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FINDING THE SEX IN SEXUAL HARASSMENT: HOW TITLE VII AND TORT SCHEMES MISS THE POINT OF SAME-SEX HOSTILE ENVIRONMENT HARASSMENT

Yvonne Zylan*

It has been nearly a quarter century since the United States Supreme Court first recognized the cause of action for a sexually hostile work environment under Title VII of the Civil Rights Act of 1964. In Meritor Savings Bank v. Vinson, the Court essentially adopted the view offered by legal academician Catharine MacKinnon that harassment taking the form of a sexually hostile work environment is a manifestation of gender-based power. In so doing, the Court created a remedy for many aggrieved employees, permitting redress in the federal courts for a problem that makes many workplaces unbearable. At the same time, however, by adopting MacKinnon's theory of sexual violence, the Court virtually ensured that a different class of plaintiffs—victims of anti-gay hostile work environments—would be denied relief.

While some analysts trace this inequity to a conflicting array of judicial doctrine, this Article claims that its source runs much deeper: to courts' misguided understanding of the nature of sexual harassment itself. Although much of the history of sexual harassment doctrine indicates courts' primary concern with determining the motivation behind incidents of harassment, hostile environments that take the form of sexual harassment cannot be explained as the simple expression of either sexual desire or gender-specific hatred. Thus, courts' reliance upon a binary conception of sexuality results in a fundamentally flawed jurisprudence. The Article concludes by offering an alternative theory of sexual harassment highlighting the independently sexual dimension of the behavior and argues that, because the nature of sexual expression itself is highly ambivalent and fluid, courts are ill-equipped to investigate the motivations underlying workplace interactions that take a sexual form.

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INTRODUCTION

It has been nearly a quarter century since the United States Supreme Court first recognized the cause of action for a sexually hostile work environment under Title VII of the Civil Rights Act of 1964.¹ In *Meritor Savings Bank v. Vinson*, the Court essentially adopted the view offered by legal academician Catharine MacKinnon² that harassment taking the form of a sexually hostile work environment is a manifestation of gender-based power.³ In so doing, the Court created a remedy for many aggrieved employees, permitting redress in the federal courts for a problem making many workplaces unbearable. At the same time, by adopting the MacKinnon theory of hostile environment harassment, the Court laid the groundwork for a fundamental misunderstanding of the nature of sexual harassment and the harm it produces. Moreover, even as it provided for the inclusion of a new class of plaintiffs⁴ and a new cause of action⁵ in the absence of new statutory authority, the Court virtually ensured that a different class of plaintiffs—victims of anti-gay hostile work environments—would be denied relief. In the absence of federal statutory authority prohibiting discrimination against them, gay men and lesbians find themselves practically and symbolically excluded from workplace protections afforded heterosexuals.⁶

This Article examines the patchwork of federal and common law rules that have emerged to address same-sex sexual harassment,

1. 42 U.S.C. § 2000e-2(a)(1) (2000); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (noting that protection under Title VII includes protection against severe and pervasive harassment that creates a hostile or offensive workplace environment).

2. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 40–47 (1979).

3. *Meritor Sav.*, 477 U.S. at 63–69.

4. This new class of plaintiffs is primarily composed of female employees subjected to harassment by male employers and coworkers where such harassment does *not* include a sexual *quid pro quo*: a demand for sexual contact in exchange for keeping one's job or for advancement. For a detailed comparison between the different forms of harassment, see generally MACKINNON, *supra* note 2.

5. The new cause of action alleges discrimination in the form of sexual harassment. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (holding that an employer may be held liable for an objectively and a subjectively severe hostile work environment under Title VII, subject to an affirmative defense which assesses the reasonableness of behavior of employer and of plaintiff); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (finding Title VII violated when workplace harassment is subjectively and objectively so severe or pervasive as to alter the conditions of plaintiff's employment).

6. See generally HUMAN RIGHTS CAMPAIGN FOUND., *THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 2003* (2003), available at <http://www.hrc.org> (follow "Publications" hyperlink; then follow "State of the Workplace" hyperlink; then follow "State of the Workplace 2003" hyperlink).

none of which is helpful for gay and lesbian victims of hostile work environments. As others have noted, gay and lesbian harassment victims regularly are denied relief, even when the hostility to which they have been subjected is clearly sexual in nature and discriminatory in its effect on the “terms and conditions of employment”⁷ and would therefore almost certainly entitle them to relief were they heterosexual.⁸

Indeed, while the Supreme Court has held in *Oncale v. Sundowner Offshore Oil Services* that same-sex sexual harassment can, theoretically, be actionable under Title VII, the Court’s language has had the effect of foreclosing many avenues of redress for gay and lesbian plaintiffs.⁹ Not only has this matured Title VII jurisprudence clearly established that homophobic¹⁰ discrimination is not covered by the Civil Rights Act of 1964 or any other federal legislation, it has made it increasingly difficult for the victims of such discrimination to pursue state statutory and common law tort remedies that arguably apply.¹¹ State anti-discrimination statutes

7. 42 U.S.C. § 2000e-2(a)(1) (2000). For cases addressing the “terms and conditions of employment” requirement, see *Faragher*, 524 U.S. at 787–89; *Harris*, 510 U.S. at 21; *Meritor Sav.*, 477 U.S. at 64; *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986).

8. See generally Marianne C. DelPo, *The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment*, 40 SANTA CLARA L. REV. 1 (1999); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 689–716 (1998).

9. While *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), established that same-sex sexual harassment may be actionable under Title VII, the opinion of the Court made it clear that such claims must allege one of two things: (1) that the harasser was motivated by sexual desire for the target because he or she is identifiable as gay/lesbian, or (2) that the harasser was motivated by hostility toward the presence of other men or women in the workplace. Anti-gay harassment falls outside of the parameters of this statutory interpretation. *Id.* at 79–80; see also discussion *infra* Section II.B.

10. Webster’s Collegiate Dictionary defines homophobia to mean “irrational fear of, aversion to, or discrimination against homosexuality or homosexuals.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 113 (10th ed. 1998). I use homophobia to refer to one aspect of sexual animus: the hatred, aggression, and/or distaste directed toward sexual subjects and objects (some of them described as particular sexual identities), which may be traced in whole or in part to fear. Heterosexism is a distinguishable aspect of sexual animus, characterized less by fear and more by the will to dominate and/or marginalize others. See, e.g., BELL HOOKS, *Interview*, in TALKING BACK: THINKING FEMINIST, THINKING BLACK 74, 167–76 (1989) (describing heterosexism as a subcategory of sexist oppression). The terms, as I use them, are not interchangeable, though they are clearly related to one another and reference phenomena that are not entirely discrete.

11. Numerous state anti-discrimination laws are couched in the same or similar language as Title VII. For example, Ohio’s non-discrimination law makes it illegal

[f]or any employer, because of the race, color, religion, sex, national origin, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

frequently are interpreted according to the guidelines established by Title VII analyses.¹² Tort remedies elude plaintiffs claiming hostile work environments,¹³ yet courts nonetheless reason that federal and state anti-discrimination laws adequately cover such claims.¹⁴ Additionally, analysis of some tort actions has begun to converge with the legal analysis governing Title VII:¹⁵ “extreme” or “outrageous” conduct is increasingly difficult to distinguish from “severe” and “pervasive” abuse.¹⁶ State workers’ compensation statutes cre-

OHIO REV. CODE ANN. § 4112.02(A) (LexisNexis 2001). There is no requirement that Ohio follow federal law in interpreting the phrase “because of the . . . sex . . . of any person,” which suggests that Ohio courts could apply the statute to discrimination on the basis of sexual orientation. So far, Ohio (and many other states) has followed federal precedent in interpreting its own broad statutory language. See *Hampel v. Food Ingredients Specialties, Inc.*, 729 N.E.2d 726, 731 (Ohio 2000) (“In prior cases, ‘we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e *et seq.*, Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112.’”). State common law remedies, such as the tort of intentional infliction of emotional distress (sometimes known as the tort of outrage), might also be thought to apply to cases involving same-sex harassment; the behavior of some coworkers and supervisors in same-sex hostile environment cases is frequently so shocking that courts have difficulty listing the details of the alleged incidents. See, e.g., *Simonton v. Runyon*, 225 F.3d 122, 124 (2d Cir. 2000) (“[F]or the sake of decency and judicial propriety, we hesitate before reciting in detail the incidents of Simonton’s abuse.”). Nonetheless, as is discussed below, few courts have been willing to find anti-gay harassment “outrageous.” See discussion *infra* Section IV.

12. See, e.g., *Griswold v. Fresenius U.S.A., Inc.*, 978 F. Supp. 718, 726 (N.D. Ohio 1997) (noting that Ohio discrimination law requires proof fulfilling federal discrimination claim); *Alphonse v. Omni Hotels Mgmt. Corp.*, 643 So. 2d 836, 839 (La. 1994) (noting that where Louisiana law is substantially similar to Title VII language, analysis proceeds according to Title VII); *Belanger v. Saint-Gobain Indus. Ceramics, Inc.*, No. 95-1767B, 1999 Mass. Super. LEXIS 72, at *11-12 (Super. Ct. Feb. 18, 1999) (using Title VII precedent to analyze Massachusetts hostile environment harassment law); *Hampel*, 729 N.E.2d at 733 (noting that same-sex harassment under Ohio law should be interpreted in light of *Oncale*); *Harris v. Pameco Corp.*, 12 P.3d 524, 532 (Or. Ct. App. 2000) (noting that Oregon law is modeled after Title VII, thus Title VII cases are considered “instructive”). But see *Centola v. Potter*, 183 F. Supp. 2d 403, 413 (D. Mass. 2002); *Breitenfeldt v. Long Prairie Packing Co.*, 48 F. Supp. 2d 1170, 1176 (D. Minn. 1999) (noting that the Minnesota Human Rights Act diverges from federal law with respect to the causation requirement).

13. See discussion *infra* Section IV.

14. See *Bartalini v. Blockbuster Entm’t, Inc.*, No. C-98-3943-SC, 1999 WL 1012383, at *10 (N.D. Cal. Nov. 8, 1999); *Metzger v. Compass Group USA, Inc.*, No. Civ.A. 98-2386-GTV, 1999 WL 714116, at *10 (D. Kan. Sept. 1, 1999); *Merritt v. Del. River Port Auth.*, Civil Action No. 98-3313, 1999 U.S. Dist. LEXIS 5896, at *19 (E.D. Pa. Apr. 20, 1999); *Pitak v. Bell Atl. Network Serv. Inc.*, 928 F. Supp. 1354 (D.N.J. 1996). To the extent that federal and state anti-discrimination statutes do not protect employees from anti-gay harassment, this reasoning is clearly erroneous. As is demonstrated below, courts have almost uniformly held that anti-gay harassment falls outside the purview of sex discrimination statutes. See *infra* Section II.B.

15. See *Metzger*, 1999 WL 714116, at *12 (noting that harassment amounts to “nothing more than mere insults, indignities, and annoyances” in terms of degree and quality of extremity); *Merritt*, 1999 U.S. Dist. LEXIS 5896, at *19 (describing evidence of the frequency and length of the harassment as well as its offensive quality to determine that tort action could be maintained).

16. The terms “extreme” and “outrageous” are common to state court definitions of the tort of intentional infliction of emotional distress. See, e.g., *Simpson v. Burrows*, 90 F.

ate an additional obstacle to would-be plaintiffs: state courts must frequently determine whether they preempt claims brought under anti-discrimination statutes or tort law.¹⁷ In short, the existing jurisprudence of Title VII—which does not apply the law to most forms of anti-gay hostile environment harassment—has “trickled down” to preclude any relief for gay and lesbian plaintiffs,¹⁸ including those suffering from even the worst kinds of workplace abuse, including batteries, assaults, threatened rapes, and wrongful discharges.¹⁹

The difficulty faced by gay and lesbian plaintiffs alleging sexual harassment is hardly news to practitioners and scholars working in this area of employment law. While some analysts trace this inequity to a conflicting array of judicial doctrine, its source runs much deeper to courts’ misguided understanding of the nature of sexual harassment itself.²⁰ Although much of the history of sexual

Supp. 2d 1108, 1124 (D. Or. 2000) (citing *Williams v. Tri-County Metro. Transp. Dist. of Or.*, 958 P.2d 202, 205 (Or. Ct. App. 1998)) (discussing the “extreme and outrageous” element of the intentional infliction of emotional distress tort); *White v. Martin*, 23 F. Supp. 2d 203, 208 (D. Conn. 1998) (citing *DeLaurentis v. City of New Haven*, 597 A.2d 807, 827–28 (Conn. 1991)); *Murray v. Oceanside Unified Sch. Dist.*, 95 Cal. Rptr. 2d 28, 44 (Ct. App. 2000); *Petyan v. Ellis*, 510 A.2d 1337, 1342–43 (Conn. 1986). Similarly, hostile environment harassment must be “severe and pervasive” to be actionable under Title VII. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

17. See, e.g., *Johnson v. Hondo, Inc.*, 125 F.3d 408, 418 (7th Cir. 1997) (observing that intentional infliction of emotional distress claims are barred by the exclusivity provisions of the Worker’s Compensation Act); *Murray*, 95 Cal. Rptr. 2d at 44 (noting that cause for intentional infliction of emotional distress was not barred by workers’ compensation law because claim founded upon actions “outside the normal part of the employment environment”); *Tarver v. Calex Corp.*, 708 N.E.2d 1041, 1051 (Ohio Ct. App. 1998) (observing that Worker’s Compensation laws may only compensate for economic, not psychological harm, and may not be adequate to address sexual harassment claims).

18. It also precludes relief for plaintiffs *perceived* to be gay or lesbian. See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1082 n.1 (7th Cir. 2000) (finding that the plaintiff who, while gay, never disclosed his sexual orientation to coworkers, failed to meet burden to go forward on a claim alleging patently anti-gay forms of sexual harassment).

19. See, e.g., *EEOC v. Harbert-Yeargin Inc.*, 266 F.3d 498, 501–02, 522 (6th Cir. 2001) (failing to find a cause of action where defendant grabbed plaintiff’s genitals); *Hamner v. St. Vincent Hosp.*, 224 F.3d 701, 708 (7th Cir. 2000) (failing to find a Title VII retaliation claim actionable where gay man was promptly fired by a supervising physician despite the physician having been reprimanded for the anti-gay verbal abuse); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257–58, 265 (1st Cir. 1999) (failing to find a Title VII claim for a gay man ridiculed; verbally abused; assaulted with rubber bands, condiments, and hot cement; physically grabbed and shaken by co-worker; threatened with death by coworker); *Klein v. McGowan*, 198 F.3d 705, 707 (8th Cir. 1999) (failing to find a Title VII claim where plaintiff was told by a supervisor, “If I ever find out you’re a queer, I’ll fire you,” and was called a “fucking homo” and hit with boxes by coworkers).

20. See, e.g., *Johnson*, 125 F.3d at 412 (finding that a single reference to the defendant’s desire to have a woman perform fellatio on him provided evidence that repeated, forceful demands that plaintiff (a male) perform fellatio on him were “simply expressions of animosity or juvenile provocation” and not sexual demands); see also *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1282–83 (D. Utah 2003) (observing that where a female

harassment doctrine indicates courts' primary concern with determining the motivation behind incidents of harassment, most courts have failed to understand the independently sexual dimension of such acts. Existing case law indicates courts are unwilling to view anti-gay harassment in sexual terms, preferring to view such cases as examples of simple "teasing" or vulgar needling. Where the harasser is presumed or asserted to be heterosexual in orientation, courts tend to dismiss even egregious forms of harassment as exuberant forms of "horseplay."²¹ On the other hand, where the harasser is assertedly or constructively²² gay and the target is heterosexual, courts almost uniformly have upheld such actions as properly brought, both under Title VII²³ and as common law tort claims.²⁴ This disparity—which is based on a perception about the nature of sexual desire and its role in some forms of harassment—reveals the fundamentally flawed view of human sexuality that lies at the center of sexual harassment jurisprudence.

defendant allegedly pinched women's breasts and "humped" them, causation could not be shown because evidence that defendant made references to fellatio undercut assumption that she was a lesbian); *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 845 (E.D. Va. 2002) (quoting *Johnson*, 125 F.3d at 412) (stating that ordinarily, sexually-tinged comments are "simply expressions of animosity or juvenile provocation" and noting that references to vaginas, wives, and girlfriends in the record "undercut" any inference that the conduct was based on homosexual desire).

21. See, e.g., *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996); *English*, 190 F. Supp. 2d at 845. This is true in spite of the holding of *Oncale*, which affirmed at least the potential viability of a same-sex harassment claim on facts suggesting both the harasser and the target were heterosexual men. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998). Although the *McWilliams* court allowed the action to proceed as a sexual harassment claim, it held that such a claim could succeed only if the plaintiff could demonstrate that the harasser was motivated by sexual desire or by an antipathy toward men in the workplace; this virtually assured that the plaintiff would not prevail on remand. *McWilliams*, 72 F.3d at 1196.

22. By "assertedly gay," I mean where there is evidence in the record that the harasser has asserted that he or she is gay. By "constructively gay," I mean that the plaintiff has persuaded the court that the harasser was gay. Often, this amounts to a recitation of workplace rumor about the sexual identity of the alleged harasser. Typically, these cases are distinguishable from the *Oncale*-type cases in that the harasser acts individually. See *Cummings v. Koehnen*, 568 N.W.2d 418, 423 (Minn. 1997). Where there is group sexual harassment, including contact with the target's genitals, courts refuse to characterize the behavior as sexual, characterizing it as gender-based bullying instead. See, e.g., *McWilliams*, 72 F.3d at 1196; see also discussion *infra* Section II.

23. See, e.g., *Kelly v. City of Oakland*, 198 F.3d 779 (9th Cir. 1999); *Merritt v. Del. River Port Auth.*, Civil Action No. 98-3313, 1999 U.S. Dist. LEXIS 5896, at *19 (E.D. Pa. Apr. 20, 1999).

24. See, e.g., *Moran v. Fashion Inst. of Tech.*, 00 Civ. 1275 (KMW) (RLE), 2002 U.S. Dist. LEXIS 19387, at *4 (S.D.N.Y. Oct. 7, 2002) ("Courts have uniformly looked for evidence of a harasser's homosexuality in deciding summary judgment motions in cases similar to this."); *Brewer v. Hillard*, 15 S.W.3d 1, 7-11 (Ky. Ct. App. 1999); *Harris v. Pameco Corp.*, 12 P.3d 524, 535 (Or. Ct. App. 2000).

The Article concludes by offering a different theory of sexual harassment highlighting the independently sexual dimension of the behavior and arguing that courts' inability to adequately theorize sexuality precludes an equitable approach to adjudication of sexual harassment claims. Hostile and abusive language and behavior toward co-workers and workplace subordinates (of whatever gender or sexual configuration) is the result of a complex interaction of forces. The modern workplace is, for many employees, a stultifying and alienating environment, and sexually aggressive behavior emerges as a particular release from the numbing day-to-day work routine. Accordingly, hostile environments that take the form of sexual harassment cannot be explained as the simple expression of *either* sexual desire *or* gender-specific hatred.²⁵ Because the nature of sexual expression itself is highly ambivalent and fluid, courts are ill-equipped to investigate the motivations underlying workplace interactions that take a sexual form.

In short, I argue that the inadequacy of the existing same-sex harassment jurisprudence lies in a false binarism characterizing courts' understanding of sexuality. That is, courts *as institutions* reduce complex social reality to binary (either/or) relationships that line up in predictable ways. Thus, courts read "hatred vs. desire" as a manifestation of "straight vs. gay" and vice versa; evidence of one produces a conclusion of the other. The institutional logic of legal decision-making means that courts' intervention in such cases more often than not reinscribes the false sexual and gender binarism that underlies homophobic social practices.

Because I locate the inadequacy of sexual harassment jurisprudence in its flawed epistemological basis, I depart from some other critics who suggest that the problem may be solved by a refiguring of the elements of the cause of action or through a *correction* of erroneous judicial reasoning.²⁶ For example, some critics trace the disparate treatment of different-sex victims and same-sex victims to a lack of consistency in judicial reasoning, claiming that a more

25. Cf. DelPo, *supra* note 8 (arguing that "desire" and "hatred," while distinguishable, may both be legally sufficient bases for harassment claims under Title VII).

26. See, e.g., *id.* at 25 ("Why are juries allowed to consider the nature of the conduct as circumstantial evidence of motivation in cross-gender cases but not in same-sex cases? . . . It is the content and type of the harassing behavior which should be scrutinized for 'sexuality' (as a way to assess its fit into the EEOC definitions of prohibited conduct), not the sexual orientation of the victim. The victim's sexual orientation should be irrelevant."); Schwartz, *supra* note 8, at 1787 ("[A 'sex per se' rule] could take the form of a conclusive presumption that sexual conduct is 'because of sex' as a matter of law, which is how courts seemed to treat the issue prior to *Oncale*. Alternatively, the rule could raise a rebuttable presumption, shifting to the defendant the burden of producing evidence that the sexual conduct was not because of sex.").

inclusive standard (i.e., one that includes the juxtaposed motivations of “hatred” and “desire” as the judicially recognized bases of prohibited conduct) would go far toward leveling the playing field.²⁷ This analytic approach, while offering a credible liberal political strategy, is problematic because it fails to address the disciplinary effects of judicial policy-making. Courts do not merely interpret and apply statutes and common law rules; they identify subjects and objects of judicial intervention, in part by refusing to identify other subjects and objects.²⁸ Thus, while it might be facially attractive to pursue a strategy aimed at defanging the causation requirement, such an approach would leave intact the binary conception of sexuality that animates and sustains homophobia and heterosexism.

In light of feminist and post-structural critiques of the disciplinary effects and functions of state institutions, advocates of sexual equality must first consider whether seeking judicial intervention in relations implicating sexual identity is a promising political course. The important question to be posed by those who would see an end to heterosexist conduct (in the workplace and elsewhere) is whether the courts, *as hegemonic institutions engaged in the central task of making distinctions*, ought to be designated as the agents of social change with respect to sexuality.²⁹ For reasons described in greater detail below, I remain (at best) skeptical that such a strategy will ultimately benefit marginalized sexual actors and communities.

In what follows, I first provide in Part I a brief history of Title VII jurisprudence, outlining the difficulties created in the case law by the multivalent nature of the key statutory term, “sex.” I trace these difficulties—especially the inability of courts to find same-sex harassment actionable within the Title VII framework—to the courts’ conflation of sex, gender, and sexuality. Failure to distinguish between these three dimensions of identity and behavior stems, in part, from courts’ unexamined reliance upon Catharine MacKinnon’s theory of harassment as a form of sex discrimination. I argue that courts employ a naturalized, “common sense” version of MacKinnon’s theory, rendering them unable to make sense of same-sex harassment cases, which do not fit comfortably within the MacKinnon framework. In Part II, I argue that the critics of

27. See generally DelPo, *supra* note 8; Schwartz, *supra* note 8.

28. See WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 52–76 (1995).

29. See generally LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002) (providing a series of compelling critical essays concerning the turn toward legalism by progressive movements for social change).

MacKinnon have not moved the jurisprudential discourse away from her sex/gender/sexuality rubric; they thus are incapable of theorizing what I term the independently sexual dimension of harassment. Combining the insights of Jessica Benjamin and Herbert Marcuse, I then offer an alternative theory of sexual harassment that is not reducible to the politics of gender inequality. Finally, in Part III, I examine how common law tort actions similarly fail to provide relief for gay and lesbian victims of same-sex harassment and offer some thoughts about what the law can and *cannot* do to address this conduct.

I. TITLE VII AND THE STRUGGLE TO DEFINE "SEX"

The language of Title VII of the Civil Rights Act of 1964 pertaining to unlawful employment practices appears deceptively straightforward:

It shall be an unlawful employment practice for an employer . . . 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.*³⁰

The phrase "because of such individual's . . . sex"—the so-called "causation requirement" of Title VII—is troublesome on many levels. First, what does the term "sex" mean? In popular usage, sex can refer to one's biological sex—to the fact that an individual is either male or female, but it can also refer to sexual activity or sexual organs.³¹ Complicating matters considerably, feminist theory has added the insight that "sex" (maleness/femaleness) is better

30. 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).

31. The dictionary defines "sex" as:

- 1: either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male
- 2: the sum of the structural, functional, and behavioral characteristics of living things that are involved in reproduction by two interacting parents and that distinguish males and females;
- 3a: sexually motivated phenomena or behavior[,] b: sexual intercourse
- 4: genitalia[.]

understood as a constellation of socially constructed features collectively termed “gender.”³² Indeed, to say the multiple nature of the word “sex” has produced a problem or two within feminist theory and practice would be a profound understatement. Within contemporary feminist scholarship, sex is sometimes gender.³³ Other times, sex is sexuality.³⁴ For Catharine MacKinnon, a crucially important contributor to sexual harassment jurisprudence, gender versus sexuality is a distinction without a difference. In MacKinnon’s epistemological framework, gender is sexuality, which is the product of male domination and the essence of power itself.³⁵

Even if one is able to adequately define “sex,” a second question arising from the causation requirement immediately follows: what does it mean to say something is “caused” by sex? In the early days of sexual harassment litigation, one seemingly straightforward answer was that the harassing behavior was the result of the harasser’s unreciprocated sexual desire for the target.³⁶ This answer seemed logical because most early harassment cases involved female targets and male harassers, and because heterosexuality is the presumed orientation of most people.³⁷ As Justice Scalia noted in *Oncale v. Sundowner Offshore Oil Services*:

32. See JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 6–13 (1990). As Butler puts it, “If gender is the cultural meanings that the sexed body assumes, then a gender cannot be said to follow from a sex in any one way. Taken to its logical limit, the sex/gender distinction suggests a radical discontinuity between sexed bodies and culturally constructed genders.” *Id.* at 6. Note that unlike many feminist theorists, Butler does not claim that “gender” is inscribed upon an anatomical “sex.” Instead, she claims that “sex” and “gender” are equally constructed by social and cultural forces, with one function of “gender” being the perpetuation of the idea that “sex” is fundamental, or “prediscursive.” *Id.* at 6–7. See generally R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON, AND SEXUAL POLITICS* (1987); JUDITH LORBER, *PARADOXES OF GENDER* (1994).

33. BUTLER, *supra* note 32, at 6–13; LORBER, *supra* note 32, at 1–12; see also *THE SOCIAL CONSTRUCTION OF GENDER* (Judith Lorber & Susan A. Farrell eds., 1991).

34. See ANDREA DWORKIN, *INTERCOURSE* 121–43 (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 126–54 (1989). For a foundational, nuanced treatment of the relationship between biological sex, sexuality, and the social identities associated with them as gender, see generally SIMONE DE BEAUVOIR, *THE SECOND SEX* (1st American ed., Knopf 1953) (1949).

35. See MACKINNON, *supra* note 34, at 126–54.

36. Note that this can be an issue even in cases not alleging *quid pro quo* harassment: a demand for sexual contact that either promises tangible job benefits in return for compliance or threatens adverse economic consequences in return for lack of compliance, or both. Many cases alleging hostile environment harassment assert that repeated, unrequited demands for sexual contact from a coworker or supervisor—while not leading to specific employment consequences in terms of compensation or advancement—make the workplace an abusive setting.

37. It is indisputable that this is the fundamental assumption held by most Americans. However, there has long been empirical evidence of a high incidence of homosexuality and bisexuality in the population, placing this truism in doubt (even when evaluated according

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.³⁸

In same-sex harassment cases, however, courts have had greater difficulty in assessing the role of sexual desire in motivating the harassment.³⁹ Because courts assume sexuality is dichotomous (i.e., persons are either homo- or heterosexual, but either way, orientation is fixed and certain), they are hard pressed to make sense of cases alleging demonstrably sexual forms of harassment that appear to fall outside the expected sexual behavior of the litigants. Instead of relying on an examination of the acts *per se*, courts attempt to divine the purpose of the acts in assessing whether or not they were "sexual" enough to be actionable. This difficulty thus does not emerge because the cases are factually more complex.⁴⁰ Instead, courts' inability to say with certainty what motivates same-sex sexual harassment results from a fundamental flaw in existing sexual harassment jurisprudence: the conflation of sexuality with gender.

A. The Influence of Catharine MacKinnon's Scholarship on Title VII Jurisprudence

While even the Supreme Court has acknowledged the role of Catharine MacKinnon's scholarship in shaping the jurisprudence of sexual harassment,⁴¹ no court expressly has recognized or

to purely behavioral criteria). See, e.g., ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978); ALFRED C. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948). A prior question, of even greater import, is what it means to "count" one as homo-, hetero-, or bisexual. To quote Kinsey's observation of over a half-century ago: "The world is not to be divided into sheep and goats." KINSEY, *supra*, at 639.

38. *Oncale v. Sundowner Offshore Oil Servs.*, 523 U.S. 75, 80 (1998).

39. See *id.*; *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412-13 (7th Cir. 1997); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996); *Hampel v. Food Ingredients Specialties, Inc.*, 729 N.E.2d 726, 731 (Ohio 2000).

40. More to the point, the unique difficulty in assessing motivation in same-sex cases is not traceable to the fact that cases alleging different-sex harassment are factually less complex than those alleging same-sex harassment. There is no simple answer to the question of what motivates sexually aggressive behavior in the workplace. See discussion *infra* Part III.

41. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998).

embraced the theoretical model of sexuality that is central to her scholarship and which underlies the jurisprudence. In MacKinnon's account, sexuality, gender, and power are mutually constitutive: "men in particular, if not men alone, sexualize hierarchy; gender is one."⁴² For MacKinnon, sexuality and violence are virtually indistinguishable.⁴³ Moreover, sexuality and violence are created by men to ensure the perpetuation of male dominance.⁴⁴ Women, in this view, are the objects of male domination, with no independent sexual identity of their own.⁴⁵ Even more importantly for sexual harassment analysis, in MacKinnon's account, the word "sex" no longer has three separate meanings (sexuality, biological/anatomical sex, and gender); instead, the three meanings are collapsed into one signifier of male domination.⁴⁶ Based on this connection, MacKinnon theorizes:

To be clear: what is sexual is what gives a man an erection. Whatever it takes to make a penis shudder and stiffen with the experience of its potency is what sexuality means culturally. Whatever else does this, fear does, hostility does, hatred does, the helplessness of a child or a student or an infantilized or restrained or vulnerable woman does, revulsion does, death does. Hierarchy, a constant creation of person/thing, top/bottom, dominance/subordination relations, does.⁴⁷

It seems unlikely that most courts analyzing harassment claims understand that, in adopting the "because of sex" formulation from MacKinnon's analysis of harassment, they also are subscribing to this theory. Yet, if one subscribes to such a view of sexuality, it becomes easy to see how any sort of sexual harassment of women

42. MACKINNON, *supra* note 34, at 127.

43. As Catherine MacKinnon puts it, "[i]n this light, the major distinction between intercourse (normal) and rape (abnormal) is that the normal happens so often that one cannot get anyone to see anything wrong with it." *Id.* at 146. This may be one of MacKinnon's most controversial claims. Few feminists, even those who generally agree with MacKinnon's view that sexual harassment is a form of sex-based discrimination, would also subscribe to her view that sex and rape are barely distinguishable. For our purposes, it is enough to note that this assertion forms an important part of MacKinnon's theory of sexuality as male power.

44. *Id.* at 140.

45. "There is no such thing as a woman as such; there are only walking embodiments of men's projected needs." *Id.* at 119. Note that MacKinnon uses the term "woman" to mean a socially constructed woman; this being the case, it matters not whether the parties are biologically male or female. What matters is the social position occupied. If this sounds confusing, it is because the account may very well be tautological.

46. "To be rapable, a position that is social not biological, defines what a woman is." *Id.* at 178.

47. *Id.* at 137.

by men—sexual imagery on the walls, uninvited (or even invited) sexual advances, invasive touching—would constitute a form of discrimination on the basis of sex, whether or not sex is defined as gender, biological sex, or sexuality. Thus, many courts simply assumed the connection between gender, biological sex and sexuality without explicating it.⁴⁸ In short, while MacKinnon provided a theory of how sex, sexuality, and gender were interconnected—with this interconnection most obvious in cases of sexual harassment or rape—those who subscribed to her claim that sexual harassment is a form of sex-based discrimination largely assumed a natural connection between the three. Courts typically refer to this assumption as a “natural” or “reasonable” inference. It should be readily apparent why advocates of gender and sexual equity ought to resist this reflexive inferential gesture.

As new forms of harassment, particularly cases of same-sex harassment, came to the courts’ attention, however, this presumed relationship gradually was exposed.⁴⁹ Because they had not adopted (nor even in all likelihood understood) the full MacKinnon theory of harassment, courts struggled to fit the diversity of sexual harassment cases within the existing judicially-created framework. For example, many cases like *Oncale* involved the harassment of assertedly heterosexual men by other assertedly heterosexual men.⁵⁰ Others involved the sexually explicit harassment of self-identified gay men or lesbians by heterosexual coworkers or supervisors.⁵¹ In some cases, this harassment included what were, on their face, invitations to sexual contact.⁵² In other cases, self-identified or presumed gay/lesbian coworkers or supervisors harassed assertedly heterosexual people of the same sex, frequently by subjecting them to uninvited sexual advances or

48. See, e.g., *O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001); *Pollard v. E.I. Dupont de Nemours Co.*, 213 F.3d 933, 941–43 (6th Cir. 2000); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 964–66 (8th Cir. 1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482–86 (3rd Cir. 1990).

49. See *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996); *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 838 (E.D. Va. 2002).

50. See, e.g., *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996); *Breitenfeldt v. Long Prairie Packing Co.*, 48 F. Supp. 2d 1170, 1176 (D. Minn. 1999).

51. *Simonton v. Runyon*, 225 F.3d 122 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992).

52. The most common advances include a request or demand for fellatio or anal sex. See, e.g., *Simonton*, 225 F.3d at 124; *Johnson v. Hondo, Inc.*, 125 F.3d 408, 410 (7th Cir. 1997). Note that the vast majority of same-sex harassment cases that have been brought, prior to and after the *Oncale* decision, involve male litigants.

contacts.⁵³ Thus, courts had to delve more deeply into issues of causation and motivation, as the gender/sex/sexuality configurations before them multiplied and diversified.

Although the conduct in many of these same-sex harassment cases was strikingly uniform, courts responded in divergent ways depending upon the perceived⁵⁴ sexual orientation of the parties.⁵⁵ In fact, prior to the Supreme Court's opinion in *Oncale*, courts noticeably were split on the question of whether *any* same-sex harassment cases should be actionable under Title VII.⁵⁶ As the next section of this Article demonstrates, although the Court attempted to clarify the status of same-sex harassment in *Oncale*, a review of recent case law indicates continued inconsistent treatment of same-sex hostile environment cases. In short, lacking a firm theoretical basis for distinguishing between different forms of same-sex harassment, courts have resorted to mainstream cultural attitudes about homosexuality in finding some forms of harassment actionable, and others outside the scope of Title VII protection.

B. Same-Sex Harassment Under Title VII: Post-Oncale

Cases alleging same-sex harassment as a violation of Title VII have always faced uncertainty in the courts. The Supreme Court's determination in *Oncale* that same-sex harassment could be actionable under the statute has done little to change this. In fact, cases with gay or lesbian plaintiffs, if anything, increasingly are deemed

53. See *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009–10 (7th Cir. 1999); *Kelly v. City of Oakland*, 198 F.3d 779, 783 (9th Cir. 1999); *Merritt v. Del. River Port Auth.*, Civil Action No. 98-3313, 1999 U.S. Dist. LEXIS 5896, at *10 (E.D. Pa. Apr. 20, 1999); *Carney v. City of Shawnee*, 38 F. Supp. 2d 905, 907 (D. Kan. 1999); *Brewer v. Hillard*, 15 S.W.3d 1, 7–11 (Ky. Ct. App. 1999). *But see* *Smith v. USA Truck, Inc.*, Civil Nos. 97-2171 & 97-2172, 1998 U.S. Dist. LEXIS 3455, at *30 (W.D. Ark. 1998) (construing Arkansas Law with reference to Title VII to hold that “one instance” of unwelcome act of fellatio does not give rise to employer liability).

54. The sexual orientation of the parties is identified according to the perception of the courts (on their own reading of the record) or by the alleged harasser(s) or target(s).

55. In some cases, the sexual orientations of the plaintiff and the defendant/harasser(s) were expressly alleged in the record. See *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1082 (7th Cir. 2000); *Simonton*, 225 F.3d at 124. In others, courts determined whether or not the orientation of the parties might be deductively inferred by the evidence. See *King v. Super Serv., Inc.*, 68 F. App'x 659, 663 (6th Cir. 2003); *Shepherd*, 168 F.3d at 1009. In still others, courts determined whether or not there was a material question as to the orientation of one or more of the parties in rendering decisions on motions for summary judgment or demurrers. See *Merritt*, 1999 U.S. Dist. LEXIS 5896, at *10.

56. Storrow, *supra* note 8, at 689–716.

to fall outside the scope of Title VII,⁵⁷ while cases with gay or lesbian (or constructively gay or lesbian) harassers almost uniformly are considered within the scope of Title VII.⁵⁸ There is no principled reason for this pattern of decisions.⁵⁹ As mentioned above, courts simply have no idea how to extend the MacKinnon approach to same-sex cases because they have not grasped how the MacKinnon theory operates to link sexual harassment and sex-based discrimination. Combined with a lack of statutory guidance,⁶⁰ this theoretical fuzziness has led to a normative approach to same-sex Title VII cases that replicates mainstream attitudes about the threatening quality of unwelcome homosexual advances. A recent trend in judicial reasoning of same-sex harassment cases reveals this tendency. While different-sex harassment cases continue to distinguish between the "severe and pervasive" and "causation" requirements, courts attempting to apply the Supreme Court's holding in *Oncale* have collapsed the two, sometimes openly re-deploying the Court's dicta to justify reading a "context" requirement into the causation requirement. What this amounts to is the codification of homosexual panic: where the motivation for the harassment is homosexual desire, the severity/pervasiveness requirement is almost automatically met.⁶¹

As discussed, the *Oncale* decision establishes that same-sex harassment can be an actionable Title VII violation. The decision,

57. *Spearman*, 231 F.3d at 1084; *Hamner v. St. Vincent Hosp.*, 224 F.3d 701, 704 (7th Cir. 2000); *Simonton*, 225 F.3d at 124–25; *Cash v. Ill. Div. of Mental Health*, 209 F.3d 695, 696 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Klein v. McGowan*, 198 F.3d 705, 707 (8th Cir. 1999); *Metzger v. Compass Group USA, Inc.*, No. Civ.A. 98-2386-GTV, 1999 WL 714116, at *3 (D. Kan. Sept. 1, 1999); see also *Schmedding v. Tnemecc Co.*, 187 F.3d 862, 865 (8th Cir. 1995) (permitting the case to proceed, seemingly because plaintiff asserted he was *falsely* accused of being gay by his harassers).

58. *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 480–81 (5th Cir. 2002); *Kelly*, 198 F.3d 779, 783, 787; *Shepherd*, 168 F.3d at 1009–10; *Merritt*, 1999 U.S. Dist. LEXIS 5896, at *10; *Brewer*, 15 S.W.3d at 4–5, 11–12; *Harris v. Pameco Corp.*, 12 P.3d 524, 535 (Or. Ct. App. 2000).

59. The only possible principle at work would be one affirming the right to engage in discrimination on the basis of perceived or claimed sexual orientation. Courts may be inferring this right from legislative inaction, *Simonton*, 225 F.3d at 125, or they may be making a determination on their own that such discrimination should not be actionable. Certainly, there is sufficient evidence that Congress is reluctant to extend protection from discrimination to gay men and lesbians. *Id.* (using the repeated failure to enact the Employment Non-Discrimination Act as evidence that Congress does not intend to protect against sexual orientation discrimination); see also Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419, 2419 (1996) (codified as amended at 28 U.S.C. § 1738C (2000)) (precluding recognition of same-sex marriages).

60. The Defense of Marriage Act does not define "sex." § 2(a), 110 Stat. at 2419.

61. See, e.g., *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 842 n.7 (E.D. Va. 2002) ("Although the Court made this pronouncement during its discussion of the severity prong of a same-sex discrimination claim, courts have applied *Oncale's* instruction concerning context to the element of because of sex.").

however, complicates the issue by identifying three nominal routes by which a plaintiff can make out a same-sex case under Title VII. First, the plaintiff might offer “credible evidence that the harasser was homosexual.” Alternatively, the plaintiff might offer evidence that a harasser used “sex-specific and derogatory terms” to demonstrate that he or she was motivated by a “general hostility” to the presence of members of his or her same sex in the workplace. Or the plaintiff might offer comparative evidence of the disparate treatment of men and women by the harasser. The Court’s language did not suggest this was an exhaustive list of evidentiary paths a same-sex harassment plaintiff might pursue, leaving would be litigants guessing as to what the Court understood the essence of same-sex hostile environment harassment to be.⁶²

Thus, while the *Oncale* Court required plaintiffs to demonstrate that the alleged discrimination occurred “because of . . . sex,” it refused to define the requirement. Instead, the Court listed three possible ways in which a plaintiff might approach the evidentiary burden. However, the language of the opinion suggests that the Court has defined “because of . . . sex” to mean: because of the sexual desire of the harasser for the target (the gay harasser), or because of the harasser’s animus toward the presence of one sex in the workplace,⁶³ or because of some underlying impulse to treat the sexes differently.⁶⁴

In a highly influential law review article critical of existing sexual harassment jurisprudence, Katherine Franke focused on the latter interpretation as one way of arguing for the inclusion of anti-gay harassment.⁶⁵ Franke has suggested same-sex harassment can be construed as a form of sex-based discrimination because it is a way of enforcing gender conformity. In Franke’s view, the sexually explicit harassment that plaintiffs like Joseph Oncale faced results when the harassers detect a failure by the plaintiff to exhibit sufficiently masculine characteristics to be distinguished from a woman. Thus, harassment acts as a “technique of sexism” in enforcing gender conformity.⁶⁶

62. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

63. In this case, such animus would mean the desire to be the only male or female in the workplace, since a desire to have a workplace entirely free of members of plaintiff’s gender would be logically impossible in a same-sex harassment case.

64. For example, one might use sexually profane language with men but not with women.

65. Katherine Franke, *What’s Wrong with Sexual Harassment?*, 49 *STAN. L. REV.* 691, 692 (1997).

66. *Id.* at 696.

Since the *Oncale* decision, arguments predicating Title VII claims on a “sex-plus”⁶⁷ theory of same-sex harassment as discrimination have become more frequent,⁶⁸ with inconsistent results. In *Higgins v. New Balance Athletic Shoe, Inc.*,⁶⁹ for example, a gay man brought a claim that his harassment included sex-based discrimination in the form of ridicule for failure to conform to masculine stereotypes.⁷⁰ In appealing summary judgment of the case, Higgins reframed his initial argument (which had rested on a Minnesota Human Rights statute forbidding discrimination on the basis of sexual orientation) to claim a Title VII violation on the basis of gender-based discrimination.⁷¹ Relying on state court precedent that precludes appellate review of a theory not raised at the trial court level, the First Circuit refused to entertain the new claim because it had not been raised below.⁷² In dicta, however, the court provided an optimistic view of whether such a claim, if timely raised, might survive summary judgment:

Be that as it may, in a footnoted rumination, the district court questioned whether plaintiffs in same-sex sexual harassment cases might properly argue that they were harassed because they did not conform to gender-based stereotypes We think it prudent to note that the precise question that the district court posed is no longer open: [the *Oncale* decision] confirms that the standards of liability under Title VII, as they have been refined and explicated over time, apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs. In other

67. Courts have used this term to denote gender-based discrimination to distinguish it from sex-based discrimination. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989). In other words, it applies where the discrimination is alleged to result because of plaintiff’s perceived failure to sufficiently match his/her masculinity/femininity to his/her biological sex. *Id.*

68. *Hamner v. St. Vincent Hosp.*, 224 F.3d 701 (7th Cir. 2000); *Simonton v. Runyon*, 225 F.3d 122 (2d Cir. 2000); *Cash v. Ill. Div. of Mental Health*, 209 F.3d 695 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Samborski v. W. Valley Nuclear Serv. Co.*, 99-CV-0213E(M), 1999 U.S. Dist. LEXIS 20263 (W.D.N.Y. Nov. 24, 1999).

69. *Higgins*, 194 F.3d at 257–59.

70. Plaintiff presented evidence at trial that his peers frequently mocked him, by speaking to him in high-pitched voices and imitating feminine gestures to him. *Id.* at 259.

71. *Id.* at 260–61.

72. *Id.* at 259–60. It appears that many cases litigated around the time of the *Oncale* decision were pled inconsistently, or somewhat broadly, as the parties were (understandably) unsure of how to pursue same-sex harassment claims. Given the liberal pleading requirements at the federal level, courts are expected to consider a broad range of theories of liability when considering motions for summary judgment, even when those theories were not specifically pled. FED. R. CIV. P. 8(a). Some appellate courts have recognized this in examining newly-raised “sex plus” theories on appeal. *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir. 1995). Others have not. *Hamner*, 224 F.3d at 707; *Higgins*, 194 F.3d at 259–60.

words, just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.⁷³

On the other hand, a Seventh Circuit court was equally forceful in *Hamner v. St. Vincent Hospital* in its conclusion that a gender-stereotyping claim brought by a gay plaintiff would not be actionable under Title VII.⁷⁴ Similar to *Higgins*, the Seventh Circuit refused to rule on plaintiff's claim of homophobic harassment consisting of gender-specific mockery⁷⁵ because it was not raised in the court below.⁷⁶ Unlike *Higgins*, however, the Seventh Circuit stated in dicta that:

[T]his argument has no merit. We have already established from Hamner's testimony that he believed that Edwards's gestures evinced his "homophobia," and thus pertained only to Hamner's sexual orientation, and not to his sex. And the record contains no evidence to indicate that Edwards's gestures were motivated by a general hostility to men, which would be an example of the type of evidence necessary in this case to sustain Hamner's [claim].⁷⁷

The Seventh Circuit also cited *Oncale* in reaching this position.⁷⁸

The "gender stereotyping" (or "sex-plus") framework embraced by Franke and others may offer an avenue of redress to some gay and lesbian plaintiffs who can argue that the hostility they faced from supervisors or coworkers was based, at least in part, on a distaste for gender nonconformity. Such an approach may be sustainable in *some* courts and in *some* cases.⁷⁹ It should be pursued

73. *Higgins*, 194 F.3d at 261.

74. *Hamner*, 224 F.3d at 707.

75. In this case, plaintiff alleged, in part, that a supervisor lisped and "flipped his wrists" at him. *Id.* at 703.

76. *Id.* at 707.

77. *Id.*

78. *Id.* The *Hamner* court's citation of *Oncale* appears to indicate that it took the "three evidentiary routes" to proving sex-based discrimination to be exclusive of the ways in which a plaintiff could satisfy the "because of . . . sex" requirement. *Id.* at 707 n.5; see also *Sweet v. Mulberry Lutheran Home*, Cause No. IP02-0320-C-H/K, 2003 U.S. Dist. LEXIS 11373, at *7-8 (S.D. Ind. June 6, 2003); *Samborski v. W. Valley Nuclear Serv. Co.*, 99-CV-0213E(F), 2002 U.S. Dist. LEXIS 12745, at *9-11 (W.D.N.Y. June 25, 2002).

79. For example, where the plaintiff exhibits or is perceived to exhibit atypical gender identity.

if feasible, and if the approach accurately reflects the nature of the harassment at issue.⁸⁰ The Franke approach, like the MacKinnon approach, however, misses what may be termed the “independently sexual component” of sexual harassment.⁸¹ Thus, it fails to move the discourse of sexual harassment outside of the MacKinnon framework and consequently makes use of only a fraction of the potential scope of Title VII. Moreover, it inadvertently may contribute to the polarized construction of sexuality that forms the basis of homophobic conduct in the first instance.

II. FINDING THE SEX(UALITY) IN SEXUAL HARASSMENT UNDER TITLE VII

Courts will often go a long way to avoid discussing sexuality, even when they are adjudicating sexual harassment claims.⁸² A particularly strained example of the judicial gymnastics that may be required to avoid discussing sexuality in a sexual harassment case is offered in the case of *McWilliams v. Fairfax County Board of Supervisors*,⁸³ discussed at length by Richard F. Storrow in his analysis of the pre- and post-*Oncale* landscape.⁸⁴ In *McWilliams*, the plaintiff was a cognitively disabled man who was subjected to a variety of sexually-charged contacts by his coworkers.⁸⁵ At one point, *McWilliams* was fondled to the point of erection by one of his harassers.⁸⁶ Yet, the *McWilliams* court saw the behavior by plaintiff’s coworkers as

80. That is, where one can reasonably assert that the harassment was more or less a product of gender conflict, rather than sexual desire or (as is discussed below) a more complex mixture of sexual desire and antipathy.

81. Given their very different intellectual and political commitments, this roping together of Franke and MacKinnon might be, at first blush, unsettling. It should be noted, therefore, that I am not claiming that the justificatory frameworks from which Franke and MacKinnon produce their (to my mind) de-sexed approaches to sexual harassment are in any way identical. In fact, MacKinnon’s approach de-sexualizes harassment by conflating gender with sexuality, while Franke’s approach rests on a conviction that the focus on sexuality in harassment masks the fact that sexuality is but one *tool* of sexism. See Kathryn Franke, *Putting Sex to Work*, in LEFT LEGALISM/LEFT CRITIQUE, *supra* note 29, at 290.

82. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998) (limiting recitation of the facts “in the interest of both brevity and dignity”); *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1276 (D. Utah 2003) (quoting *Oncale*, 523 U.S. at 77).

83. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996).

84. Storrow, *supra* note 8, at 700–02.

85. *McWilliams*, 72 F.3d at 1196.

86. *Id.*

horseplay rather than sexual harassment.⁸⁷ In the absence of evidence that any (or presumably *all*) of the harassing workers were actually homosexual, the court was unwilling to find that the harassment occurred because of McWilliams' [male] sex.⁸⁸ In this case, the court implied that by "sex" it meant biological sex. Yet such a definition appears difficult to sustain given the facts; was the court suggesting that the fact that McWilliams had a penis was irrelevant to the conduct of his coworkers?⁸⁹

Storrow notes that a number of courts, like the *McWilliams* court, have made the mistake of presuming that sexually-harassing conduct between men in the workplace emerges not from sexual desire but from some more generic impulse toward "horseplay."⁹⁰ Storrow argues that rather than make this mistake, courts should presume desire where sexually explicit behavior seems to beg them to locate it, thus providing same-sex harassment victims the same presumption (that the harassment occurred because of the target's sex) as that provided opposite-sex targets.⁹¹ Storrow is exactly right on this score. It is a feature of homophobia that courts seem bound and determined not to see a form of sexual desire where it is clearly staring them in the face.

Unfortunately, Storrow does not go further in this analysis because his ambition is to locate same-sex cases within the existing Title VII jurisprudence.⁹² If, however, we push this reasoning to its logical conclusion, we can see cases like *McWilliams* do not belong under the rubric of Title VII given the existing, MacKinnon-inspired jurisprudence. They are not cases of sex-based discrimination as it has been articulated under sex discrimination law, which are cases of sex-gender discrimination. Cases like *McWilliams*, on the other hand, posit a form of sexual harassment that does not necessarily correspond to, support, or manifest gender-based dis-

87. *Id.* (describing the conduct at issue as "puerile and repulsive" but not within the ambit of Title VII); *id.* at 1197 (stating that McWilliams' supervisors were on notice of, at most, "teasing and 'horseplay'").

88. Storrow, *supra* note 8, at 702.

89. Storrow notes that McWilliams also was required to "fellate" a coworker's finger and was subjected to a mock anal rape with a broom handle. *Id.* at 700. Are such activities meaningful if the target's biological/anatomical sex is irrelevant? Would such harassment have meant the same thing either to the harassers or to the target if the target had been female? Would it even have occurred?

90. *Id.* at 699, 701–02, 740. From whence this impulse derives, is a question completely open to speculation. So many courts seem to think it endemic to male culture, that one can at least say this about it: it is something like a biological drive but perhaps even more basic, because judges are likely to find it as the truly motivating force even when all indications point toward sexual desire as the culprit.

91. *Id.* at 736–42.

92. *Id.* at 740–45.

crimination. A man fondling or grabbing another man's genitals may be doing so for reasons that have nothing to do with the status of men in the workplace, or with the dictates of gender conformity.

The harassment of women by men on the job was first deemed actionable because it represented gender-based power; men exert their power over women in part through masculinity as it is expressed in sexual dominance.⁹³ This is what most people thought they were addressing when they advocated for the inclusion of sexual harassment claims within the rubric of Title VII anti-discrimination law. But some advocates wanted more. MacKinnon argued the biological sex of the harasser and the target were immaterial to the gendered dimensions of sexual harassment, and therefore irrelevant to whether such claims would fall under Title VII (they would).⁹⁴ For MacKinnon, the core nature of sexuality was gendered power, whether it was expressed between men and women, men and men, women and women, or a man or woman alone in his/her most private moments. Susan Estrich followed MacKinnon's lead, writing that:

Aggressive fondling, drunken lurches, exclusive attention to anatomy, abusive language, and the treatment of women solely as sexual objects may, empirically speaking, be considered acceptable behavior outside of the workplace What makes such conduct generally acceptable outside of work is that men say it is, and that women have no say.⁹⁵

For Estrich, the solution is a far more expansive application of Title VII: she would prohibit all forms of sexual interaction in the workplace: "Men and women could, of course, violate the rule; but the power to complain, once in the hands of the less powerful, might well 'chill' sexual relations by evening the balance of power between the two."⁹⁶

93. See discussion *supra* Part I.A.

94. MacKinnon, *supra* note 34, at 141–42. This is because, according to MacKinnon, biological sex is itself socially constructed. *Id.* From MacKinnon's perspective, because the gendered quality of sexual domination is not dependent upon the anatomical differences between men and women, there is no principled reason to restrict harassment claims under Title VII to cases involving male harassers and female targets. *Id.* at 131–32, 178–79. Janet Halley provides a compelling analysis of MacKinnon's briefing of the *Oncale* case to the Supreme Court. Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 29, at 80. Halley convincingly argues that MacKinnon may have invited the Court to articulate a homophobic standard of causation—one that equates a finding of "homosexuality" in the "perpetrator" of harassment with an adequate showing of but-for causation. *Id.*

95. Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 859 (1991).

96. *Id.* at 860.

Critics of the MacKinnon approach have tended to argue for a different tack than that argued by Estrich, but on the same (sex-gender) terrain. Katherine Franke, as noted above, has argued that same-sex harassment should be actionable under Title VII not because men and women are interchangeable in the MacKinnon sense,⁹⁷ but because sexual harassment is a “technology of sexism.”⁹⁸ According to Franke, what men are doing when they are grabbing the genitalia of other men is not seeking sexual gratification, but engaging in a form of gender discipline.⁹⁹ Franke’s argument is appealing, but it too denies the possibility of an independently sexual dimension of harassment. When a man grabs another man’s genitals, might he be doing so out of a sexual impulse that is at least in part *not* driven by the (according to Franke and others) more fundamental drive to enforce gender dominance? Even posing the question this way seems heretical by feminist standards. It is suggesting that there may be a sexuality beyond gender. Is that, in fact, what I am suggesting?

Yes and no. I am arguing there is a sexual dimension that, while deeply grounded in gender (and, by extension, gender inequality), is not driven by it—or at least, is not driven by the desire to perpetuate the gender inequality or domination that forms the language of its expression. This sexual dimension has both a positive and negative valence. It is experienced as desire and disgust, sometimes simultaneously.¹⁰⁰ In the case of a homophobic work environment, for example, one can view the efforts of the presumptively heterosexual harassers as attempts to discipline the gender of effeminate (gay) men or masculine (lesbian) women as Franke’s approach might have us do. Or one could, like MacKinnon,¹⁰¹ see the harassment as male sexuality run amok as usual: uncontained in the case of the physical harassment of gay men; oppressively forceful in the denial of, for example, a lesbian’s alternative erotic attachments.

97. By this I mean that MacKinnon imagines a totalizing structure of male domination. See MACKINNON, *supra* note 34, at 116–17. Within this structure, biological males and females may occupy or play different “roles” but the structure itself is hierarchically male. *Id.* at 118–19, 141–42. In other words, a lesbian woman may be the boss, but when she harasses her female secretary, she is objectifying her as any male boss would. Sexuality is imprinted with gender domination, whether it is heterosexual or homosexual. *Id.* at 141–42, 178–79.

98. Franke, *supra* note 65, at 693.

99. *Id.*

100. The ambivalent quality of sexual feeling has been recognized at least since Freud. See SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* (James Strachey trans., Basic Books 1962) (1905).

101. MACKINNON, *supra* note 34, at 136, 141, 143.

Alternatively, an approach that gives credence to the independently sexual dimension of harassment might see the homophobic workplace in quite different terms. The harassment of the gay man by male coworkers may be said to emerge from the conflicted sexual desires of the presumptively heterosexual harassers; distaste and desire often commingle to produce a violent denial. The lesbian's choice is ridiculed or dismissed as "disgusting" because of the sexual polarity that is demanded by a homophobic culture. While one's own sexuality is blessed, natural, and comfortably physical, alternative sexualities are distasteful, foreign, inexplicable and disgusting. These are sexual evaluations at bottom.

Certainly it can be argued that the very nature of sexuality—the need to polarize *and fix* as heterosexual or homosexual one's sexual attributes—is itself a function of gender and gender inequality. I would not argue strenuously against that point. In a gendered social order, it is impossible to test this hypothesis. It seems plausible that a significant part of sexual expression is shaped by gender ideals and gendered practices. However, it is equally plausible—and cases like *Oncale* seem to suggest—that there is a dimension to sexuality that is not straightforwardly gendered. And there are alternative explanations. Perhaps the need to polarize and fix sexual orientation¹⁰² is a function of "western metaphysical dualism": the need to polarize and value differently all social and cultural distinctions.¹⁰³ Alternatively, it may be a manifestation of a structure of the mind,¹⁰⁴ or the nature of language and the result of how language is acquired.¹⁰⁵ Or maybe the myth of gender polarity is derived from the myth of sexual polarity. Perhaps it is the other way around. I contend that, contra our tendency to conceive of sexuality, gender, and sex as constituting a binary system, sexuality is, instead, complex and fluid, reaching beyond the dichotomous categories of male and female, masculine and feminine, heterosexual and homosexual.

In the next section of this Article, I indicate how contemporary sexual harassment jurisprudence, in relying upon only a fraction of the theoretical literature on the social dimensions of human sexuality, fails to take account of this complexity. I then proceed toward

102. Even the word "orientation" betrays the spatial metaphor that corrupts sexuality—particularly, but not exclusively, in Western/Anglo cultures.

103. See generally LUCE IRIGARAY, *SPECULUM OF THE OTHER WOMAN* (1985); GAYATRI CHAKRAVORTY SPIVAK, *THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES* (Sarah Harasym ed., 1990).

104. See CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 72–98 (1988).

105. See JACQUES LACAN, *FEMININE SEXUALITY AND THE ECOLE FREUDIENNE* 78–85 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1982).

an alternative conception of sexuality that would animate a qualitatively different approach to sexual harassment—one that calls into question the role of the judiciary in adjudicating harassment claims.

A. Theories of Sexuality: Toward a New Understanding of Causation

As discussed above, the essential theoretical premises underlying most sexual harassment law were derived from the work of Catharine MacKinnon. It is indisputable that victims of sexual harassment are more effectively protected in the post-MacKinnon era than they were in the pre-MacKinnon era. That said, even many MacKinnon supporters have been critical of the facility with which she equates sexual and gendered power. Katherine Franke, for example, sees MacKinnon's theory as failing to fully explore the unique ways in which sexually harassing behavior can enforce gender norms among men, as well as women.¹⁰⁶ Vicki Schultz, while generally approving of MacKinnon's view that sexuality and gender are intricately connected, blames what she calls the "desire-dominance paradigm" for misinterpreting the basic function of sexual harassment.¹⁰⁷ For Schultz, sexual harassment often has little to do with desire; instead, this harassment is about undermining worker competence in an effort to assert male privilege and the exclusivity of male occupational domains.¹⁰⁸ Schultz goes further than Franke by noting that there may be an arena of sexual harassment that has nothing to do with efforts to assert gender inequality at all.¹⁰⁹ Observing that "some discussions and overtures—and perhaps even some forms of outright discrimination based on sexual orientation—are not gender-based attempts at denigration."¹¹⁰ Schultz underscores her point that her approach goes beyond that of MacKinnon and others by declining to "conflate harassment on the basis of gender with harassment on the basis of sexual orientation."¹¹¹

Schultz' concern, however, is with the application of Title VII to gender-based harassment, and she does not elaborate on her view

106. Franke, *supra* note 65, at 760–62.

107. Vickie Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687–89 (1998).

108. *Id.* at 1687.

109. *Id.*

110. *Id.*

111. *Id.*

that there may be a theoretically or empirically important distinction between harassment based on gender and harassment based on sexuality. Doing so would require a move away from the MacKinnon/radical feminist view of sexuality. There are, however, other theories of sexual behavior that permit a more complex and nuanced view of what motivates sexual aggression in the workplace. Below, I synthesize the insights of psychoanalytic theorist Jessica Benjamin and political economist Herbert Marcuse to develop a theory of sexual harassment that can explain the facially incoherent quality of same-sex hostile workplace harassment.

B. Other Perspectives on Sexual Behavior: Jessica Benjamin

In *Master/Slave: The Politics of Erotic Domination*, Jessica Benjamin offers an explanation of erotic domination that is rooted in a person's internal conflict between the need for recognition and the need for independence.¹¹² Benjamin argues that this conflict plagues each of us throughout our lives.¹¹³ Indeed, the emotional and psychological seeds of this struggle are planted early in infancy.¹¹⁴ It is then, in early infancy, that we begin to differentiate as individual beings, against a backdrop of parental care that brings the conflict between recognition and independence into sharp relief.¹¹⁵ Struggling to assert ourselves, we strive to make an impact through our infantile acts.¹¹⁶ The distinction we create and recognize between ourselves and others (the self/other divide) becomes the central organizing frame of our conscious and unconscious selves, laying the groundwork for adult patterns of erotic conflict, violence, and domination/subordination:

What I am describing here is a dialectic of control: if I completely control the other, then the other ceases to exist, and if the other completely controls me, then I cease to exist. True differentiation means maintaining the essential tension of the

112. Jessica Benjamin, *Master/Slave: The Politics of Erotic Domination*, in *POWERS OF DESIRE* 280 (Ann Snitow et al. eds., 1983).

113. *Id.* at 284.

114. *Id.*

115. *Id.*

116. *Id.* Here, the prototypical example of the recognition/independence conflict is the toddler who crawls away from its mother, venturing further and further away from her control, while periodically looking over its shoulder to ensure that its mother is watching and appreciating its attempts at independence.

contradictory impulses to assert the self and respect the other.¹¹⁷

This struggle is intensely physical. As an articulation of the self/other divide, it plays itself out on the borders of the body.¹¹⁸ In practice, this means sexual intimacy is conceived as a transgression of bodily boundaries—a transgression that is invited or pursued willingly, but always symbolically promises the ultimate collapse of the distinction between self and other.¹¹⁹

The stakes of such a physical exchange are high.¹²⁰ Even in a free world—one not shot through with relations of social inequality—one could imagine frequent slips from mutually balanced efforts at control and passivity into a more violent expression of the dialectic; in a world patterned by inequality, erotic violence and systematic expressions of domination and submission are inevitable. Benjamin understands the gendered quality of erotic domination to emerge from the gendered fact of parenting. The “other” in childhood relations is nearly always female. Therefore, efforts to assert independence are undertaken against a backdrop of gender difference (in the case of a male child) or gender identification (in the case of a female child).¹²¹ In this view,¹²² male efforts to individuate are particularly violent and aggressive, because they must (in a gender stratified and polarized world) entail an express rejection of the mother and her femaleness.¹²³

117. *Id.*

118. Although Benjamin deploys the language of object relations analysis, she cites Georges Bataille’s Hegelian approach to eroticism to explain adult sexuality as a function of this struggle. *Id.* at 285. In Bataille’s work, “eroticism centers around maintaining the tension between life and death of self.” *Id.*

119. *Id.* In short, it is a journey towards death.

120. According to Benjamin, sexual interaction may be contemporary western society’s only outlet for transcendence, replacing religion as the site of this life/death negotiation. *Id.* at 295–96.

121. *Id.* at 284.

122. Benjamin’s view borrows here from the object relations analysis of Nancy Chodorow. *Id.* at 294.

123. Female children, on the other hand, undergo a more tortured and slow process of individuation—and one that may never be complete. As an adult, the female “is object. She serves men as their other, their counterpart, the side of themselves they repress.” *Id.* at 294. Benjamin is much more thorough in her theorization of male development than female development in this particular article. Thus, she clearly establishes that male egos are developed along the lines of rationality, aggression, and a drive to objectify. Benjamin pays less attention to how female children develop the desire to be objectified. In JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* 51–84 (1988), Benjamin describes this aspect of the developmental roots of erotic domination more clearly. As a child, the girl struggles intensely with her need for individuality, which is masked and made problematic by her identification with her mother. *Id.* In subjecting herself to erotic violation as an adult, the woman is attempting to recognize her physical

Although Benjamin describes the dynamic of erotic domination as gendered, its roots are more fundamental than gender itself. Gender frequently is mapped onto the desire to erotically dominate another such that men dominate and women submit, but this need not be, and frequently is not, the case.¹²⁴ Benjamin even suggests “[t]o an increasing extent this form of individuality is becoming de-gendered: that is, male and female roles are no longer as binding as they once were.”¹²⁵ For Benjamin, gender is not the central problem posed by the dialectic of control: it is the polarization of the traits of nurturance and rationality that threatens the peace.¹²⁶

Benjamin’s theory directly applies to our understanding of the dynamics of workplace harassment. If the drive to dominate is the drive to assert one’s will, where we observe domination and sexual aggression, we should be looking for the effort to assert the self. Such an effort becomes especially well-defined in contexts that threaten a numbing of the self, such as modern workplaces. The attack on Mark McWilliams, adjudicated in *McWilliams v. Fairfax County Board of Supervisors*, thus can be understood as one of the “strange new forms of collective violation”: an effort by McWilliams’ tormentors to experience the will to power that, one could imagine, is largely thwarted by the day-to-day routine of work at a small mechanics shop.¹²⁷

Group harassment of the sort experienced by McWilliams or Joseph Oncale has been, to courts and laypersons alike, among the most perplexing forms of harassment there is. Katherine Franke and Vicki Schultz would explain the harassment as an effort to discipline masculine identity: to bring those men who do not perform

boundaries—her “self”—by regularly subjecting them to the threats posed by male sexuality, which can verge on violence and which is frequently expressed as domination. *Id.*

124. Benjamin, *supra* note 112, at 294.

125. *Id.*

126. *Id.* at 295–96 (“Rationalization and depersonalization in all public areas of life have by now virtually banished nurturance to the private household, the dwindling maternal world Ironically, domestic privatization seems to encourage strange new collective forms of violation Love is the new religion, and the psychological components of erotic domination are repeated in the eroticized cult politics of our era. I believe that we are facing unbearably intensified privatization and discontinuity, unrelieved by expressions of continuity. Given that social structure and culture enforce individual isolation so rigidly, the transgression that attempts to break it may necessarily be more violent.”).

127. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996). This is not to relieve the employee defendants of responsibility for their actions. It is merely to explain those actions as they are embedded in larger institutional contexts. It also is to suggest an implicit solution: to the extent that employees feel isolated, powerless, and physically and psychologically numbed by their work, they are dangerous to their coworkers. The structure of work is the culprit that can be controlled in this account of harassment.

their gender according to type into line.¹²⁸ But this account is unsatisfying because, like the courts who adjudicated the cases, it ignores the expressly sexual dimension of the harassment. McWilliams and Oncale both had their genitals fondled and both were threatened with anal penetration.¹²⁹ These are expressly sexual forms of harassment and had we observed them being perpetrated by men against a woman, we would have had little difficulty in labeling them as such. But the fact that McWilliams and Oncale are men and were harassed and assaulted by other men obscures the sexual element of the harassment, even when it is patently obvious from the facts. In a sense, our *inability to understand the harassment* is “because of the sex of the plaintiff,” while the harassment itself may not have been.¹³⁰

C. Other Perspectives on Sexual Behavior: Herbert Marcuse

At a broader level of analysis, the structure of the workplace, not an internal conflict between the need for recognition and the need for independence, is the problem. Herbert Marcuse saw this (in an admittedly stilted Marxian form) nearly sixty years ago. Mixing the insights of Freudian psychoanalysis and Marxist political economics, Marcuse’s *Eros and Civilization* posits a theory of civilization as the progression of “organized domination.”¹³¹ The specific form of domination is determined by the particular requirements of capitalism, and includes the sublimation and perversion of eroticism via the technique of alienation (as it is understood by Marxism).¹³² Thus, as Freud noted, sexuality would have to be largely repressed if society were to advance and progress.¹³³ Where Marcuse departs from Freud is at the point of biological determinism. It is not the fact that social life requires the sublimation of sexuality that produces the “discontents” of civilization; it is rather the fact that capitalism—a particular organization of “scarcity”—produces a self-

128. See discussion *supra* Part II.A.

129. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998); *McWilliams*, 72 F.3d at 1196.

130. That is, the harassment may not have been “because of the sex of the plaintiff,” if by “sex” we mean “gender.”

131. HERBERT MARCUSE, *EROS AND CIVILIZATION* 34 (1955).

132. In Freud, this is described as the antagonistic relationship between “the pleasure principle” and the “reality principle.” See SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 21–32 (James Strachey ed. & trans., 1962). For Marcuse, Freud essentially was correct that there is a conflict between pleasure and “reality”; the need to work is opposed by necessity to the impulse toward the experience of pleasure, including sexual pleasure.

133. *Id.* at 50–52, 58–60.

perpetuating system of domination that, among other things, requires and exacts a “surplus-repression” of sexuality.¹³⁴ The term “surplus-repression” connotes two things: that repression is used to create a surplus for the dominant class, and that there is a surplus of repression that is experienced under conditions of capitalism.¹³⁵

Sexuality increasingly has been organized toward the end of procreation, and normative sexuality takes place entirely in the “part-time” world of the full-time worker. The “libido,” once a free-flowing and expansive expression of the sexual self increasingly is particularized and fragmented under conditions of exploitation and domination through the social organization of work.¹³⁶ In short, sexuality is ever narrowed under conditions of capitalism—from an activity occupying much of our time to one now occupying only a fraction of each day. What is more, sexuality is increasingly focused on procreation as it serves the reproductive needs of capitalism.

It becomes clear in Marcuse’s account what drives the occasional explosion of sexually inappropriate and even violent behavior in the workplace: the restrained libido breaks free of its chains in an effort to subvert the power of the social organization of work.¹³⁷

134. MARCUSE, *supra* note 131, at 37 (“Moreover, while any form of the reality principle demands a considerable degree and scope of repressive control over the instincts, the specific historical institutions of the reality principle and the specific interests of domination introduce *additional* controls over and above those indispensable for civilized human association. These additional controls arising from the specific institutions of domination are what we denote as *surplus-repression*.”).

135. The effects and consequences of surplus-repression are many and varied. One important effect is the channeling of desire into particularized forms of expression and, in fact, particular zones of bodily experience. Marcuse writes, for example, that the “proximity” senses of smell and taste have been progressively subdued in capitalist societies because “[t]heir unrepressed development would eroticize the organism to such an extent that it would counteract the desexualization of the organism required by its social utilization as an instrument of labor.” *Id.* at 38–39.

136. *Id.* at 45 (“For the vast majority of the population, the scope and mode of satisfaction are determined by their own labor; but their labor is work for an apparatus which they do not control, which operates as an independent power to which individuals must submit if they want to live Libido is diverted for socially useful performances in which the individual works for himself only in so far as he works for the apparatus, engaged in activities that mostly do not coincide with his own faculties and desires.”).

Lurking underneath this libido-deployed-in-the-service-of-alienated-work is a genuine expression of the pleasure principle. Marcuse sees the disciplinary stance of modern societies toward the perversions (that is, non-normative forms of sexuality) as an indication of their subversive quality. *Id.* at 50 (“Against a society which employs sexuality as a means for a useful end, the perversions uphold sexuality as an end in itself; they thus place themselves outside the dominion of the performance principle and challenge its very foundation.”).

137. Like Benjamin, Marcuse views eroticism as being closely linked to death. In his view, however, it is the ostensible function of eros in modern societies to render the destructive (death) impulse “harmless.” But the perversions—and here, “perversions” is used by Marcuse in a value-neutral way to refer simply to atypical sexual behavior—let the cat out of

Unable to meaningfully alter the nature of work or its organization, the worker—an instrument of labor—experiences a momentary sensation of power and freedom through the expression of a perverse sexual impulse.¹³⁸ In this account, the structure of the workplace produces the impulse to sexual domination.¹³⁹

Taken together with Benjamin's account of erotic domination, Marcuse's theory of the antagonistic relationship between eros and work in capitalist societies points us toward a theory of sexual harassment that is not ultimately reducible to gender. This is not to say that sexual harassment is never about gender inequality. On the contrary, it may derive from the effort to exert gender dominance much more often than it derives from any other source. *Quid pro quo* forms of harassment, for example, may be explicable largely as an expression of gender domination. The issue is how to conceive of desire. If it is conceived in the narrow terms used by most courts and many feminist theorists, then it is of course true that desire is a poor explanation of most forms of harassment. But, if the notion of desire is broadened to include the sorts of conflict-laden, internally divided, and profoundly constructed impulses and sensibilities that are at the heart of Benjamin and Marcuse's theories of domination, then it becomes possible to see how desire is operative in workplace harassment.

The simple point is that there is some dimension of sexuality that operates apart from, or at least not in the service of, gender domination. This, I would argue, is why there has been a great gnashing of teeth and beating of breasts over the attempt to squeeze non-paradigmatic cases of sexual harassment into the stiff-armed embrace of Title VII. Sometimes, sexual harassment really is about sex.

the bag: they "suggest the ultimate identity of Eros and death instinct, or the submission of Eros to the death instinct." *Id.* at 51.

138. *Id.*

139. The unrestrained libido is (theoretically) a total, physical, and unifying force that resides in the body and produces the very will to exist. The true perversion is the subordination of this libido to the strictures of capitalism; once subordinated it becomes twisted, misguided, and potentially violent unless carefully contained within the bounds of normal, procreative, part-time sexuality. The occasional release of this distorted libido within the workplace is dangerous in itself and is an indication of the "fatal dialectic of civilization: the very progress of civilization leads to the release of increasingly destructive forces." *Id.* at 54.

III. TORT REMEDIES: ANTI-GAY HARASSMENT IS NOT “BEYOND THE BOUNDS OF DECENCY”

A growing sense of the awkwardness of the fit between Title VII and the realities of sexual harassment has led some critics to advocate for an abandonment of the Title VII framework in whole or in part.¹⁴⁰ Some believe the framework is ineffective or even treacherous when applied to claims of harassment implicating gay and lesbian people.¹⁴¹ Others believe Title VII has gone too far in punishing forms of behavior that should not be actionable¹⁴² or in punishing those who are not actually responsible for it—namely, employers.¹⁴³ Among those in the latter group is Mark M. Hager, who has argued strenuously for replacing Title VII remedies with traditional tort remedies, of both the common law and constitutional¹⁴⁴ variety.

Tort remedies offer the promise of more directly addressing the harm of sexual harassment without either requiring or implying—as the MacKinnon theory of harassment does—that harassment is always fundamentally about gender inequality. For example, Rosa Ehrenreich argues that tort remedies are more appropriate vehicles for redressing the “dignitary harms” associated with all forms of workplace harassment, whether sexual or not.¹⁴⁵ She writes that “Modern tort law embraces the concept of ‘dignitary harm,’ a

140. See generally Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999); Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375 (1998); E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the “Reasonable Heterosexist” Standard*, 18 BERKELEY J. EMP. & LAB. L. 56 (1997).

141. See generally Ehrenreich, *supra* note 140; Spitko, *supra* note 140. These concerns apply regardless of whether the gay person is the alleged harasser or the alleged victim. Note that the gender-based approach toward sexual harassment would view the former scenario quite differently from the latter, whereas the sexuality-based approach would see similar principles at work in both. What the sexuality-based approach suggests is that the sexual orientation of the target and the harasser are not *determinative* of the harm of harassment, although they are partly constitutive of it. The harm results from the ambiguity, conflict, and assertion of power that are played out in sexual terms which, because they are sexual, are especially potent. Whether the harasser is gay or lesbian or heterosexual or bisexual informs the quality of the conflict, and codes the behavior as either threatening or merely annoying, but it does not determine in and of itself whether or not desire is at work. Where the behavior takes a sexual form, desire is always at work (if only in its negative valence).

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

143. See generally Hager, *supra* note 140.

144. For example, Hager argues that public employees could bring § 1983 claims on the grounds that the harassment is being undertaken “under the color of law.” *Id.* at 281–82.

145. Ehrenreich, *supra* note 140, at 3–5, 44–48.

harm that injures ‘personality interests’”¹⁴⁶ because tort law understands individuals to have a basic right to personhood and autonomy.¹⁴⁷ Because most instances of harassment—physical assaults, batteries, and verbal attacks of various sorts—can be conceived as invasions of personhood and autonomy, tort law should provide a direct and precise remedy.¹⁴⁸

Relying upon Prosser’s¹⁴⁹ definitions of the torts of battery, assault, false imprisonment, and intentional infliction of emotional distress, Ehrenreich argues that intentional torts cover the sorts of incidents that arise in the workplace and victimize employees.¹⁵⁰ Ehrenreich claims these torts are designed to be “broad” in their application, subjected as they are to a simple test of reasonableness.¹⁵¹ Unfortunately, courts have not seen it this way. As indicated in the next section, many courts have erected high bars to pursuing intentional tort actions in workplace claims.¹⁵² Furthermore, there is evidence that both courts and juries are more likely to find harassment by a gay man or lesbian actionable than they are to find harassment against a gay or lesbian worker to be so.¹⁵³

A. Evidence from Case Law: Defining Outrageousness in Terms of the Parties, Not the Behavior

Existing case law suggests the tort approach to homophobic hostile environment harassment has not gone unnoticed by plaintiffs’ lawyers. The tort of intentional infliction of emotional distress has seemed to some a tort designed to offer redress to precisely this

146. *Id.* at 22.

147. *Id.*

148. *Id.*

149. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 40 (5th ed. 1984).

150. Ehrenreich, *supra* note 140, at 23.

151. *Id.* Note that the “reasonableness” standard itself may be anything but simple, as any first year torts casebook would illustrate. The “reasonable person” standard has been particularly contentious in the area of Title VII law. *See, e.g.,* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1403 (1992); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 781–93; Deborah B. Goldberg, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 CARDOZO WOMEN’S L.J. 195, 212 (1995).

152. *See, e.g.,* Mims v. Carrier Corp., 88 F. Supp. 2d 706, 710 (E.D. Tex. 2000); Redden v. Contimortgage Corp., No. 99-4535, 1999 WL 1257280, at *2 (E.D. Pa. Dec. 22, 1999).

153. *See* Kelly v. City of Oakland, 198 F.3d 779, 784–85 (9th Cir. 1999); Merritt v. Del. River Port Auth., Civil Action No. 98-3313, 1999 U.S. Dist. LEXIS 5896, at *9–10 (E.D. Pa. Apr. 20, 1999); Harris v. Pameco Corp., 12 P.3d 524, 532 (Or. Ct. App. 2000).

sort of offensive behavior.¹⁵⁴ The problem has been that a successful cause of action must demonstrate—in the words of most common law definitions of the tort—that the behavior was outrageous and “exceed[ed] all bounds usually tolerated by decent society.”¹⁵⁵ In a society characterized by institutionalized heterosexism,¹⁵⁶ few acts of homophobia meet the definition.

In *Mims v. Carrier Corp.*, for instance, the plaintiff Quentin T. Mims alleged that two coworkers, in the presence of other coworkers, accused him of having a sexual relationship with a male coworker.¹⁵⁷ Mims further alleged that coworkers made obscene and “offensive” gestures indicating Mims’ engagement in homosexual acts as part of this “teasing.”¹⁵⁸ Mims complained to supervisors about the behavior, but it continued “unabated.”¹⁵⁹ Moreover, he alleged the supervisors retaliated against him for raising the complaints by, among other things, physically removing him from the premises in front of fellow workers in a “humiliating” and injurious fashion.¹⁶⁰ The court spilled little ink in dismissing Mims’ claim for intentional infliction of emotional distress, stating that “the individual defendants comments do not ‘shock the conscience’ The teasing, obscenities, and other unpleasantness endured by Mims—while unfortunate—do not rise to the required level for such extraordinary relief.”¹⁶¹

Likewise, in the case of *Redden v. Contimortgage Corp.*,¹⁶² plaintiff Norman Redden alleged that his coworkers engaged in anti-gay harassment over a period of more than a year, during which they called him a “fag,” made reference to his supposed knowledge of homosexual acts, referred to his weekend activity as a “sausage party,” made gestures indicating that he was masturbating under his desk, sang parodies of a Village People song, and made frequent derogatory comments about gay men to him. Redden complained to supervisors, but ultimately resigned from his position as a result of the harassment.¹⁶³ The court began its discussion of Redden’s claim of intentional infliction of emotional distress by

154. Ehrenreich, *supra* note 140, at 23.

155. KEETON ET AL., *supra* note 149, at 60.

156. That is, in a society where the preference for heterosexual behavior and identity is codified in institutional practices.

157. *Mims*, 88 F. Supp. 2d at 710.

158. *Id.*

159. *Id.*

160. Mims alleged that, while talking with a group of friends, he was grabbed forcefully by the wrist by a supervisor and ushered out of the building. *Id.*

161. *Id.* at 721.

162. *Redden v. Contimortgage Corp.*, No. 99-4535, 1999 WL 1257280, at *2 (E.D. Pa. Dec. 22, 1999).

163. *Id.*

establishing a particularly high bar for workplace sexual harassment: "offensive comments and gestures in the workplace, although sexually explicit, do not constitute the type of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress."¹⁶⁴ That said, the court in *Redden* admitted that a tort of intentional infliction of emotional distress, while difficult to prove in a case of workplace harassment, was not impossible to make out.¹⁶⁵ Nonetheless, it held that Redden's claim did not meet this standard and was properly dismissed.¹⁶⁶

The question arises, then, as to which sorts of harassment claims might be actionable in tort. Specifically, can anti-gay harassment ever rise to the level of "outrageousness" that is required? The case of *Simpson v. Burrows* provides a clue.¹⁶⁷ In *Simpson*, a lesbian lodge owner was harassed when a town resident circulated anti-lesbian letters to the entire community, which hindered her ability to run her business.¹⁶⁸ The letters contained anti-gay rhetoric and pointed death threats¹⁶⁹ and were sufficient to cause the appellate court in that case to dismiss defendant's motion for summary judgment.¹⁷⁰ The court found the threatening quality of the letters reached the level of extremity and outrageousness required to make out the tort,¹⁷¹ but this decision hardly can be encouraging to gay employees seeking redress for constructive exile by less dramatic forms of homophobia. In permitting the case to go forward, the *Simpson* court emphasized the death threats as well as the fact that the harassment prevented the lodge owner from earning a living.¹⁷² Most cases of anti-gay harassment will not reach these thresholds.

Another case indicating how courts are likely to examine tort claims relating to homophobic harassment is *Nance v. M.D. Health Plan, Inc.*¹⁷³ In *Nance*, the plaintiff alleged a variety of wrongs against his employer, including racial discrimination and intentional and negligent infliction of emotional distress.¹⁷⁴ The intentional infliction of emotional distress claim was grounded in the fact that Nance's supervisor questioned Nance's subordinates

164. *Id.* at *3.

165. *Id.* at *2-3.

166. *Id.* at *3.

167. *Simpson v. Burrows*, 90 F. Supp. 2d 1108 (D. Or. 2000).

168. *Id.* at 1114-15.

169. *Id.*

170. *Id.* at 1124.

171. *Id.*

172. *Id.* at 1123-24.

173. *Nance v. M.D. Health Plan, Inc.*, 47 F. Supp. 2d 276 (D. Conn. 1999).

174. *Id.* at 277.

about his sexual orientation, ostensibly as part of his investigation of a same-sex harassment complaint lodged against Nance.¹⁷⁵ Although the court rejected Nance's contention that such questioning, *per se*, constituted outrageous conduct,¹⁷⁶ it refused to grant defendant's motion for summary judgment on the intentional infliction of emotional distress claim.¹⁷⁷ The court's reasoning in this regard is instructive:

Many homosexuals take great care to conceal their sexual orientation from those with whom they work for fear of humiliation or actual physical risk if their homosexuality is disclosed. An employer's questioning that signals to others its belief that the subject employee is a homosexual in reckless disregard of a foreseeable, unsavory response by those persons thus informed, could constitute extreme and outrageous conduct. Whether this case represents any such circumstances awaits a more fully developed record¹⁷⁸

The case is unclear as to whether Nance claimed he was or was not, in fact, gay. The court is careful to contextualize its concerns about maintaining the sanctity of the closet within a recognition of the "continuing homophobia, discrimination and even fatal violence directed towards homosexuals"¹⁷⁹ that makes disclosure of one's sexual orientation potentially dangerous. Nonetheless, what seems clear from the court's acceptance of the idea that one *could* make out a claim for intentional infliction of emotional distress in a case alleging anti-gay harassment is the fact that the harm alleged is not the harassment itself but the surreptitious labeling of a person as gay when they have not labeled themselves as such in "public."¹⁸⁰

What *Mims*, *Redden*, and *Nance* thus demonstrate is that, in the courts' eyes, garden variety homophobic harassment is not beyond

175. *Id.*

176. *Id.* at 279. The court noted that the context of such questioning would be important in determining whether or not it constituted "extreme and outrageous conduct." *Id.* In this case, the court noted that "here the employer's questions were within the context of a same-sex sexual harassment investigation." *Id.* These facts undercut Nance's claim, but the court permitted the case to go forward because it could not rule out the possibility that Nance could demonstrate, for example, that he was "personally subjected to any direct questioning, references or harassment about his sexual orientation or personal relationships." *Id.* Presumably, such conduct might make out the elements of the claim.

177. *Id.* at 279.

178. *Id.*

179. *Id.*

180. For a similar case in the Title VII context, see *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

“all possible bounds of decency,”¹⁸¹ while the disruption of the closet—exposing a person as gay, or labeling a person as gay—crosses the threshold.¹⁸² A person who has taken “great care to conceal”¹⁸³ his or her homosexuality may bring an action against a supervisor who authoritatively puts into question that person’s sexual orientation. But a person subjected to direct, vicious, repeated, and graphic sexual insults relating to his or her perceived sexual orientation is not protected by the tort of intentional infliction of emotional distress. The implication is that the employee in the latter case has done something to trigger the perception—whether true or not—and thus has forfeited the protection of the tort claim. In the language of Marcuse, the employee in the former case has taken affirmative action to maintain the separation between work and perverse desire, while the employee in the latter case has unleashed the destructive forces of surplus-repression upon himself by bringing perversity itself into the workplace.¹⁸⁴ It is little wonder, from a Marcusean standpoint, that the courts would choose to discipline the conduct of the employer in the former case while leaving the employee in the latter case to his own devices. Both approaches function to sustain the dialectic; homophobia is a tool of workplace alienation.

There is, therefore, at least one reason why Ehrenreich’s approach would be unlikely to work any fundamental change in the treatment of same-sex harassment under tort law: in a heterosexist society, homophobia is rarely outrageous.¹⁸⁵ Further support for this notion emerges from tort cases involving homosexual advances made towards assertedly heterosexual men.¹⁸⁶ Although there are few cases on record from which one might generalize, there is evidence that courts are more willing to find sufficient “outrageousness” in cases alleging unwelcome homosexual advances. In *Harris v. Pameco Corp.*,¹⁸⁷ the plaintiff was an assertedly heterosexual man who had put the defendant on notice that he believed homosexuality was immoral. The defendant, Harris’ su-

181. *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 720 (E.D. Tex. 2000); *Redden v. Contimortgage Corp.*, No. 99-4535, 1999 WL 1257280, at *2 (E.D. Pa. Dec. 22, 1999).

182. *Nance*, 47 F. Supp. 2d at 279.

183. *Id.*

184. MARCUSE, *supra* note 131, at 34.

185. It should be noted that Ehrenreich was not concerned expressly with homophobic harassment. Nonetheless, the point can be extended to heterosexual forms of harassment: in a sexist society, harassment against *women* is rarely outrageous. See Ehrenreich, *supra* note 140, at 33.

186. *Kelly v. City of Oakland*, 198 F.3d 779, 782–83, 785 (9th Cir. 1999); *Merritt v. Del. River Port Auth.*, Civil Action No. 98-3313, 1999 U.S. Dist. LEXIS 5896, at *19–22 (E.D. Pa. Apr. 20, 1999); *Harris v. Pameco Corp.*, 12 P.3d 524, 532 (Or. Ct. App. 2000).

187. *Harris*, 12 P.3d at 527.

pervisor, nevertheless engaged in several behaviors that the plaintiff found sexually threatening, including putting his arm around plaintiff's neck, touching him on the knee, and offering him a "big, wet kiss" if he met certain production goals.¹⁸⁸ Plaintiff's supervisor also made two comments that Harris took to be invitations to join him in bed.¹⁸⁹

In examining the plaintiff's cause of action for the torts of intentional infliction of emotional distress and battery, the court emphasized the importance of Harris' prior disclosure of his feelings regarding homosexuality.¹⁹⁰ Not only did this discussion help establish the "intent" requirement of the intentional infliction of emotional distress claim, it also made the defendant supervisor's touching more likely to be deemed "offensive" by a jury (and thus a battery):

It is also inferable from plaintiff's testimony that George's touching was sexual in nature in light of plaintiff's previously expressed views about homosexuality and his reactions when touched. It is also inferable that George knew that his conduct would be considered objectively offensive when considered in the context of his course of conduct.¹⁹¹

In deciding the question of whether a jury could find the supervisor's conduct "beyond the bounds of socially tolerable conduct," the court noted simply that the comments were sexual in nature and therefore (in the context of the supervisor/employee relationship) could be deemed sexually harassing and intolerable.¹⁹²

The *Harris* case is notable for its matter-of-fact approach to the question of whether sexually harassing conduct can be deemed socially outrageous.¹⁹³ Other cases reviewing allegations of

188. *Id.* at 527-28.

189. The first such incident occurred at a hotel where the parties were attending a business function. Harris' supervisor greeted him at his hotel door while wearing his boxer shorts, then climbed under the sheets of his hotel room bed and asked Harris why he "didn't . . . just get in bed." *Id.* at 527. The second incident occurred during a conversation about a head cold suffered by the supervisor. Harris opined that he should not get "too close" to the supervisor. In response, the supervisor stated: "Does that mean I cannot invite you to my bed?" *Id.* at 527-28.

190. *Id.* at 529.

191. *Id.*

192. *Id.* The court relied on precedent in reaching this conclusion. The cited case involved a claim of opposite-sex sexual harassment and the court found no reason to distinguish it from the same-sex case at bar. *Id.* (citing *McCanty v. Staudenraus*, 901 P.2d 841 (Or. 1995)). This, alone, marks the court's approach as distinctive from those alleging anti-gay sexual harassment as a tort.

193. The case is notable, that is, when compared to those cases alleging torts arising from anti-gay hostile environments.

unwelcome homosexual advances are similarly straightforward in concluding that a jury could reasonably find such conduct to be outrageous.¹⁹⁴ The question that naturally presents itself, then, is “why?” Why are courts relatively untroubled when leaving intentional tort cases alleging a gay sexual harasser to the vicissitudes of jury deliberations, while decidedly unwilling to permit cases alleging anti-gay sexual harassment the same fate? It is ironic and unfortunate that the cases that are most unlikely to find an alternative form of redress are precisely the cases that courts are least likely to permit to go forward as common law tort claims.

CONCLUSION: WHAT CAN (OR SHOULD) THE LAW DO?

If neither Title VII nor the common law torts currently provide adequate remedies to homophobic hostile work environments and, instead, appear to exacerbate the inequities faced by gay and lesbian workers, does this mean that the law is powerless to redress this harm? Conceptually, a federal statutory solution might seem to offer a workable alternative. Congress could enact a statute that expressly forbids anti-gay or -lesbian harassment in the workplace or, even more directly, forbids any form of sexuality-based workplace discrimination. Indeed, some in Congress have tried, repeatedly introducing the Employment Non-Discrimination Act (ENDA), which would prohibit workplace discrimination on the basis of sexual orientation.¹⁹⁵ While firmly anchored in the settled, centrist jurisprudence of nondiscrimination, ENDA consistently has been rejected by Congress since 1996.¹⁹⁶ Yet even were the bill to be enacted into law,¹⁹⁷ it would closely track the language of Title

194. Most such cases allege far more egregious conduct than that alleged by Harris. But it is an open question whether such conduct is any more egregious than that faced by plaintiffs like Edison Spearman, who was regularly taunted; was referred to as a “nigger,” a “fag,” a “punk-ass,” and a “bitch;” was the subject of graffiti stating that he had AIDS; and had his toolbox stolen and his tools destroyed while on medical leave for treatment of depression. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1082–86 (7th Cir. 2000). The point here is not that employees like Harris are not alleging “outrageous” enough conduct or that employees like Spearman are; rather, it is to suggest that determinations of what a reasonable jury *might* find outrageous are likely the product of homophobic assumptions about sexually offensive behavior.

195. See Employment Non-Discrimination Act (ENDA) of 1999, H.R. 2355, 106th Cong. (1999).

196. Most recently, in 2003 a version of ENDA was introduced as part of Senate Bill 16, but was the object of no further congressional action. 149 CONG. REC. S16, S134 (daily ed. Jan. 9, 2003).

197. At present, efforts to pursue the legislation have stalled in the wake of the gay marriage juggernaut.

VII; in essence, drafters have simply added the words “sexual orientation” to those of “sex, race, national origin”¹⁹⁸ As a result, there is little reason to believe that ENDA would effect much of a shift in existing sexual harassment jurisprudence. To the contrary, by adding the categorical identifier “sexual orientation” to the list of protected classes, ENDA would fail to break out of the dualistic conception of sexuality that has served to undermine the effectiveness of the existing harassment framework to create conditions of sexual equality. Indeed, the proposed reform would reinforce this dualism; “sexual orientation” invokes a spatial metaphor that invites the trier of fact to locate and fix sexual identity and desire.¹⁹⁹

Moreover, there are good reasons to question the wisdom of approaching the project of sexual freedom and equality via state-centric, juridical strategies. As Wendy Brown has argued in *States of Injury: Power and Freedom in Late Modernity*, progressive politics in late modern capitalist democracies require, at a minimum, an interrogation of the relationship between rights-based tactics of political inclusion and the structures of domination they are imagined to subvert.²⁰⁰ Modern identity politics, grounded in a politics of *ressentiment*—of injury and the fantasy of redress—feed from, and *into*, systems of oppression based on articulated statuses. Brown writes:

While the effort to replace liberalism’s abstract formulation of equality with legal recognition of injurious social stratifications is understandable, what such arguments do not query is whether legal “protection” for a certain injury-forming identity discursively entrenches the injury-identity connection it denounces. Might such protection codify within the law the very powerlessness it aims to redress? Might it discursively collude with the conversion of attribute into identity, of a historical effect of power into a presumed cause of victimization?²⁰¹

The problem, as Brown articulates it, is not simply that the law disables subjectivity through protectionist interventions, but rather that injury claims become constitutive of identity through the

198. ENDA, *supra* note 195. Note, however, that recent revisions of the bill have inserted express prohibitions of quotas and preferential hiring treatment for gay men and lesbians, as well as an express exemption for religious organizations. *Id.*

199. The causation requirement remains in force, thus necessitating an inquiry into whether the conduct at issue was undertaken “because of” plaintiff’s sexual orientation. *See* ENDA, *supra* note 195, at § 4(a)(1).

200. BROWN, *supra* note 28, at 21.

201. *Id.*

disciplinary effects of state action.²⁰² Classification and categorization are the *modus vivendi* of the institutions comprising modern statehood—courts, bureaucracies, regulatory bodies, etc.—and claims for inclusion and recognition (conceived as “rights”) that are grounded in injury do little to unsettle the systems of domination that produce such injuries in the first place.²⁰³ Indeed, the politics of *ressentiment* may “unwittingly increase the power of the state and its various regulatory discourses at the expense of political freedom.”²⁰⁴

Ultimately, the problem of sexually hostile work environments is so deeply embedded in the psychology of work and sexuality that its source is beyond the reach of judicial action. If we take seriously the claims of theorists like Jessica Benjamin and Herbert Marcuse, we must admit that the dysfunctional quality of the work-sex nexus is endemic to advanced capitalist societies. We cannot hope to prevent the excesses of sexual repression in the service of alienated labor through thinly worded statutes wielded by the likes of Antonin Scalia or even Ruth Bader Ginsberg. Nor can we expect that workplaces will ever become de-sexualized, as long as they remain repetitive, sterile environments where nobody is enjoying his or her job very much. The true solution to sexual harassment in the workplace lies in a transformation of the workplace, not a transformation of the law. Efforts to bend the law in directions that are marginally less heterosexist may, if successful, offer incremental compensation to some gay and lesbian individuals suffering the *consequences* of the radically unbalanced dialectics of control characterizing modern workplaces and psychosocial development. But, these efforts will do little to strike at the homophobic core of binary conceptions of sexuality and, consequently, will fail to disintegrate the systems of oppression that produce acts of harassment, violence, intimidation, and domination in the workplace.

At best, reformation of the existing sexual harassment jurisprudence will fail to move the project of sexual equality forward. At worst, it will serve more deeply to inscribe the terms of sexual oppression, and willingly submit the articulation of sexual identities, practices, and communities to the disciplinary capacity of the state. If freedom inheres in the “struggle against what will otherwise be done to and for us,”²⁰⁵ this willing submission to law’s denominative and generative apparatus—an apparatus that serves to delimit the

202. *Id.*

203. *Id.*

204. *Id.* at 28.

205. *Id.* at 25.

possibilities of existence—amounts to a forfeiture of freedom's defining praxis. A victory in achieving inclusion of sexual orientation within the ambit of Title VII's protection against sexual harassment would thus be Pyrrhic, and advocates of gender and sexual equality would do well to consider an alternative, political, course of action.

