally discriminates against the male applicant, because the employer uses sex stereotyping to determine that the male applicant cannot meet the expectations of the job.

c. Stereotype: Woman as Siren

A third stereotype is that of woman as dangerous temptress. Patricia Yancey Martin's field research produced Tom, a middle-aged manager and a married Christian who vowed to himself for thirty years that he would never dine alone with a woman other than his wife.[149] Tom traveled often for his job and when he arrived at his destination, he would meet his host for dinner to plan the next day's meetings, unless the host was a woman.[150] Finally, after thirty years of this practice, Tom realized that his behavior discriminated against the women who were his hosts because he created an informal network with the men but did not get to know the women as well.[151] Despite this realization, Tom did not change his policy.[152] Professor Martin notes that this policy frames women as sexual beings, as signs of sexuality, and as a temptation to engage in sex. When Tom became aware of the discriminatory nature of this policy and still continued to practice it, he was practicing gender fully aware that if he were not to do so it might be better for his company. Instead, the institution of gender prevailed to determine his behavior.[153]

Tom's story demonstrates that women suffer professionally from the stereotype of woman as dangerous sex symbol. This stereotype, combined with the informalism that excludes women from important relationships, creates serious barriers to women's

[148] *See supra* note 98 and accompanying text.
[149] Martin, *supra* note 22, at 348.
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *See id*. at 349.

advancement at work, contributing in large part to the dynamic stasis I identified in Part I. Certainly, the use of sex stereotypes, such as woman as siren, to make decisions concerning hiring, promotion, or firing is illegal under Title VII as disparate treatment because of sex. Expert testimony from masculinities theorists can help judges and juries realize that the decision a manager makes to avoid contact with a lower-level employee because she is sexually attractive is illegal discrimination because of sex and may perpetuate and amplify inequalities between women and men at work.

In the above subsections, I have demonstrated that masculinities research can make many unequal work relationships visible to judges and juries trying Title VII cases. There are times, however, when it would be difficult to prove that a plaintiff has suffered an adverse employment action as a result of masculinities because there is no comparator[154] with whom a plaintiff may compare her job progress. These plaintiffs may be able to redress the masculinities at work by alleging sex or gender harassment, and demonstrating that masculinities practices create a hostile work environment that alters the terms and conditions of their work because of their sex.[155] The next subpart explains how masculinities theory applies to prove a cause of action under Title VII by demonstrating that the practices employed create a hostile work environment because of a person's sex.

2. Masculinities Theory: Sex Stereotyping as Harassment

a. Hostile Work Environments Under Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of an individual's race, color, religion, sex, or national origin.[156] The express language of the Act does not mention harassment.[157] Nonetheless, the courts began to recognize that racial harassment created a cause of action,

[154] In employment discrimination, the Court has advocated the use of "comparator" evidence to prove disparate treatment. A plaintiff can prove that she has suffered intentional discrimination by demonstrating that a "similarly situated" person who is not a member of the protected class was treated better than she. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

[155] Another possibility would be to address these five practices as neutral employment practices that have a disparate impact on women. I address this point in a subsequent article. *See* McGinley, *supra* note 101.

[156] *See supra* note 5.

[157] *Id*.

based on an intimidating, hostile, or offensive working environment if that environment alters the terms and conditions of the plaintiff's employment. In *Rogers v. Equal Employment Opportunity Commission*, the Fifth Circuit held that a Latino plaintiff established a violation of Title VII by demonstrating that the employer's mistreatment of its Latino customers created a hostile work environment for its Latino workers.[158] Lower courts subsequently found illegal harassment based on a plaintiff's race, religion, and national origin.[159] Following the lower courts, the EEOC issued guidelines in 1980 for Title VII liability in sexual harassment cases.[160] The guidelines distinguished between harassment that is directly linked to an economic quid pro quo and harassment that alters the terms and conditions of employment because it creates an abusive environment based on a person's sex. In either case, the guidelines stated, the conduct constitutes actionable sexual harassment under Title VII if it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."[161] After the guidelines were issued, lower courts uniformly held that a cause of action existed under Title VII for a hostile work environment based on sexual harassment.[162]

In 1986, in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court confirmed that sexual harassment creating a hostile work environment sufficiently severe or pervasive to alter a person's work environment constitutes sex discrimination under Title VII.[163] The plaintiff in *Meritor* presented evidence that her su-

158 454 F.2d 234, 240 (5th Cir. 1971).

159 *See, e.g.*, Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (finding illegal discrimination on the basis of the employee's national origin); Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 661 (8th Cir. 1980) (finding illegal discrimination on the basis of the employee's race); Cummins v. Parker Seal Co., 516 F.2d 544, 551 (6th Cir. 1975) (finding illegal discrimination on the basis of the employee's religion); *see also* Jackson v. Quanex Corp., 191 F.3d 647, 657 (6th Cir. 1999) (stating that Title VII provides a cause of action for racial harassment in the workplace); Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996) (noting that workplace harassment may take the form of racial discrimination); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1270 (7th Cir. 1991) (recognizing a Title VII claim on the basis of racial harassment).

160 Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 45 Fed. Reg. 74,676 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11 (2004)).

161 29 C.F.R. § 1604.11(a)(3).

162 *See, e.g.*, Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

163 477 U.S. 57, 66-67 (1986).

pervisor had subjected her to repeated demands for sexual favors, fondling, and forcible rape.[164] The defendant argued that Title VII was limited to redressing discrimination resulting in a tangible economic loss, not merely psychological injury.[165] Because the plaintiff had not suffered an economic loss, the defendant argued, she had not suffered actionable sex discrimination.[166] The Court rejected this view, relying on the language of the statute, the 1980 EEOC Guidelines, and lower court cases holding that abusive working environments can constitute sex discrimination.[167] Adopting the reasoning of the EEOC Guidelines, the Court held that the language of the statute making it illegal to discriminate in the terms, conditions, or privileges of employment protects workers from abusive working environments based on sex as well as race and national origin.[168] Sexual harassment is actionable if it is "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"[169]

In *Harris v. Forklift Systems, Inc.*, the Court held that a plaintiff need not demonstrate severe psychological damage to state a cause of action for a hostile work environment.[170] Rather, a plaintiff proves a violation of Title VII when she shows that the harassment is sufficiently severe or pervasive by objective[171] and

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164 *Id.* at 60.

165 *Id*. at 64.

166 *Id*.

167 *Id*. at 63-66.

168 *Id.*

169 *See id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)).

170 510 U.S. 17, 22 (1993).

171 There is a split among the circuits concerning whether the objective standard is the "reasonable woman" standard or the "reasonable person" standard. In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the Ninth Circuit adopted the "reasonable woman" standard, noting that use of a "reasonable person" standard might reinforce the "prevailing level of discrimination." *Id*. at 878. The court preferred to analyze whether a work environment is hostile from a victim's perspective, a view that would require an analysis of the different perspectives of men and women. *Id.; see also* Gray v. Genlyte Group, Inc., 289 F.3d 128 (1st Cir. 2002) (applying the "reasonable woman" standard in a case applying Massachusetts law). Other courts refused to adopt the "reasonable woman" standard, noting that a sex-based standard would reinforce stereotypes about women. *See, e.g.*, Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426 (2d Cir. 1999).

Although the Supreme Court has not addressed the issue directly, in *Harris* the Court defined an objectively hostile work environment as one that "a reasonable person would find hostile or abusive." *Harris*, 510 U.S. at 21. It declined to address the question of the validity of recently proposed EEOC regulations that specifically adopted both a "reasonable person" standard and a "victim's perspective" standard.

subjective measures.[172]

In *Oncale v. Sundowner Offshore Services, Inc.*, the Court held that Title VII creates a cause of action for sexual harassment where the harassers and the victim are of the same sex if the environment discriminates because of sex.[173] While the Court did not elaborate, it gave three examples of evidentiary routes for proving that same-sex harassment occurred because of sex.[174] First, if there is credible evidence that the harasser is a homosexual, the inference can be drawn that the harassment occurred because of the victim's sex.[175] This conclusion is based on the concept that a homosexual would be attracted to another person of the same sex and may make sexual advances toward him or her.[176] But the Court made clear that sexual attraction is not the only motive for sexual harassment.[177] Second, if the victim is harassed in sex-specific and derogatory terms by another person of the same sex, the trier of fact can reasonably infer that the harasser is motivated by general hostility toward the presence of

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Id. at 23 (citing Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993) (to be codified at 29 C.F.R. pt. 1609.1(c)). The EEOC-proposed regulation, later withdrawn by 59 Fed. Reg. 51, 396 (1993), stated, "[t]he 'reasonable person' standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability." Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. at 51,269.

Harris does not settle the question of whether the reasonable woman standard is still good law. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), decided after *Harris*, notes that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale*, 523 U.S. at 81 (quoting *Harris*, 510 U.S. at 23). This standard is consistent with the reasonable woman standard because it requires the fact-finder to consider the plaintiff's position. *See Oncale*, 523 U.S. at 80. One aspect of this position is to consider the gender of the alleged victim. The Ninth Circuit continues to use the reasonable woman standard. *See, e.g*., Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003). For an interesting view of the reasonable woman standard, see Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797 (2000). Wildman argues that a reasonable woman standard does not go far enough, but that it is necessary to examine the facts from an analysis which makes male privilege visible in order to come to the proper conclusion.

[172] *Harris*, 510 U.S. at 21 (quoting *Meritor*, 477 U.S. at 67).

[173] 523 U.S. 75, 80 (1998).

[174] *Id*. at 80-81.

[175] *Id*. at 80.

[176] *Id*.

[177] *Id*.

other members of his or her own sex in the workplace.[178] Third, a victim of same-sex harassment can offer direct comparative evidence of differential treatment of men and women in the workplace.[179]

Since *Oncale*, lower courts have had difficulties determining whether same-sex harassment occurs because of sex. The issue is particularly troublesome because many courts have held that hostile work environment harassment because of sexual orientation is not covered by Title VII, but harassment because a person does not conform to gender stereotypes is covered.[180] As explained below, the cases holding that harassing a man because he does not conform to the traditional stereotype of men as masculine rely on the principle set forth in *Price Waterhouse*.[181]

b. Same-Sex Harassment Because of Sex

A plaintiff suing for sex harassment must prove that the harassment occurs because of sex.[182] Where the harassing behavior is sexual in nature, courts have little difficulty finding in a case of male on female harassment that the harassment occurred because of sex, automatically drawing the inference that the man's sexual advances, touches, or jokes are related to the sex of the victim.[183] This inference is ordinarily drawn because courts have

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178 *Id*.

179 *Id*. at 80-81.

180 *See, e.g*., Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001) (holding that the district court improperly granted judgment to the defendant in a bench trial where throughout plaintiff's employment his male coworkers and a supervisor subjected him to name-calling such as "her" and "she" and mocked him for carrying a tray "like a woman"); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) (holding that the lower court improperly granted a motion to dismiss a heterosexual male's claim alleging that his coworkers harassed him, called him a "homo" and "jerk off," unbuttoned his clothing, patted him on the buttocks, asked him to perform sexual acts, scratched his crotch and humped his door frame, concluding that "simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is [not] thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation").

181 *See supra* related discussion in notes 25, 27 & Part III.C.

182 *See Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1998).

183 *See id.* at 80, stating that

> [c]ourts 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 [that] those proposals would not have been made to someone of the same sex.

See also Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997) (noting "it is

generally assumed that the purpose for the sexual behavior was to forward the romantic interests of the perpetrator. The courts reason that the perpetrator, presumably a heterosexual in a male on female harassment case, would not have behaved the same way with a person of his own sex. While sexual attraction is not the only reason for sexual harassment, courts have nonetheless had greater problems concluding that same-sex harassment is because of sex, especially where there is no evidence that the harasser him or herself is gay or lesbian.[184]

Since *Oncale*, plaintiffs in same-sex hostile environment cases, with varying degree of success, have used the sex stereotyping doctrine of *Price Waterhouse* to prove that their harassment was because of sex. Male plaintiffs compare their situation to that of Ann Hopkins, who was denied partner status because she did not live up to the ideals of femininity held by the partners. Male coworkers and supervisors have harassed male plaintiffs, they argue, because they do not live up to the traditional ideal of masculinity.

A cabined view of *Price Waterhouse* might conclude that the stereotyping doctrine does not apply to harassment cases at all.[185] One could argue that the stereotyping doctrine applies only where there is an adverse employment decision made because the plaintiff does not conform to societal gender norms or stereotypes. This interpretation of *Price Waterhouse*, however, would seem particularly stingy, given that the Court has held on numerous occasions that a hostile work environment can alter the terms, conditions or privileges of employment just as an adverse job action can.[186]

Furthermore, in both *Price Waterhouse* and in the cases of male-on-male sexual harassment, the key issue is whether the adverse treatment occurred because of sex. If the use of gender stereotypes to deny a woman partnership is an adverse employment action because of her sex, the creation of a hostile work environment because a man does not live up to gender stereo-

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generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against 'because of' her sex"), *vacated by* 523 U.S. 1001 (1998).

184 *See Doe*, 119 F.3d at 575.

185 *See, e.g.*, Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).

186 *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

types must be because of his sex.[187]

Many post-*Oncale* courts accept that *Price Waterhouse*'s stereotyping doctrine applies to hostile work environment harassment cases,[188] but they struggle with the question of whether the hostile work environment is due to sex stereotyping which would create a cause of action under Title VII,[189] or to the alleged victim's sexual orientation (or perceived sexual orientation), which they hold is not covered by Title VII.[190]

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[187] Judge Richard Posner has suggested another means of distinguishing *Price Waterhouse.* In his concurrence in *Hamm v. Weyauwega Milk Prods., Inc.,* 332 F.3d 1058, 1066-68 (7th Cir. 2003), Posner argued that a man in an all-male environment has no cause of action for harassment based on sex stereotypes because the stereotype is not used to discriminate against men in general. Posner opines that in *Price Waterhouse* there was a cause of action because the partnership used a gender stereotype to deny entry of Ann Hopkins, a woman, into a nearly all-male partnership. In the all-male environments, however, Posner argues, there is discrimination against a subclass of men, not discrimination against men. As Posner states, "[t]hey are discriminated against not because they are men, but because they are effeminate." *Id*. at 1067. This analysis, however, is reminiscent of *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court held that discrimination because of pregnancy was not sex discrimination. *Gilbert* quickly prompted Congress to overrule the decision by passing the Pregnancy Discrimination Act. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)). In *Gilbert*, which has been much maligned for its reasoning, the Court held that the defendant's denial of pregnancy benefits did not violate Title VII because it discriminated against a subclass of women—pregnant women—but not against all women. *Gilbert*, 429 U.S. at 138-39, 145-46. Under Title VII a plaintiff does not have to prove that all members of the group are discriminated against in order to establish a cause of action. For a more thorough analysis of *Gilbert* and the Pregnancy Discrimination Act, see Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 235-45 (1994).

[188] *See, e.g.*, *Hamm*, 332 F.3d at 1064 (accepting the use of the *Price Waterhouse* sex-stereotyping theory where applicable but concluding that the plaintiff's case was not a sex-stereotyping case as a matter of law); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (affirming the lower court's grant of summary judgment because evidence shows that plaintiff was harassed because of his apparent homosexuality, and not sexual stereotyping). *But see* David S. Schwartz, *When is Sex Because of Sex?: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1742-43 (2002) (concluding that *Oncale* does not stand for the proposition that harassment based on non-conformity to gender norms is sex discrimination).

[189] *See* Nichols v. Aztec Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001) (holding that the plaintiff, an "effeminate man," had a cause of action under Title VII, using the *Price Waterhouse* sex-stereotyping theory for same-sex hostile work environment harassment where his co-workers subjected him to taunts). *Cf.* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (concluding that Rene, a homosexual who had endured attacks and taunts in a same-sex environment, had a cause of action under the sex-stereotyping theory of *Price Waterhouse*).

[190] *See, e.g*., *Hamm*, 332 F.3d at 1062 (affirming the district court's grant of sum-

The cases demonstrate that drawing this line is virtually impossible.[191] Since *Oncale*, the courts of appeals have dealt with the issue in six published cases; three held that the plaintiff made out a cause of action[192] for sex stereotyping; with nearly identical facts, three others held that the plaintiff did not. In the latter, the courts held that, as a matter of law, the plaintiff was harassed because of his sexual orientation or perceived homosexuality rather than for his failure to conform to sex stereotypes.[193]

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mary judgment in Title VII case alleging same-sex hostile work environment because the evidence supported only work performance conflicts or harassment based on perceived sexual orientation, not sexual stereotyping); *Spearman*, 231 F.3d at 1085 (affirming the lower court's grant of summary judgment because evidence showed that plaintiff was harassed because of his apparent homosexuality, and not sexual stereotyping).

[191] One court states that such a claim "requires us to navigate the tricky legal waters of male-on-male sex harassment." *Hamm*, 332 F.3d at 1062.

[192] *See Rene*, 305 F.3d at 1068-69 (holding by the plurality decision reversed the district court's grant of summary judgment to the defendant, and three judges concurred that Rene had preserved his case of sex stereotyping for appeal where the plaintiff was openly gay and his coworkers had teased him about the way he walked, whistled at him, caressed his buttocks, blew kisses at him, touched his body and his face, and called him "muñeca" or doll); *Nichols*, 256 F.3d at 869-70, 874 (holding that the district court improperly granted judgment in a bench trial to the defendant where throughout plaintiff's employment his male coworkers and a supervisor subjected him to name-calling such as "her" and "she," mocked him for carrying a tray "like a woman," and for not having sex with a waitress who was his friend, called him "faggot" and "fucking female whore," and directed "the most vulgar name-calling . . . cast in female terms."); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999). *See* summary of *Schmedding* holding, *supra* note 180. *Cf*. Doe v. City of Belleville, 119 F.3d 563, 567 (7th Cir. 1997) (holding before *Oncale* that the plaintiffs had made out a cause of action for sex stereotyping where two sixteen-year-old boys were subjected to relentless harassment, called "fat boy," "fag," "queer," "bitch," asked "Are you a boy or a girl?", threatened to be taken "out to the woods," and had their testicles grabbed), *vacated by* 523 U.S. 1001 (1998). While *Doe* was vacated by the Supreme Court in light of *Oncale*, *Doe*'s alternative holding based on sex stereotyping is probably still good law. *See Hamm*, 332 F.3d at 1063 (citing to *Doe* for its sex-stereotyping holding and distinguishing it on its facts); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001) (concluding that the *Doe* holding concerning sex stereotyping is still good law).

[193] *See Hamm*, 332 F.3d at 1059-60 (7th Cir. 2003) (affirming grant of summary judgment to the defendant because no reasonable jury could conclude that the harassment plaintiff suffered was sex stereotyping rather than caused by his work performance or his perceived homosexuality where coworkers regularly threatened plaintiff in vulgar terms, called him "faggot," "bisexual," and "girl scout," and passed rumors that he was gay, warning others not to bend over in front of him); *Bibby*, 260 F.3d at 260, 265 (affirming district court's grant of summary judgment because the plaintiff did not present sufficient evidence that the harassment was because of sex where the plaintiff, a gay man, was assaulted at work, told by his assaulter, "everybody knows you're a faggot," and "everybody knows you take it up the ass," called "sissy," and mistreated by his supervisors); *Spearman*, 231 F.3d at

These cases are indistinguishable. They all arise in an all-male or virtually all-male environment. In all of the cases, co-workers and/or supervisors use vulgar verbal taunts as well as physical attacks, often to sexual organs of the victim, to harass him. Moreover, the taunts invariably include comments questioning the victim's masculinity and his sexual orientation. Terms such as "bitch," "fag," "queer," "homo," and "sissy," actions such as the grabbing of testicles, questions asking whether a person is male or female or "takes it up the ass," and threats of rape are common to all of the cases. It would be impossible for the courts, the juries or, I daresay, even the victims or the perpetrators, to distinguish between behavior that is motivated by the victim's failure to conform to gender stereotypes and behavior motivated by the victim's sexual orientation.[194]

Many of the most blatant gender stereotypes derive directly from the sex act. For example, stereotypes hold that men are aggressive, take the initiative, and are physically strong and emotionally remote; women are passive, allow men to take the initiative, and are physically weak and emotional.[195] These descriptions conflate with the concept of how the sex act should be practiced between men and women. In effect, the ultimate stereotype about men is that they are active during sexual relations, and have sexual relations exclusively with women; the ultimate stereotype about women is that they are passive and receptive during sexual intimacies, which they perform exclusively with active men. A man who engages in sex with other men or a woman who engages in sex with other women does not live up to this most basic stereotype. In fact, society defines the gender of homosexual men as female, and of lesbian women as male precisely because they engage in same-sex sexual activity. Creating a hostile environment because of the biological sex of

1082-83 (affirming lower court's grant of summary judgment and concluding that the harassment was because of plaintiff's perceived sexual orientation where coworkers called plaintiff "little bitch," "cheap ass bitch," "[y]ou f-ing jack-off, pussy-ass," threatened to "f- [his] gay faggot ass up," and wrote graffiti on the bulletin board stating "Aids kills faggots dead . . . RuPaul, RuSpearman" (after RuPaul, a black male drag queen)).

194 For an interesting discussion of male feminism, male and heterosexual privilege, and the fear heterosexual men have of being portrayed as not heterosexual, see Carbado, *supra* note 61, at 97-104, 108-11.

195 *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 38-44 (1995).

the alleged victim's sexual partners would therefore equate to discrimination against the victim because of his or her gender nonconformity with a sex-based stereotype.[196]

Professor Frank Valdes demonstrates this point in his article, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*.[197] Like many feminists and masculinities theorists, Valdes distinguishes among a person's sex, gender (or social identity), and sexual orientation (or sexual identity). Valdes traces the historical roots of the conflation of sex and gender; he shows that early twentieth century European and American medical and psychological texts inextricably intertwined sex and gender.[198] He demonstrates that the prevailing concept was (and still is) that a person's gender will ordinarily flow from his or her biological sex, as defined by external genitalia.[199] Thus, those with the biological characteristics of men were also expected to act socially as men: to conform to the expectations of the active, aggressive, masculine person.[200] In contrast, persons

[196] In his dissent in *Rene*, Judge Hug attempts to distinguish *Nichols*. *Rene*, 305 F.3d at 1070-78 (Hug, J., dissenting). While Nichols is allegedly heterosexual and Rene is homosexual, Judge Hug does not overtly base his distinction on this difference. Instead, he argues that Nichols was discriminated against based on his effeminate behavior at work, whereas Rene was discriminated against based on his sexual orientation. *Id.* at 1077. This distinction is amorphous, unless the courts want openly to distinguish between heterosexuals and homosexuals. This distinction would deny rights to a whole class of persons: homosexuals. Second, it would lead to intrusions into the privacy of individuals. Finally, some courts have already concluded that a harassing environment based on "perceived homosexuality" is permissible. Thus, in these cases, even heterosexuals would suffer harassment without recourse.

In *Hamm*, Judge Posner assumes that the sex stereotyping doctrine applies only to heterosexual men—that homosexual men cannot use this doctrine to create a cause of action. Other courts reaching this question are in clear disagreement. According to these courts, the sexual orientation of the plaintiff is irrelevant in deciding whether the discrimination is because of sex. *See, e.g.*, *Rene*, 305 F.3d at 1068 (plurality opinion); *Bibby*, 260 F.3d at 264. When Posner makes this argument, he implicitly recognizes the impossibility of separating harassment based on sexual orientation and harassment based on a person's failure to conform to stereotypes. However, he excludes from the doctrine a whole class of individuals—homosexual men—who would otherwise be protected by the statute, just by virtue of their sexual orientation. This exclusion would create an incentive to prove that an employee is homosexual or that he was perceived to be homosexual, a prospect that may lead to perjury, discovery abuse, and further harassment.

[197] Valdes, *supra* note 195.

[198] *Id*. at 34-56.

[199] *Id*. at 38-44, 52-56.

[200] *Id*. at 40-42, 51.

born with the biological characteristics of women were expected to act passively, shunning interest in work in the outside world.[201] Persons whose biological sex and gender did not conform with each other were considered diseased "inverts."[202] Valdes notes that this conflation of sex and gender continues to dominate today. While psychologists and psychiatrists no longer use the term "invert," the psychiatric community continues to accept the basic conflation of sex and gender, classifying as illness "gender identity disorder."[203]

Valdes also demonstrates that as gender and sex were conflated, so too were gender and sexual orientation. He notes, "[t]hrough inversion theory, sexuality became subsumed within gender because the active/passive stances during or in sexual/private intimacies were officially a part of the overall gender composite being built for each sex on the basis of the active/passive paradigm."[204] Because gender flowed naturally from biological sex and gender subsumed sexuality, sexual orientation was conflated with gender.[205] Thus, persons whose gender is female or feminine would naturally and normally have a sexual orientation toward persons who are male or masculine. The converse was also considered true. If a male was masculine, he would be sexually oriented toward the passive and feminine. The end result was that men who were oriented toward men were considered to be abnormal and gendered female (so called "sissies" and "fags"), whereas women who were oriented toward other women were considered abnormal and gendered male (so called "dykes"). Hence, gay men and lesbians automatically fell into the wrong gender category.

Valdes' research shows that the hatred leveled at homosexuals is caused more by a distaste of the individual's gender than by the fact that he or she engages in sexual activity with members of his or her own sex.[206] For example, a number of studies that Valdes cites define male homosexuals as men who are socially (or sexually) more effeminate than society expects of men. The

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201 *Id*. at 52-56.

202 *Id*. at 50-51.

203 *Id*. at 84 (citing the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532 (4th ed. 1994)).

204 Valdes, *supra* note 195, at 51.

205 *Id*.

206 *See id*. at 72 (discussing a study by the Mazet Committee investigating New York public officials in 1899).

studies consistently conflated the social behavior of "sissies" with male homosexuality.[207]

In a remarkable study, a group of volunteer enlisted men were sent to investigate the homosexual activities of servicemen at the Newport Naval Training Center during 1919-1920.[208] The volunteers engaged in sexual acts with the men and then tesified against them in subsequent military and civilian trials.[209] A study by George Chauncey, Jr. demonstrated that the men who were the decoys did not characterize themselves as homosexuals even though they engaged in numerous same-sex sexual activities with the defendants.[210] Instead, the records demonstrate that they considered themselves to be "real men" because their behavior during the sexual activities was "masculine" and "more aggressive" while the behavior of their homosexual subjects was passive and receptive.[211]

A similar purge occurred in the Navy years later. Right before the Persian Gulf War, Valdes notes, an admiral directed all those under his command to dismiss lesbians working in their midst.[212] The admiral directed their removal because the lesbians might be too aggressive and intimidating.[213] According to Valdes, the admiral was concerned that personnel under his command might be reluctant to expose the lesbians because the lesbians were, according to the admiral, hard-working, career-oriented and among the top performers.[214] Valdes concludes (and it appears rightly so) that the admiral's fears were not based on the lesbians' sexual activity or that their sexual activity would in some way interrupt their work.[215] Instead, he feared that the lesbians would be threatening to the men because they may be more accomplished in their positions than the men.[216] In sum, the admiral feared that the lesbians' failure to conform to gender stereotypes, rather

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[207] *Id*. at 72-73.

[208] *Id*.

[209] *Id*. at 73.

[210] *Id*. at 73-74.

[211] *Id*. (citing George Chauncey, Jr., *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era*, *in* DAVID F. GREENBERG, HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 294 (1989)).

[212] Valdes, *supra* note 195, at 95-96.

[213] *Id*. at 95.

[214] *Id*. at 95-96.

[215] *Id*.

[216] *Id*.

than their sexual orientation, would cause problems on the ships. Valdes notes that this is an example of the conflation of sexual orientation with gender (and therefore with sex).[217] According to the law, the admiral could legally expose and dismiss lesbians because they were lesbians. He could not, however, dismiss women for their non-conformance with gender sterotypes.

Thus, Valdes demonstrates that permitting discrimination based on sexual orientation actually reinforces discrimination based on gender. It therefore supports and reinforces illegal gender discrimination, harming society, sexual minorities, and heterosexual women.

Professor Valdes states:

> [T]he conflation's impact on life and law is neither natural, nor neutral, nor benign. On the contrary, this conflation is a highly problematic contrivance that exerts a divisive force on society and a destabilizing influence in law; this conflation embodies, excludes, and extends androsexist[218] and heterosexist biases, which engender and accentuate social and sexual rankings and acrimonies in both law and society. In other words, this conflation constitutes and validates hetero-patriarchy. As such, it creates and reinforces artificial oppressive dictates and distinctions that affect all of us, but that specifically impede social and legal equality for (heterosexual) women and for sexual minorities.[219]

Masculinities studies support Valdes' findings. Robert Connell notes that hegemonic masculinity subordinates gay men and gay masculinity, conflating it with femininity. He states: "Gayness, in patriarchal ideology, is the repository of whatever is symbolically expelled from hegemonic masculinity . . . . Hence, from the point of view of hegemonic masculinity, gayness is easily assimilated to femininity. And hence—in the view of some gay theorists—the ferocity of homophobic attacks."[220]

Concepts of masculinity and sexual orientation are inextricably intertwined. Connell notes that in this society hegemonic masculinity is defined exclusively as heterosexual. Even the most aggressive, competitive and masculine gay men are considered not masculine, merely because of the identity of their sex partners.[221]

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[217] *Id*. at 97-99.

[218] Professor Valdes uses the term "androsexism" to identify a type of sexism that prefers or gives advantage to male ideals. *See id*. at 8.

[219] *Id*. at 8 (citations omitted).

[220] CONNELL, *supra* note 8, at 78.

[221] CONNELL, *supra* note 8, at 162. Connell states:

Moreover, experience shows that men in predominately male work environments often denigrate women and other males who do not conform to gender norms, using gender specific language that equates inferiority with being female or feminine.[222] The greatest insults lodged against other men, whether heterosexual or homosexual, challenge their masculinity. These insults include clear references to the gender of the victim, referring to him in terms used to refer to women, such as "bitch," or that give him characteristics of women, such as "pussy" or "milquetoast," or that conflate a lack of masculinity with homosexuality. This behavior, which Robert Connell identifies as a symbolic blurring with femininity, maintains the superiority of the masculine over the feminine, of men over women.[223]

Gender scholars attribute this behavior to attempts to preserve the job in question as masculine and the exclusive domain of men.[224] It reinforces the hegemonic masculinities from which

> Patriarchal culture has a simple interpretation of gay men: they lack masculinity. This idea is expressed in an extraordinary variety of ways, ranging from stale humour of the limp-wrist, panty-waist variety, to sophisticated psychiatric investigations of the 'aetiology' of homosexuality in childhood. The interpretation is obviously linked to the assumption our culture generally makes about the mystery of sexuality, that opposites attract. If someone is attracted to the masculine, then that person must be feminine—if not in the body, then somehow in the mind.
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> These beliefs . . . are pervasive. Accordingly they create a dilemma about masculinity for men who are attracted to other men.

Id. at 143.

[222] *See, e.g.*, Sharon R. Bird, *Welcome to the Men's Club: Homosociality and the Maintenance of Hegemonic Masculinity*, 10 GENDER & SOC'Y 120, 122, 125-29 (1996) (concluding from her study of heterosexual males that homosociality—the attraction of men in non-sexual ways to one another—is used to reinforce meanings of hegemonic masculinity and differentiation from that which is feminine; when heterosexual men associated with each other they constantly reinforced the hegemonic masculine behaviors of emotional detachment, competition and sexual objectification of women, and encouraged suppression of "feminine" characteristics such as expressing one's feelings); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 68-69 (2002) (describing the hostile treatment of Shannon Faulkner, the first woman to integrate the Citadel, a military college in South Carolina; the male students screamed obscenities at Shannon, addressed death threats to her, scrawled on the bathroom wall "Let her in—then fuck her to death"). This behavior begins early. Boys attack other boys as being "girls" or "sissies" in the playground in elementary school. *See* BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 115-18 (1999) (noting the prevalent use of "sissy" as a derogatory term to refer to boys who like to do "girl things," as opposed to the term "tomboy," to refer to girls who are athletic or like comfortable clothing, in a relatively positive vein).

[223] CONNELL, *supra* note 8, at 79.

[224] Patricia Yancey Martin, *Gender, Interaction, and Inequality in Organizations*,

men achieve a patriarchal dividend, an increase in income merely because they are male. Class and race are also involved. For example, in blue collar jobs, these practices, which are often violent in nature, reinforce the masculine identities of the job holders, protecting their fragile place in the hierarchy and permit them to challenge the "limp-wristed paper pusher" managers whose jobs are less masculine.[225]

If permitted by law, the conflation of certain types of work with men, and men with hegemonic masculinities, clearly privileges gender-conforming men over women and gender-nonconforming men. It leads to environments that are abusive to women and gender-nonconforming men because of their sex, and it creates an entire class of jobs that exclude all but the most daring women and gender-nonconforming men. If the courts do not recognize that this behavior discriminates because of a person's sex in violation of Title VII, they reinforce the hegemonic masculinities, the superiority of masculine men and the inferiority of women, and the gender differences in pay and experience. In other words, they contribute to the dynamic stasis of women at work.

Title VII makes it illegal to discriminate against an individual because of sex. The crucial question is whether a legitimate interpretation of Title VII would permit a holding that discrimination because of sex includes discrimination because of sexual

in GENDER, INTERACTION, AND INEQUALITY 217 (Cecilia L. Ridgeway, ed. 1992) (noting that men attempt to exclude women peers because they fear that women's presence will undermine the masculinity requirements of the job leading to lower status and pay); WILLIAMS, *supra* note 8, at 77-79; James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 314 (1998) (finding that predominately male environments are more physically hostile and threatening to women and men are more likely to mark their work environments with symbols of the sexual objectification of women); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 23, at 1687. *Cf*. Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 STAN. L. REV. 777, 793-96 (finding that "hypermasculinity," including aggression and violence in police work, is a means of maintaining a masculine identity of the job and the men in the job). Interestingly, sociologist Barrie Thorne has found that boys who are good athletes, popular, and masculine can more easily "cross over" to play with the girls in elementary school without harming their reputations. *See* THORNE, *supra* note 222, at 122-23.

225 WILLIAMS, *supra* note 8, at 78 (stating that the hidden injuries of class experienced by male blue-collar workers create the incentive to define their own work as truly masculine); Harris, *supra* note 224, at 785 (noting that on shop floors, workers see their positions as signifying the "true masculinity . . . an alternative to the hegemonic form associated with managers").

orientation. Masculinities studies clearly support such a holding. One tenet of those studying masculinities is that the exaggerated and socially constituted differences between two polar opposites, male and female, maintain the power structure that privileges men over women.[226] These theorists advocate the degendering of women and men as a social movement. Moreover, feminist sociologist Judith Lorber argues that the division between heterosexuality and homosexuality is not as clear-cut as society represents. She argues that it is difficult empirically to support the conventional sexual categories because sexual desire, preference and orientation belong to a spectrum of responses that are often tempered by social and cultural restrictions and pressures. The bipolarity of opposites between homosexuality and heterosexuality, like the bipolarity of men and women, male and female, reinforces the superiority of men over women, and gender-conforming men over gender-nonconforming men.[227]

Since its passage in 1964, Title VII has undergone a dynamic interpretive evolution, consistent with enormous societal changes in attitudes and values occurring over the past forty years. These changes include the incorporation of the disparate impact theory of litigation and the recognition of affirmative action as permissible,[228] the decision to include pregnancy discrimination as sex discrimination,[229] the emergence of sexual harassment as a form of sex discrimination,[230] the application of sexual harassment law to same-sex harassment,[231] and the explicit expansion of the protected category of sex from coverage of biological sex alone to

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226 *See* Lorber, *supra* note 21, at 153-55.

227 *Id*. at 146-47.

228 *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 69-80 (1994) (discussing the "dynamic" interpretation of Title VII to create a cause of action under the disparate impact theory and the consequent decision that at least some forms of affirmative action do not violate Title VII); *see also* Ann C. McGinley, *Affirmative Action Awash in Confusion: Backward-Looking-Future-Oriented Justifications for Race-Conscious Measures*, 4 ROGER WILLIAMS U. L. REV. 209, 221-22 (1998).

229 *See* McGinley & Stempel, *supra* note 187, at 235-42 (discussing the amendment of Title VII to create the Pregnancy Discrimination Act).

230 *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). After Professor MacKinnon published her book in 1979, the EEOC promulgated guidelines defining sexual harassment as sex discrimination in violation of Title VII. 29 C.F.R. 1604.11 (1985). The Supreme Court recognized a cause of action for sexual harassment as sex discrimination violative of Title VII in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

231 *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

the broader coverage of discrimination based on sex and gender, or failure to conform to societal gender expectations.[232] Some of these changes initiated with legal scholars, litigants and the EEOC, culminating in the Supreme Court's expanded interpretation of the statute.[233] In other cases, the Supreme Court's conservative interpretation of the statute led to congressional amendments that liberalize the statute.[234] Whether the evolution occurs through interpretation or amendment, it is dynamic and informed by specialists in the social sciences, including sociology, psychology, and feminist studies.

Currently a substantial body of gender and masculinities studies defines sexual preference or sexual orientation as part of Gender.[235] Judith Lorber, for instance, argues that Gender in-

[232] In *Price Waterhouse*, the Court expanded the definition of "sex" to include "gender," or the set of societal expectations to which a person of a particular biological sex should conform. Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989). *Price Waterhouse* made clear that discrimination against a person for failure to conform to societal expectations "required" of the person's biological sex is discrimination because of sex. *Id*. at 251-52. Recently, the Seventh Circuit stated that discrimination "because of sex" under Title VII is limited to discrimination based on "biological sex." *See* Spearman v. Ford Motor Co., 231 F.3d 1080, 1082-84 (7th Cir. 2000) (relying on a case decided before *Price Waterhouse* to determine that the term "sex" means "'biological male or biological female,' and not one's sexuality or sexual orientation"). This holding, while most likely consistent with the expectations and purposes of the members of Congress who passed the bill into law in 1964, is too narrow given *Price Waterhouse* and subsequent lower court decisions.

[233] For example, the Supreme Court has interpreted sexual harassment to create a cause of action for sex discrimination and has expanded that interpretation to same-sex harassment. *See Oncale*, 523 U.S. at 78.

[234] For example, after the Supreme Court cut back on its interpretation of the disparate impact theory of Title VII claims in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1971), Congress reacted by enacting the Civil Rights Act of 1991, overruling much of *Wards Cove* and explicitly recognizing the disparate impact cause of action in the text of Title VII for the first time. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

[235] I use the term "Gender" with a capital "G" to denote Judith Lorber's definition of Gender as an overarching category. Lorber notes:

> Gender is an overarching category—a major social status that organizes almost all areas of social life. Therefore bodies and sexuality are gendered; biology, physiology, and sexuality, in contrast, do not add up to gender, which is a social institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, is built into the major social organizations of society, such as the economy, ideology, the family, and politics, and is also an entity in and of itself.
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> For an individual, the components of gender are the sex category assigned at birth on the basis of the appearance of the genitalia; gender identity; gendered sexual orientation; marital and procreative status; a gendered personality structure; gender beliefs and attitudes; gender displays; and work and family roles. All these social components are supposed to be

cludes three theoretically distinct categories, all of which are socially constructed in different ways:[236] 1) biological or physiological sex;[237] 2) sexuality, which includes sexual desire, preferences, and orientation; and 3) gender, a social status that sometimes has a sexual identity.[238] While these categories may be theoretically distinct and capable of separation for research purposes, as a practical matter, it is impossible to distinguish between sexuality and Gender (both as used by Lorber) in determining the motivations for, or causation of, harassing behavior.

The courts' attempt to distinguish a hostile environment caused either by the victim's failure to conform to sex stereotypes or by the victim's sexual orientation is cramped and unpersuasive. Moreover, courts appear mean-spirited and undignified as they seek to distinguish vulgar expressions and physical attacks resulting from the harasser's disgust for the victim's failure to conform to gender norms from expressions and attacks caused by the victim's sexual orientation, real or perceived. Through their opinions, courts become complicit in endorsing the very environment that supports aggressive, competitive, brash, hegemonic masculinity.

Men who are punished at work for not conforming to gender norms or for their sexual orientation or both should be accorded

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> consistent and congruent with perceived physiology. The actual combination of genes and genitalia; prenatal, adolescent, and adult hormonal input; and procreative capacity may or may not be congruous with each other and with the components of gender and sexuality, and the components may also not line up neatly on only one side of the binary divide.

Lorber, *supra* note 21, at 146-47. I use the term "gender" with a lower case "g" to mean "gender" connected with social status. *See infra* note 238.

[236] *See* Lorber, *supra* note 21, at 146-47.

[237] Lorber argues that even biological sex is contestable, focusing on the large number of babies born who are of indecipherable sex at birth. She notes that male and female genitalia develop from the same tissue, and that a minimum of one in one thousand babies is born with ambiguous genitalia. Lorber, *supra* note 21, at 147 (citing Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar. - Apr. 1993, at 21.

Lorber notes that when a child is born with ambiguous sexuality—XY chromosomes and anomalous genitalia—the doctors officially categorize the child by labeling it a "boy" or a "girl," depending on the penis size. If the penis is very small, the doctors perform surgery to make an artificial vagina and label the child a girl. *See* Lorber, *supra* note 21, at 147. Lorber contends that the categorization of the ambiguous as either female or male sustains the false notion that there are clear-cut differences between the two sexes. *Id*. at 148.

[238] *See* Lorber, *supra* note 21, at 146. *See generally* David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223 (2002) (arguing that academics must recognize and negotiate the commodification of LesBiGay identity).

the same dignity granted to women to avoid sexual harassment.[239] Furthermore, the interpretation of Title VII to permit the harassment of these men undermines equal rights for women at work. Masculinities studies demonstrates that the very methods used to harass nonconforming men is based on the superiority of men over women, the masculine over the feminine.[240] These methods, if permitted to continue, confirm that women (and nonconforming men) do not belong in many workplaces that are predominately male. Without desegregating these workplaces and breaking down the gender identification of the job, it is virtually impossible to achieve equality for women.[241]

The courts should consider using masculinities theory to redefine "because of sex." Masculinities theory can demonstrate that discrimination because of sex should redress harmful behavior caused by all three aspects of gender as Lorber defines it: biological sex, sexuality, and gender. In other words, masculinities theory demonstrates that discrimination because of sexual orientation is discrimination because of sex.

Perhaps the most persuasive argument against defining Title VII's term "because of sex" to include sexual orientation is that Congress has attempted and failed to amend the statute on numerous recent occasions to include sexual orientation as a prohibited reason for discrimination.[242] Masculinities research demonstrates that there is no distinction between gender discrimination and discrimination based on sexual orientation, and the Court has already banned gender discrimination—sex stereotyping. However, there is a good argument that Title VII already prohibits sexual orientation discrimination under the *Price*

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[239] *See generally* Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445 (1997); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999).

[240] *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 18, 33, 47 (1995) (noting that many cases interpret *Price Waterhouse* not to apply to the feminine male and arguing that this devaluation of the feminine harms not only the individual effeminate male, but also women as a group).

[241] *See* Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 (1990) (noting negative consequences of segregation for women including lower wages, less status, and fewer opportunities for advancement).

[242] Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (2d Sess. 1994).

Waterhouse stereotyping doctrine. The cases attempting to distinguish between discrimination based on sex stereotyping and on sexual orientation, as demonstrated above, fail miserably to draw a principled distinction between the two.

Moreover, political theorists have demonstrated that the political process is an inconsistent and imprecise measure of the support of the majority of the voting public for a particular issue.[243] The research on the distortion of the political process by monied interests demonstrates that in an area that is so fraught with emotion, it will be extremely difficult to amend the statute to offer protection to persons based on their sexual orientation,[244] even though a majority of the public may well support the concept that persons who are homosexuals should not be discriminated against at work because of their sexual orientation.[245] Furthermore, because social conservatives put significant money behind opposing gay and lesbian rights, the information concerning the amendment to the statute may be distorted: many people believe

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[243] *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 52-61 (2d ed. 1995) (discussing Kenneth Arrow's public choice theory concerning the incoherence of majority-voting, transaction theories of legislation and the empirical studies challenging the all-encompassing power of interest groups, and underestimating the power of the President in blocking or passing legislation) [hereinafter ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION]; William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1406 (1988) (noting that public choice theory demonstrates that the political process tends to "pander to small, well-organized groups") [hereinafter Eskridge, *Overruling Statutory Precedents*].

[244] *See* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION, *supra* note 243, at 58 (noting that Schlozman and Tierney's empirical studies support the position that an interest group tends to be more influential "[w]hen the group is seeking to block new legislation rather than to promote a new policy, because there are so many opportunities for an organized group to kill or delay new legislation") (citing KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 395 (1986)); *see also* Eskridge, *Overruling Statutory Precedents*, *supra* note 243, at 1407 (explaining that legislators get themselves reelected by refusing to make tough political choices that harm important interest groups). *Cf*. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1613-17, 1620-26 (1998) (suggesting through use of psychological studies that people in contract negotiations prefer inaction over action).

[245] There is research that would lead one to conclude that conservative Christians in particular are very hostile, for religious reasons, toward the presence of persons in their midst who are openly homosexual. *See, e.g.,* THOMAS J. LINNEMAN, WEATHERING CHANGE: GAYS AND LESBIANS, CHRISTIAN CONSERVATIVES, AND EVERYDAY HOSTILITIES (2003) (studying the hostile attitudes of Christian conservatives toward lesbians and gays).

that adding sexual orientation provides special protection for lesbians and gays, protection not afforded to other persons.[246] Research suggests that most Americans believe it should be illegal to discriminate against gays and lesbians in the workplace for their sexual orientation.[247] Thus, it seems that the political process does not operate properly in this arena.[248]

Because of the distortion of the political process, the courts should not interpret the failure of Congress to amend the statute to conclude that Title VII should not and does not prohibit discrimination based on sexual orientation.[249] This point is consis-

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[246] *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1352-53 (2000) (observing that those opposing laws prohibiting discrimination based on sexual orientation argue that such bills grant "special rights" to gays and lesbians). Eskridge argues that there is a new rhetoric surrounding the anti-gay discourse: the "no promo homo," which supports the concept that it is not in the states' interest to promote homosexuality because heterosexuality is preferable. *Id*. at 1329, 1338-39. While appearing reasonable, the "no promo homo" argument masks invidiously discriminatory reasons for opposing legislation that prohibits discrimination against members of the GLBT community. *Id*. at 1363-65. Eskridge opines, however, that the "no promo homo" argumentation cannot maintain its distance from the "status-subordinating features of anti-gay policies." *Id*. at 1365. He argues that the "no promo homo" arguments actually seek "both status denigration and identity censorship, which for GLBT people are closely linked." *Id*.; *see also* Howarth, *supra* note 20, at 227 ("'Special treatment' is serious, powerful coded language in U.S. culture wars about racial justice, gay and lesbian rights, and women's rights.").

The failure of courts to recognize that sexual orientation discrimination is discrimination because of sex and the attempts to distinguish discrimination based on sexual orientation from discrimination based on sex stereotyping seems to do the same thing: the only basis for refusing to include sexual orientation in the definition of "sex" is to permit discrimination based on status, membership in a particular, discrete minority group, and to permit censorship of GLBT people in the workplace.

[247] In the hearings on the Employment Non-Discrimination Act of 2003, Senator Kennedy noted that according to a 2003 Gallup study, 88% of Americans believe that gays and lesbians should have equal job opportunities. *Employment Non-Discrimination Act of 2003: Hearing Before the S. Comm. On Health, Educ., Labor & Pensions*, 108th Cong. (2003) (statement of Sen. Edward M. Kennedy).

[248] For an explanation of why a legislature may not act to overturn the Supreme Court's interpretation of a statute, see Eskridge, *Overruling Statutory Precedents*, *supra* note 243, at 1403-05, for a list of five reasons other than legislative approval for the Court's decision for legislative inaction. These same reasons are applicable here. Eskridge states that "[t]he vagaries of the political process make it hard to determine what Congress' 'positive inaction' meant." *Id*. at 1405.

[249] Furthermore, there is some question as to whether it is even constitutional for the courts to attempt to draw the line between gender discrimination and discrimination based on sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court struck down as violative of the Equal Protection Clause a Colorado Constitutional Amendment that prohibited the enforcement of any anti-discrimination ordinances as applied to sexual orientation. The Court held that the constitu-

tent with the expressed view of one of the most conservative members of the U.S. Supreme Court. Justice Scalia has opined in many Court opinions that the failure of Congress to act should not be interpreted to demonstrate its consent to the courts' statutory interpretation.[250]

c. Other-Sex Harassment "Because of Sex"

Masculinities studies can also help courts and juries determine whether other-sex harassment is because of sex. *Oncale* made clear that Title VII forbids hostile work environment harassment because of sex whether the motivation for the harassment is sexual attraction or hostility. It also explained that sexual and nonsexual harassing treatment should be considered in determining whether there is a hostile work environment because of sex.[251] Lower courts, however, encounter difficulty in determining that some other-sex harassing behavior is because of sex rather than because of personal animosity. An example is *Galloway v. General Motors Service Parts Operations*, in which the Seventh Circuit affirmed the district court's grant of summary judgment in a sexual harassment case, concluding that the terms "sick bitch" and "bitch," combined with other verbal abuse and obscene gestures directed at a woman who was previously the lover of the harasser, was not a sex- or gender-related term as a matter of law.[252] The relevant portion of the opinion states:

> It is true that "bitch" is rarely used of heterosexual males (though some heterosexual male teenagers have taken recently to calling each other "bitch"). But it does not necessa-

tional amendment was based on bias and hatred against a specific group—homosexuals—and was not rationally related to a legitimate governmental interest. *Romer*, 517 U.S. at 634-36. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court held that a Texas statute that provided criminal sanctions for engaging in sodomy was violative of the Due Process Clause of the 14th Amendment because it interfered with the right of liberty of every adult citizen to engage in consensual intimate relations with other adults. These cases could be interpreted to prohibit the courts and the Congress from making the distinction between homosexuals and heterosexuals, a distinction which arguably is based on bias and invidiousness.

[250] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 292 (2001); Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

[251] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 57, 81 (1998); *see supra* Part I and note 23; *see also* Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 23, at 1687 (explaining that most of the harassment suffered by women is not sexual in nature but instead involves non-sexual actions by men attempting to undermine their female colleagues' perceived (or actual) competence in order to protect their "bastions of masculine competence and authority").

[252] 78 F.3d 1164, 1167 (7th Cir. 1996).

> rily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for "woman." If Bullock had called Galloway a "sick woman," and a similarly situated male coworker a "sick man," there would be no ground for an inference of sex discrimination. And, likewise, were there a similarly situated male worker to Galloway whom Bullock called a "sick bastard" while calling her a "sick bitch," we do not think it would be rational for a trier of fact to infer that Bullock was making the workplace more uncongenial for women than for men. Even if Bullock didn't abuse any men, there would not be an automatic inference from his use of the word "bitch" that his abuse of a woman was motivated by her gender rather than by a personal dislike unrelated to gender.[253]

This opinion, written by Judge Posner, demonstrates the Seventh Circuit's failure to understand the derogatory, gendered nature of the term "bitch," the unequal personal relationships that many women endure, and the structural inequalities of gender at work. These attitudes contribute to the dynamic stasis of women at work. A woman at work who is subjected to repeated behavior such as name-calling and obscene gestures, combined with the term "bitch" and "sick bitch," works, at least arguably, in a hostile work environment because of her sex. Masculinities studies can help the judge and the fact finder in this case to recognize that the aggressive, hostile treatment of a female worker may be a masculinity that establishes the superiority of the male over the female in a personal relationship, which, in this case, spills over into the workplace. The purpose of this aggression, occurring at work, could be in large part to punish a woman for not conforming to the feminine stereotype of dependence on her man. As in *Galloway*, for example, the harassment may occur as a means to control the woman or in order to punish her for her resistance to her partner's control.[254] This harasser's behavior closely mirrors domestic violence which becomes more acute when the victim attempts to assert her own independence from a domineering partner.[255] When this behavior is brought into the

[253] *Id*. at 1168.

[254] *See id*.

[255] *See* LORBER, *supra* note 7, at 71-72.

workplace and tolerated by the employer, a jury should be permitted to draw the inference that the behavior is because of sex.

Second, and perhaps more importantly, even though courts after *Oncale* generally agree that sexual and non-sexual behavior because of one's sex can be considered in a harassment case, there are no reported cases in which the harassing behavior has no gender or sexual components to it. This is an especially important area for women who work in jobs where their male colleagues are relatively sophisticated in their understanding of the anti-discrimination laws. These women can be harassed mercilessly because of their sex without there being any mention of sex or any gender-based comments.

A hypothetical should demonstrate this point. Assume a law school named the Southern Elite Less Law School (SELLS). The fortyish white male members of the faculty are good scholars, have graduated from good law schools, and are very troubled by their inability to move to more prestigious law schools. They believe that there are many women and minorities who have been hired at higher ranking law schools who are not as good as they are. These men call themselves the EXCELS (Excellent Law Scholars).

The junior untenured faculty is the most diverse group of faculty ever employed at SELLS: Black, Latina, and white women, as well as two white men and a Latino. The untenured women form a close bond with each other and with two tenured women. The group of untenured women are generally about the same age as the EXCELS and are fairly confident in their abilities and viewpoints; they do not see their role as submissive to the EXCELS. Furthermore, their credentials are equal to, if not better than, those of the EXCELS. Early on in their careers at SELLS, the untenured women and at least one tenured woman protest to the dean about the pervasive environment of sexual harassment of the students at the law school. Moreover, they argue for an increase in minority faculty hiring. Both of these positions anger the EXCELS. They feel that the women should keep their mouths shut about sexual harassment, and they do not believe that there are any qualified minority faculty to hire.

The EXCELS treat the two untenured white males and the untenured Latino well. They also invite into their ranks a tenured woman on the faculty who was once a noted scholar, but who has not published for years. Despite her lack of scholarship, this wo-

man curries favor with the EXCELS by agreeing with them publicly and often doing their dirty work. Together with the one woman, they verbally attack the young, untenured women on the faculty, to their faces and behind their backs. Since the EXCELS accept one woman into their ranks and treat well one man of color, they believe that their actions are safe from accusations of gender and race bias.

The EXCELS describe themselves as the "scholars" who uphold standards through scholarship. They disparage the senior faculty and the women and persons of color, labeling the senior faculty DINOSAURS; white women and women of color are the AFFIRMATIVE ACTION HIRES or simply THE EXPERIMENT. They also describe the women as "anti-standards," "anti-scholarship," and "service-oriented," even though some of the women have produced more scholarship than any of the EXCELS had at the corresponding point in their careers. Two senior men also eventually earn the title of "anti-standards" and "anti-scholarship," because they break ranks by openly defending the scholarship of the untenured women. One of these "anti-scholarship" men has published more scholarly articles and books than any other faculty member.

The institution accords the EXCELS power, prestige, and respect. A majority of EXCELS or persons they control sits on the most powerful committees; the dean condones their process-perverting tactics, and rewards them with status and/or economic benefits. The university president seeks their counsel on decisions affecting the law school.

Although generally the senior faculty may not agree with the EXCELS' tactics, the EXCELS assiduously court them before important faculty meetings in order to assure the senior faculty's votes. At SELLS, there is little or no process. Most decisions are made in office discussions from which the women and minorities are excluded. These pre-meeting decisions are often used to screen out qualified women and persons of color as faculty candidates, and to tarnish the reputations of the untenured women and persons of color at SELLS as they are considered for tenure and promotion.

The untenured women are aware of the EXCELS' disdain. It is evident in all of their interactions, including faculty meetings. This environment, which the untenured and at least two of the

tenured women perceive subjectively to be hostile and harassing, creates stress in the women, causing many to seek medical help.

Many courts would recognize that the environment at SELLS is sufficiently severe or pervasive to alter the terms and conditions of the women's jobs but would conclude that it does not constitute harassment because of their sex. This conclusion would rest on the absence of a sexually hostile environment and of gender-based references. Nonetheless, the women who suffer this environment should be able to sue using the sex harassment law. Masculinities theory would aid the court in understanding why this harassment occurred because of the women's sex. First, gender and masculinities theory would emphasize that the women did not conform with the established sex stereotypes of compliance with and subversion to their senior male faculty colleagues. The women had their own opinions and were willing to voice them. These opinions were particularly troublesome to the male faculty because they dealt with issues of sexual harassment and minority hiring, topics which the more established faculty did not want to discuss. By viewing the culture at SELLS through the lens of masculinities theory, a court would note the presence of careerism in the law school. The identities of male faculty members are very much involved in moving to a more prestigious school. This careerism, in turn, harms the women. Masculinities theory would also explain the men's use of authoritarianism and informalism to gain control. The EXCELS expected that the junior women would submit to their demands and not disagree with them. Moreover, men used informalism to build relationships with their untenured male colleagues and the senior men. These informal networks worked to the disadvantage of the women at work. Finally, masculinities fieldwork, demonstrating that women are described as unduly aggressive when they do not submit to the expected social stereotypes of women, would account for the men's severe reaction to their more junior female colleagues.

In other situations, masculinities theory would explain that a workplace that includes demands on women's emotional labor, combined with an informal network benefitting male workers[256]

[256] *See, e.g.*, Brill v. Lante Corp., 119 F.3d 1266, 1272 (7th Cir. 1997) (failing to understand why the plaintiff's allegation that she was excluded because she was not "one of the boys" would be because of sex, given that a man could also be similarly excluded).

and demands of working long hours,[257] may create a hostile work environment for some women because of their sex.

This theory should help the judge and/or jury place into context the experiences of the individual plaintiff. While a woman's exclusion from a trip to a baseball game with the "guys," an expectation that she listen to the men's personal problems, or a requirement that she work into the evening may not alone be sufficient to create a hostile work environment because of her sex, masculinities studies would help place these individual occurrences into a framework of gendered relations and power. Her exclusion from the trip to the ball game may seem insignificant, but, when combined with the other masculinities at work, it may be very significant.[258] It may be one piece of evidence of the informalism practiced by men that places women at a disadvantage at work.

While men's expectations that women provide emotional comfort may seem natural, masculinities studies demonstrate that men expect this emotional labor of a woman, but would not require the same work of a man in the same position. Combined with testimony from a plaintiff who may spend inordinate amounts of time giving comfort to the men, or in contrast, is considered a "bitch" for refusing to provide such comfort, masculinities studies may be key to helping a woman prove that her treatment at work is different from the men's and sufficiently severe or pervasive to alter the terms and conditions of her work.[259]

In other words, masculinities studies can help demonstrate that

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257 Joan Williams attributes the inequality of women at work in professional and managerial positions to the glass ceiling, the "maternal wall," the executive schedule, the marginalization of part-time work, and relocation (the woman's inability to relocate because of her husband's job or having to relocate because of his job). *See* WILLIAMS, *supra* note 8, at 69-76. Williams attributes the inequality in working class jobs to the designing of blue-collar jobs around men's bodies, access to family work, and the policing of masculinity at work. *Id*. at 76-81 (observing that blue-collar jobs are highly segregated with 45% of men and only 10% of women holding these jobs; white women hold only 2.1% and black women hold only 2.2 % of the best blue-collar jobs in production, precision, and craft occupations).

258 *See generally* Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996).

259 *See* LORBER, *supra* note 7, at 243-44 (noting that women leaders are expected to be "empathic, considerate of others' feelings, and attuned to the personal"; if they fail to have these characteristics, they are criticized for being "abrasive," even though men with similar personalities are not criticized for their style; in contrast, a more conciliatory style is criticized as being not sufficiently authoritative).

the expectations that men have of women and men at work differ and that these expectations, fulfilled or not, place women at a distinct disadvantage. If a woman fulfills the expectations, she may spend hours of her work time on this emotional work, creating stress and feelings of inferiority and affecting her ability to accomplish the more visible requirements of her job.[260] If a woman does not fulfill these expectations, the men may treat her less favorably, either taunting her or concluding that she is not a "team player."

A hostile environment because of sex can also occur when women are harassed for their failure to conform to gender-based stereotypes, especially when the job itself is defined with reference to these stereotypes. If women in these "women's" jobs take control, speak out at work, or behave in a way that is not subservient to the men, they can suffer harassment because of their sex. Jennifer Pierce's *Gender Trials* demonstrates that women paralegals were evaluated by their supervisors more harshly if they were not compliant, not friendly enough, and in other ways did not conform to the stereotype of a woman "helper."[261] If the male attorneys or paralegals harass the women paralegals because they did not conform to gender stereotypes, these women should be able to prove that their harassment occurred because of their sex, even if the means of the harassing behavior was neither overtly sexual nor overtly related to the women's gender.

d. Masculinities and the "Severe or Pervasive" Requirement

(i) Summary Judgment and Hostile Work Environments

As mentioned above, besides demonstrating that harassment occurs because of the victim's sex, a plaintiff alleging sex harassment must also prove that the harassment was sufficiently severe or pervasive to alter the terms and conditions of her work.[262] In determining whether a hostile work environment exists, the

[260] The "time bind" created by expectations of emotional labor can be even more problematic for women because the research shows that even women who make as much money as their male partners spend significantly more time caring for their homes and their children and taking care of the family's relations with the schools, friends, and others. *See* LORBER, *supra* note 7, at 175, 183, 185. *See generally* ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK (1997).

[261] *See supra* notes 87, 126-40 and accompanying text.

[262] *See supra* notes 163-72 and accompanying text.

courts have little trouble concluding that plaintiffs meet the subjective standard. However, the objective standard, especially when combined with the procedural summary judgment standard,[263] has created difficulties for the lower courts. *Anderson v. Liberty Lobby, Inc.* requires that a court grant a defendant's motion for summary judgment in a hostile work environment case only if the court concludes that there is insufficient evidence in the record from which a reasonable jury can conclude that the plaintiff should prevail.[264] Combining the summary judgment standard with the substantive standard in a hostile work environment case, the inquiry is: whether there is sufficient evidence in the record from which a reasonable jury can conclude that the plaintiff has proved by a preponderance of the evidence that a reasonable person would consider the harassment sufficiently severe or pervasive to alter the terms and conditions of employment. The court must employ this inquiry drawing all reasonable inferences in the favor of the plaintiff, and refusing to weigh the evidence itself.[265] This is a high order for any court and especially difficult for courts working under the press of increased filings of employment discrimination cases[266] and the pressure to dispose of cases pretrial.[267]

Law professor Theresa Beiner has criticized the federal district courts for inappropriately granting summary judgment in situations where a reasonable person could conclude that the environment created is "severe or pervasive,"[268] thereby usurping the jury's proper role of fact finder.[269] In *The Misuse of Summary*

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[263] Federal Rule of Civil Procedure 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[264] 477 U.S. 242, 252 (1986) (holding that the federal courts must consider the substantive evidentiary standard of proof when deciding motions for summary judgment). For a discussion of the summary judgment standards after *Anderson*, see generally Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

[265] *Anderson*, 477 U.S. at 255.

[266] *See* Becker, *supra* note 86, at 1520 (noting that the number of employment discrimination cases filed rose from 8,290 in 1990 to 23,547 in 1997).

[267] *Id*.

[268] Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 99-119 (1999).

[269] In an earlier article, I criticized the lower federal courts for inappropriately granting summary judgment in cases brought under Title VII and the Age Discrimi-

Judgment in Hostile Environment Cases, Beiner documents the increasing use of summary judgment to dispose of hostile environment cases on the issue of severity or pervasiveness.[270] She demonstrates that the federal district courts grant summary judgment inappropriately in hostile environment cases by improperly drawing inferences in favor of the moving party, making credibility determinations, and substituting their judgment for that of the fact finder, to conclude that, as a matter of law, the conditions at the defendant's workplace are not sufficiently severe or pervasive to hold the defendant liable.[271]

Since Beiner's article appeared, there have been many more cases in which the courts of appeals have concluded that, as a matter of law, the plaintiff did not present evidence from which a reasonable jury could conclude that the harassment was sufficiently severe or pervasive to alter the terms or conditions of employment. In many of these cases, there appear to exist genuine issues of material fact to create a jury issue of the severity or pervasiveness of the harassment.[272]

For example, in *Duncan v. General Motors Corp.*, the plaintiff testified that her manager requested that she meet him offsite.[273] When the plaintiff went to the meeting, her supervisor told her of his troubled marriage and propositioned her.[274] Plaintiff refused. After this event, the supervisor expressed hostility toward the plaintiff, becoming more critical of her work, and telling her that she was incompetent.[275] He also directed her to create a training document on his computer, which displayed a picture of a naked woman.[276] He touched the plaintiff's hand unnecessarily numerous times and asked her to make an illustration of a planter he had in his office that was shaped as a "Mexican" man slouching and wearing a sombrero with a hole in the

nation in Employment Act of 1967. *See generally* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and the ADEA Cases*, 34 B.C. L. REV. 203 (1993). *See also* Becker, *supra* note 86, at 1517-20 (describing the prevalence and misuse of summary judgment in employment discrimination cases).

[270] Beiner, *supra* note 268, at 101 (documenting federal district court cases granting summary judgment on the basis of insufficient severity or pervasiveness from 1987 through August 17, 1998).

[271] *Id*. at 103-19.

[272] *See infra* notes 273-88 and accompanying text.

[273] 300 F.3d 928, 930 (8th Cir. 2002).

[274] *Id*.

[275] *Id*.

[276] *Id*.

front of his pants with a cactus protruding from where his penis should be.[277] The supervisor also twice showed the plaintiff a pacifier that was shaped like a penis.[278] He created a "recruitment poster" portraying the plaintiff as the CEO of the "Man Hater's Club of America," and asked the plaintiff to type a draft of the beliefs of the "He-Men Women Hater's Club."[279] The jury returned a verdict for the plaintiff.[280] Despite considerable evidence demonstrating that the plaintiff's supervisor had subjected her to a constant barrage of hostile treatment, the Eighth Circuit overturned the jury verdict, holding that as a matter of law the harassment in question was not sufficiently severe or pervasive to alter the plaintiff's terms and conditions of employment.[281]

Another example of the court's intrusion into the jury's province is *Scusa v. Nestle U.S.A. Co.*[282] In *Scusa*, the plaintiff and a coworker filed charges of sexual harassment.[283] The plaintiff alleged that she was ostracized and isolated by her coworkers, and that a coworker had patted her buttocks, blown kisses, and made sexual comments to her.[284] She also alleged that another coworker had teased her, picked on her and thumped her on her head, making fun of the way she dressed and ate; a third employee had approached her saying, "[y]ou need to get your f—— story straight;" another coworker had made threatening gestures, shaking his fist and cursing at her during a meeting discussing sexual harassment complaints and the company sexual harassment policy.[285] Other coworkers treated her rudely, slammed doors in her face, glared at her and keyed her car.[286] The district court granted summary judgment to the defendant, holding that as a matter of law, the harassment was insufficiently severe or pervasive to alter the plaintiff's terms and conditions of employment.[287] The Eighth Circuit affirmed.[288]

There is no question that a reasonable jury could conclude in

277 *Id*.
278 *Id*.
279 *Id*. at 932.
280 *Id*. at 933.
281 *Id*. at 935.
282 181 F.3d 958 (8th Cir. 1999).
283 *Id*. at 961.
284 *Id*.
285 *Id*.
286 *Id*.
287 *Id*. at 963-64.
288 *Id*. at 961.

these cases that the women were subjected to harassment that was sufficiently severe or pervasive to create a hostile working environment that altered the terms and conditions of the plaintiffs' employment. The courts intruded into the fact-finding functions of the jury, simply overstepping their boundaries and getting away with it.[289]

(ii) Disaggregation of Sexual and Gender-Based Evidence

A second problem courts encounter in determining whether harassment is sufficiently severe or pervasive to alter the terms

[289] *See also* Akers v. Alvey, 338 F.3d 491, 499 (6th Cir. 2003) (holding that as a matter of law the environment alleged was not sufficiently severe or pervasive to constitute retaliatory harassment for plaintiff's sexual harassment complaints of over thirty incidents of inappropriate behavior by her supervisor, where, after plaintiff complained, the defendant involuntarily transferred plaintiff to another office, and during the two weeks that the employer investigated her complaints, her supervisor refused to speak to her, instructed her coworkers to refuse to associate with her, withheld her mail and inter-office memoranda, and criticized her work); Ottman v. City of Independence, 341 F.3d 751, 760 (8th Cir. 2003) (holding that the lower court erred in refusing to grant summary judgment because as a matter of law plaintiff failed to show that the alleged harassment was sufficiently severe or pervasive where the alleged harasser had belittled the work of the plaintiff and that of other women, but had not belittled the work of the men, had belittled women's abilities, had cut off plaintiff's conversation with a city employee, had spoken in a condescending manner to the plaintiff as if she were a child, had made the comment twice, "It's just like a woman," referring to two women who disagreed with him, had occasionally referred to the women as the "girls," and where another woman had told the plaintiff that "we need more men," and "be quiet, men are talking"); Dattoli v. Principi, 332 F.3d 505, 506 (8th Cir. 2003) (affirming summary judgment against hostile work environment claim because, after separating "several" incidents that were "plainly based" on gender from other harassing acts that were not apparently based on gender, concluding they were not severe or pervasive as a matter of law); Alagna v. Smithville R-II Sch. Dist., 324 F.3d 975, 977-79 (8th Cir. 2003) (affirming lower court's grant of summary judgment because the conduct was not sufficiently severe or pervasive where the alleged harasser, a tenured teacher, over a period of one-and-a-half years, persistently called the plaintiff at home over twenty times one summer and three times during Christmas break, talked to her about his failing marriage, visited her office two or three times a week during one semester, regularly touched her arm, told her he "loved her" and that she looked nice, placed two romance novels in her mailbox at work, stopped her in the hallway often, and gave her a gift and told her to open it alone); Stinnett v. Safeway, Inc., 337 F.3d 1213, 1219 (10th Cir. 2003) (affirming the lower court's grant of summary judgment on the plaintiff's hostile work environment claim because the harassment was insufficiently severe or pervasive where the plaintiff alleged that the women employees were subject to more onerous working conditions than their male counterparts, including cleaning underneath the checkstands in a supermarket and being sent to work in more remote locations, as well as receiving less training than the men); Kirk v. City of Tulsa, No. 02-5138, 2003 U.S. App. LEXIS 14387 (10th Cir. July 16, 2003) (holding that eight instances of harassment, with two being overtly gender-based, insufficient to create a cause of action).

and conditions of employment is the failure to recognize that non-sexual gender-based harassment can be equally as damaging as sexually explicit behavior and can, either alone, or in combination with sexually explicit behavior, create a hostile working environment. Law professor Vicki Schultz has criticized the courts for disaggregating sex-based evidence of a hostile work environment because of sex from evidence of non-sexual gender-based hostility. Schultz demonstrates in *Reconceptualizing Sexual Harassment* that when faced with evidence of a sexual and a non-sexual nature the courts separate the two types of evidence, considering only the non-sexual evidence in determining whether a gender-based harassment claim exists and only the sexual evidence in deciding whether a sexual harassment claim exists.[290] By disaggregating both types of evidence, the courts often reach the conclusion that the harassment is not sufficiently severe or pervasive to constitute either gender-based harassment or sexual harassment. Schultz argues that courts should look at all types of harassment occurring because of sex, whether the harassing behavior is sexual in nature or not.[291] When considering whether a hostile work environment is sufficiently severe or pervasive to create a cause of action, the courts must consider all types of evidence creating this environment.

Oncale v. Sundowner Offshore Services, Inc.,[292] decided just as Schultz's article went to press, appears to affirm this approach. It comments that an environment in which the hostilities are not sexual in nature can create a cause of action if there is a hostile work environment created because of sex.[293] Since *Oncale*, however, many courts continue to hold as a matter of law that non-sexual behavior at work, either alone, or combined with sexual behavior, is insufficiently severe or pervasive to create a cause of action for hostile work environment.[294] In these cases, courts

290 Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 23, at 1713-29.

291 *Id*. at 1796-1805.

292 523 U.S. 57 (1998).

293 *See supra* notes 173-79 and accompanying text.

294 *See supra* note 289; *see also Kirk*, 2003 U.S. App. LEXIS 14387 (holding that eight instances of harassment, with two being overtly gender-based, insufficient to create a cause of action); Shoemaker-Stephen v. Montgomery County Bd. of Comm'rs, 262 F.Supp. 2d 866, 884 (S.D. Ohio 2003) (holding that as a matter of law the plaintiff had not created a triable issue as to whether her treatment was because of sex even though there were at least two gender-based comments and other employees agreed that the supervisor treated women more harshly). *But see* O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001) (stating "sex based harass-

pay lip service to the concept that both sexual and non-sexual gender-based harassment should be aggregated to constitute a hostile work environment based on sex, but they often ignore their own mandates.

While sexual advances, touchings, and jokes may be easier to identify as harmful to women, many non-sexual behaviors that occur at work may contribute to a hostile work environment because of a woman's sex. These non-sexual behaviors may appear less harmful in part because the differentiation between women and men based on their biological sex appears natural. In effect, many of these non-sexual behaviors are invisible; nonetheless, masculinities research suggests that despite their invisibility, they can be quite harmful to women.[295]

Expert testimony concerning research on masculinities should be a valuable resource for judges to determine whether there is sufficient evidence of severity or pervasiveness for the claim to go to the fact finder. Furthermore, this research should aid fact finders in determining whether a reasonable person under the circumstances of the job would consider the harassment sufficiently severe or pervasive to alter the terms and conditions of employment.[296]

This research can be particularly helpful in reinforcing a plain-

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ment that is not overtly sexual is nonetheless actionable under Title VII, so evidence of that sort may be admissible"); O'Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1097 (10th Cir. 1999) (stating "[f]acially neutral abusive conduct can support a finding of gender animus sufficient to sustain a hostile work environment claim when that conduct is viewed in the context of other, overtly gender-discriminatory conduct").

[295] *See* Martin, *supra* note 22, at 361 (noting that "hidden and subtle but widespread and invidious forms of gender discrimination . . . perpetuat[e] men's advantage and women's disadvantage").

[296] The admissibility of this expert testimony should be determined by the trial judge in accordance with the principles set forth by *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993). In *Daubert*, the Court held that the Federal Rules of Evidence overruled the common law rule that expert opinion be "generally accepted" as reliable for it to be admissible. *Id*. at 589. The Court required, however, that scientific expert evidence be reliable and relevant under Federal Rule of Evidence 702; factors to be considered as to the reliability are whether the theory has been tested, whether it has been subjected to peer review and publication, whether the particular technique has a high error rate, whether there are standards that control the technique's operation, and whether the technique is generally accepted in a relevant scientific community. *Id*. at 593-95; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141-42 (1999) (holding that *Daubert* applies to technical or other expert knowledge but that the rule is flexible and the factors to be considered by the judge in her gatekeeping capacity will vary depending on the knowledge of the expert and the facts of the case). In response to *Daubert* and *Kumho*, Federal Rule of Evi-

tiff's cause of action that comprises, in whole or in part, non-sexual, gender-based harassment that is less visible than overtly sexual behavior. Masculinities theory can make visible to the judge and jury the structures and practices in a particular workplace that privilege men over women even though they may appear to be "natural" or "neutral" on issues of gender.

Masculinities studies can also legitimate the "petty" complaints many women have about the workplace environment that they fear to express, or if expressed, are not taken seriously.[297] One problem women often have in proving that the environment is sufficiently severe or pervasive to constitute a hostile work environment is that courts tend to dismiss individual acts that appear to be petty, ignoring the structures surrounding these acts and the difficulty they create for women at work, often concluding, as a matter of law, that the environment created is not sufficiently severe or pervasive for the case to go to a jury.[298]

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dence 702 was amended to add the *Daubert* requirements. Rule 702 states currently:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

Expert testimony based on scientific, technical, or other specialized knowledge must be useful to the finder of fact, the witness must be qualified as an expert, and the evidence proposed must be reliable or trustworthy. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FED. EVID. § 702.02[3] (Joseph M. McLaughlin ed., 2d ed. 2002). Broad discretion is granted to the trial judge to determine the admissibility of the evidence. *Id*. The danger of confusing a fact finder with the expert evidence is better controlled through cross-examination than through refusing to admit the evidence. *Id*.

In considering whether an expert should be permitted to testify on masculinities in a sex discrimination case, the court should consider the qualifications of the expert, whether the expert's information on masculinities has been vetted by peer review journals and publication, and whether the particular expert is applying masculinities studies properly to the facts at issue. The acceptance of masculinities theory and research in the field of sociology should guarantee its reliability, especially if the proposed expert has published studies or theories in peer-reviewed journals or in books that are considered to be academic treatises.

297 Judith Lorber describes some of these behaviors as "microinequities." LORBER, *supra* note 7, at 250 (citing Beth E. Schneider, *Approaches, Assaults, Attractions, Affairs: Policy Implications of the Sexualization of the Workplace*, 4 POPULATION RES. & POL'Y REV. 93, 104 (1985)).

298 *See supra* note 294 and accompanying text.

These acts, however, must be aggregated in order to perceive a clear view of the environment. In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court emphasized the difference between a case alleging a hostile working environment based on race and a race discrimination case alleging one or more discrete acts that constitute an adverse employment action.[299] In cases where "discrete acts" occur such as termination, failure to promote, denial of transfer, or refusal to hire, each incident constitutes a separate actionable unlawful employment practice.[300] For these claims, the plaintiff cannot recover for discrete acts occurring outside of the statute of limitations.[301] In contrast, the Court emphasized, hostile work environment cases, by their very definition, involve repeated conduct, which because of its cumulative effect creates a hostile environment.[302] Therefore, unlike cases of discrete acts of discrimination, cases alleging a hostile work environment are timely if merely one act contributing to the claim occurs within the statute of limitations.[303]

In sum, masculinities theory and field research provide a rich theoretical and practical expertise that can help the judge and jury define whether a particular series of practices, whether sexual or non-sexual or both, would potentially cause an objectively hostile work environment for a "reasonable woman" or a "reasonable person" under all of the circumstances.

D. Juries and Masculinities Theory

One possible reaction to my proposal is that the use of masculinities studies to create a genuine issue of material fact will leave too much power to the jury to decide that the employer discriminated "because of sex," or that the harassment was "severe or pervasive," resulting in a large number of verdicts for plaintiffs alleging hostile work environments. I do not anticipate such problems. First, I do not recommend that judges automatically deny summary judgment in hostile environment cases; rather, I

[299] 536 U.S. 101, 122 (2002) (holding that acts outside of the 180 or 300-day statute of limitations period can be redressed under Title VII hostile work environment claims, but cannot be redressed in claims for violations of Title VII based on discrete acts such as demotions, promotions, etc.).

[300] *Id*. at 114.

[301] *Id*.

[302] *Id*. at 115-16.

[303] *Id*. at 117. The Court also noted that race and sexual harassment cases use the same standards. *Id*. at 116 n.10.

urge that because of the existence of masculinities, visible and invisible, that deny women and gender-nonconforming men equal opportunities at work, judges should act thoughtfully, fully aware of masculinities in the workplace, before granting summary judgment to a defendant in a hostile work environment case.

Judges should not be concerned that a jury hearing a hostile work environment case will automatically rule for the plaintiff. While there needs to be more empirical data concerning how juries react, social science research on behavior suggests that jurors, as well as judges, will likely lean toward affirming the status quo. Experiments in behavior demonstrate that people have a bias in favor of the status quo and an aversion to extremes.[304] Masculinities studies demonstrate that invisible masculinities are the status quo at work and in American homes. Juries, like judges, will likely tend toward reinforcing this status quo, refusing to give much weight to the experts' testimony concerning masculinities. Due to the status quo bias that I believe will operate with juries and judges' decision making, I am less concerned that juries will adopt the conclusions of the expert sociologists who study masculinities; I have a greater concern that juries will reject the experts' testimony outright because it tends to conflict with the status quo. For this reason, I urge judges to permit the jury to hear the expert testimony and to emphasize to the jury the importance of the testimony in their decision making process.

CONCLUSION:

ELIMINATING MASCULINITIES FROM THE LAW OF WORK

Masculinities theory should redefine sex discrimination cases decided under Title VII. As demonstrated above, theoretical and empirical work in masculinities makes visible the structures and practices that damage women and gender non-conforming

304 *See* Cass R. Sunstein, *Introduction to* BEHAVIORAL LAW AND ECONOMICS 3-4 (Cass R. Sunstein ed., 2000); Mark Kelman et al., *Context-Dependence in Legal Decision Making*, *in* BEHAVIORAL LAW AND ECONOMICS 61-76 (Cass R. Sunstein ed., 2000) (noting that the number of options available to a person in legal decision-making may affect the outcome because people tend to move away from the extremes and to compromise); Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, *in* BEHAVIORAL LAW AND ECONOMICS 116-43 (Cass R. Sunstein ed., 2000) (noting the existence of a body of research demonstrating that persons tend to favor the status quo or default rules in contract negotiations); *see also* Korobkin, *supra* note 244, at 1613-17, 1620-26.

men at work. This research is valuable because it contradicts the notion that women "choose" to work in less equal positions. Masculinities can prove that differential treatment that is invisible or subtle to some, or even natural to others, can support a sex discrimination claim if that treatment reinforces sex stereotypes or is based on opportunities created by informal relationships, paternalism, entrepreneurialism, careerism, or authoritarianism at work.

Masculinities theory can also demonstrate that particular practices occur "because of sex" and that they are sufficiently "severe or pervasive" to create a hostile work environment for women or men who do not conform to gender expectations.

Finally, I believe that additional research on masculinities will enable the courts, litigants, lawyers, and juries to understand the complex nature of gender and the role it plays at work. For many of us, gender is obvious, but difficult to describe. For others, it is invisible, but present. The masculinities studies can confirm the legitimacy of concerns raised by women and gender-nonconforming men. It can help overcome the persistent inequalities at work that account in large part for the great gender gap in pay and promotions and the seemingly impenetrable glass ceiling. With the courts' use of masculinities theory and field studies, employers should become more aware of the "built-in headwinds"[305] women experience because of the ways in which society defines work as masculine. If the courts recognize the usefulness of masculinities studies, this recognition should create an incentive for employers to eliminate the practices that harm women and their families. Through further field research in masculinities and the use of these studies and masculinities theory in courtrooms and in boardrooms, women should be able to develop in their careers beyond the fetus-like creatures depicted by Salvador Dali in *The Persistence of Memory*, beyond the dynamic stasis, truly leaving behind inequality at work as a memory that fades with time.

[305] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).