

Directions in Sexual Harassment Law

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Introduction

A Short History of Sexual Harassment

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Some two decades after the federal courts first recognized sexual harassment as a form of sex discrimination, debate still continues about what sexual harassment is, why it might be sex discrimination, and what law can and should do about it. Many voices take up these questions in the pages to follow. In this introduction I will describe the historical foundations of this conversation, a conversation that continues without sign of diminishing, in the workplace and the popular press, as well as in such academic fora as the conference from which this book grew.

What can history bring to our understanding of sexual harassment? Sexual harassment is a social practice. Social practices have lives, institutional lives and semiotic lives. And so social practices like sexual harassment have histories. Considering sexual harassment in historical perspective allows us to ask some fundamental questions about the nature of the practice, the terms in which it has been contested, and the rules and rhetorics by which law constrains — or enables — the conduct in question.

My object in these pages is to invite reflection, not only about sexual harassment, but also about the law of sex discrimination itself. It is only quite recently that sexual harassment acquired the name of “sexual harassment” and was prohibited as a form of “sex discrimination.” By examining the process through which a persistent and pervasive practice came to be recognized

as discrimination “on the basis of sex,” we learn much about what law does when it recognizes discrimination.

Clearly, this act of recognition was a momentous one. For the first time in history, women extracted from law the means to fight a practice with which they had been struggling for centuries. And yet, when we consider this development from a historical vantage point, it becomes plain that legal recognition of sexual harassment as sex discrimination was at one and the same time a process of misrecognition—involving a sometimes strange account of the practice in issue. On a moment’s reflection, this is not terribly surprising. When law recognizes the harms inflicted by social practices, it is intervening in the social world it is describing, both enabling and constraining challenges to the social order of which the practices are a part.

For this reason, the language of discrimination is a specialized language, one that describes the social world in selective ways. When we in turn talk about a practice in the language of discrimination, we are viewing the world through this conceptual filter. Recourse to history supplies one way in which we can think about the languages in which we characterize the social world, to consider what work they are doing, and to ask again what work we might have them do.

It is in that spirit that I offer the following short history of sexual harassment, as a prelude to a much larger conversation, and as a provocation of sorts: an invitation to meditate, yet again, on what we mean when we say that a practice discriminates “on the basis of sex.” The longer I think about what that proposition might mean, the more I appreciate how its elusive meaning is the very source of its power—its maddening capacity to excite and to deaden curiosity, to challenge and to legitimate the social arrangements that make men men and women women.

It is with a view to continuing a several-decades-old conversation about what discrimination “on the basis of sex” might mean that I begin my short history of sexual harassment at a time well before anyone dreamed of describing the practice in such terms. I begin my story, quite self-consciously, with a provisional account of what sexual harassment might be and end by speculating about some ways that the practice seems to be changing in our own day. In this way, I hope to survey the terrain of the debate that the essays in this book join—a debate about what sexual harassment is and what law should do about it, a debate about the terms in which we describe and remedy the wrongs we have only recently come to call “discrimination.”

*Some Historical Perspectives on the Practice, Protest,
and Regulation of Sexual Harassment*

The practice of sexual harassment is centuries old — at least, if we define sexual harassment as unwanted sexual relations imposed by superiors on subordinates at work. For example, sexual coercion was an entrenched feature of chattel slavery endured by African-American women without protection of law.¹ While there were crucial differences in the situation of free women employed in domestic service, they, too, commonly faced sexual advances by men of the households in which they worked.² Surviving accounts of women employed in manufacturing and clerical positions in the late nineteenth and early twentieth centuries also point to a variety of contexts in which men imposed sexual relations — ranging from assault to all manner of unwanted physical or verbal advances — on women who worked for them.³

Nor was this sex shrouded in silence. Since the antebellum period, there has been public discussion of women's vulnerability to coerced sexual relations at work. To be sure, Americans often blamed women's sexual predicament on women themselves; both slaves and domestic servants were often judged responsible for their own "downfall" because they were promiscuous by nature.⁴ Yet an equally powerful line of public commentary condemned men for sexually abusing the women who worked for them. The abolitionist press, for example, "was particularly fond of stories that involved the sexual abuse of female slaves by their masters"⁵ as such stories directly put in issue the morality and legitimacy of slavery. And sexual relationships between women and the men for whom they worked as domestic servants were, if anything, even more volubly discussed. Over the decades, governmental hearings and reports, as well as all manner of commentary in the public press, delved into this and other aspects of the "servant problem."⁶ Thus, by the close of the nineteenth century, we find Helen Campbell's 1887 report on *Women Wage-Workers* invoking the common understanding that "[h]ousehold service has become synonymous with the worst degradation that comes to woman."⁷ Campbell also described in some detail the forms of sexual extortion practiced upon women who worked in factories and in the garment industry.⁸ Along similar lines, Upton Sinclair's 1905 exposé, *The Jungle*,⁹ dramatized the predicament of women in the meat-packing industry by comparing the forms of sexual coercion practiced in "wage slavery" and chattel slavery:

Here was a population, low-class and mostly foreign, hanging always on the verge of starvation, and dependent for its opportunities of life upon the whim of men every bit as brutal and unscrupulous as the old-time slave drivers; under such circumstances immorality was exactly as inevitable, and as prevalent, as it

was under the system of chattel slavery. *Things that were quite unspeakable went on there in the packing houses all the time, and were taken for granted by everybody; only they did not show, as in the old slavery times, because there was no difference in color between the master and slave.*¹⁰

As public commentators such as Campbell and Sinclair and the abolitionists before them well appreciated, the American legal system offered women scant protection from sexual coercion at work. Rape was, of course, punishable by law; but the criminal law did not protect slaves from rape,¹¹ and it defined the elements of rape so restrictively that most free women sexually coerced at work would have little reason to expect the state to sanction the men who took advantage of them.

Few women were willing to endure the damage to reputation and prospects for marriage that followed from bringing a rape complaint, and if they did, the prospects for vindication of their complaint were remote indeed. The common law required a woman claiming rape to make a highly scripted showing that sexual relations were nonconsensual; she had to show that sex was coerced by force and against her will¹²—that she succumbed to overpowering physical force despite exerting the “utmost resistance.”¹³ Economic coercion did not suffice, nor was most physical resistance enough to satisfy the common law requirement of “utmost resistance.” New York’s high court explained in 1874, as it rejected a rape prosecution of a man who forcibly assaulted his fourteen-year-old servant girl, after sending away her younger siblings and locking her in his barn: “Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? *And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant?* If consent, though not express, enters into her conduct, there is no rape.”¹⁴

In short, the law assumed that women in fact *wanted* the sexual advances and assaults that they claimed injured them. Unless women could show that they had performed an elaborate ritual of resistance, perfect compliance with the legally specified terms of which was necessary to overcome the overwhelming presumption that women latently desired whatever was sexually done to them, they could expect little recourse from the criminal law. Rape law’s protection was further vitiated by the fact that prosecutors and judges relied on all kinds of race- and class-based assumptions about the “promiscuous” natures of the women in domestic service and other forms of market labor as they reasoned about utmost resistance.¹⁵

Tort law was only marginally more effective as a weapon against sexual coercion at work. Initially, tort law gave women no right to recover damages for sexual assault. At common law, sexual assault gave rise to an action for damages insofar as it inflicted an injury on *a man's property interest in the woman who was assaulted*; thus, a master might have a claim in trespass against a man who raped his slave,¹⁶ or a father might bring a seduction action against an employer who impregnated or otherwise defiled his daughter.¹⁷ When American law eventually began to recognize a woman's right to recover for sexual injury in her own right — whether through an action for seduction or indecent assault — tort law developed a specialized body of law on “sexual” touchings that incorporated doctrines of consent from the criminal law of rape.¹⁸ By the early twentieth century, some jurisdictions moderated the consent requirement in actions for indecent assault, but none seems to have relinquished it.¹⁹ The tort action for seduction, by contrast, seems to have been more plastic, as it evolved from an action designed to recompense a father's economic injury (when it focused on his daughter's out-of-wedlock pregnancy) to an action designed to recompense injuries to a father's honor (when it focused his daughter's loss of virginity) to an action designed to recompense women directly for injuries suffered in “sexual connexion.”²⁰ In this newly configured form, Lea VanderVelde reports, by the late nineteenth century there were at least some seduction cases in which “the coercive force of words of economic threat were sufficient to render the sexual predation redressible.”²¹ But this development was by no means uniform across jurisdictions²² and was, moreover, short-lived: by the early twentieth century, many states began legislatively to repeal the tort of seduction along with other “heart-balm” actions.²³

The law's failure to protect women from sexual predation at work did not, of course, pass unnoticed; it has been a subject of protest since the days of the antislavery movement. We might count in this tradition abolitionist Henry Wright's description of South Carolina as “one great legalized and baptized brothel,”²⁴ or Harriet Jacobs's *Incidents in the Life of a Slave Girl*,²⁵ or the petitions of Henry McNeal Turner and other African-American men in the aftermath of the Civil War who protested the sexual violation of black women in domestic service: “All we ask of the white man is to let our ladies alone, and they need not fear us.”²⁶ As the story of Turner's petition reminds us, the parties most interested in achieving law reform in such matters were for the most part disfranchised. Petition thus emerged as a crucial weapon in the campaign. For example, even before the movement for woman suffrage emerged in the 1840s, women's moral reform societies had begun to wage petition campaigns designed to persuade state legislatures to enact legal penalties for seduction.²⁷ The

campaign to reform tort law had both practical and expressive purposes. Abolitionist Lydia Maria Child described the dignitary affront of a tort regime that recognized the sexual injury of women as an economic loss to men. She protested the common law of seduction as it denied to women the legal subjectivity to sustain sexual injury and the legal agency to secure its redress, and argued that women had internalized their devaluation and objectification by law: “[A] woman must acknowledge herself the *servant* of some-body, who may claim *wages* for her lost time! . . . It is a standing insult to womankind; and had we not become the slaves we are deemed in law, we should rise en masse . . . and sweep the contemptible insult from the statute-book.”²⁸

With the rise of the woman’s rights movement in the decade before the Civil War, some of its more vocal spokespersons began to discuss the socioeconomic conditions that made women susceptible to sexual coercion. The portrait they painted of heterosexual interaction was completely at odds with the common law’s, insofar as it presented coercion as the normal rather than deviant condition of heterosexual relations. On this account, restrictions on women’s labor market participation (“crowding”) and the systematic depression of their wages left women as a class dependent on men for economic support, and it was in this condition of “pecuniary dependence” that men could extract their sexual compliance, in and out of marriage.²⁹ As Ernestine Rose explained at an 1856 woman’s rights convention: “What was left for her but to sell herself for food and clothing either in matrimony or out of it; and it would require a wise head to determine which was the worse.”³⁰

In this critique of marriage as “legalized prostitution”³¹ the woman’s rights movement had begun to analyze the political economy of heterosexuality in a way that took as structurally interconnected the institutions of marriage and market. This socioeconomic understanding of sexual relations shaped the movement’s response to the trial of domestic servant Hester Vaughn in the aftermath of the Civil War. Vaughn was fired by her employer when she became pregnant by him; she gave birth alone, ill, and impoverished, and was found several days later with her dead infant by her side, adjudged guilty of infanticide, and sentenced to death.³² As Elizabeth Cady Stanton, Susan B. Anthony, and other woman’s rights advocates publicized the Vaughn case, they pointed to a variety of gendered injustices that cumulatively sealed Vaughn’s fate—an analysis that started with the gender and class restrictions that drove Vaughn to domestic service, and the sexual vulnerability her economic dependency engendered.³³ For the woman’s rights movement, the Vaughn case presented an occasion to protest the economic arrangements and social understandings that visited the judgment of death on Vaughn for a

predicament the woman's movement judged society as a whole — and men in particular — culpable.

The woman's rights movement responded to Vaughn's case with wide-ranging social critique and an equally wide-ranging remedy. The movement drew on Vaughn's case to protest the injustice of women's exclusion from jury service and suffrage and, after persuading the governor of Pennsylvania to pardon her, turned the Vaughn episode in the direction of its larger quest for political empowerment.³⁴ During the late nineteenth century, only the Woman's Christian Temperance Union mounted a sustained effort to reform laws protecting women from sexual predation; as Jane Larson has recounted, their effort took the form of a national campaign to raise the age of consent for statutory rape law.³⁵ While the campaign spoke the language of moral purity, Larson has shown that it was centrally preoccupied with the failure of rape law to protect women from sexual predation, and at least some of its centrally publicized cases involved the sexual exploitation of young women workers.³⁶

For the most part, efforts to protect working women from sexual coercion in the early twentieth century focused, not on law reform, but on other modes of collective self-help. For example, in 1908, settlement workers Grace Abbott and Sophonisba Breckinridge took a saloon-keeper to court who fired a young barmaid when he discovered that she was about to bear a child by him; after losing the case, Abbott and Breckinridge they turned to organizing immigrant protective associations to provide young working women alternate bases of community support.³⁷ Outside the settlement movement, various labor activists addressed the issue of women's vulnerability to sexual coercion at work as part of a more wide-ranging effort to organize working women.³⁸ But as Lisa Granik relates, there were pressures on women workers struggling to organize that caused them to defer gender-specific demands — such as protection from sexual coercion — in favor of traditional union demands such as seniority rights.³⁹

Even so, the fusion of labor and feminist advocacy agendas in the progressive era bore critical fruit. In 1916, for example, socialist-feminist Emma Goldman elaborated the "legal prostitution" critique of the nineteenth-century woman's rights movement in her influential essay "The Traffic in Women": "*Nowhere is woman treated according to the merit of her work, but rather as a sex. It is therefore almost inevitable that she would pay for her right to exist, to keep a position in whatever line, with sex favors.* Thus it is merely a question of degree whether she sells herself to one man, in or out of marriage, or to many men. Whether our reformers admit it or not, the economic and social inferiority of woman is responsible for prostitution."⁴⁰

Women in the early feminist and labor movements never managed to organize a sustained assault on the set of practices we have come to call “sexual harassment,” but they did articulate an indictment of the practices that anticipated many of the arguments that women in the modern feminist and labor movements voiced in the 1970s.

*The Rise of Sexual Harassment Law:
Regulating Sexual Harassment as Sex Discrimination*

As we have seen, the practice and protest of sexual harassment have a long history, in which we can situate developments of the 1970s as a recent and relatively short chapter. But these developments nonetheless represent a dramatic turning point in social and legal understandings of the practice.

In the 1970s Catharine MacKinnon and Lin Farley and the many other lawyers and activists who represented women in and out of court were able to mount a concerted assault, of unprecedented magnitude and force, on the practice of sexual harassment. Responding on many fronts to the demands of the second-wave feminist movement, the American legal system began slowly to yield to this challenge, and for the first time recognized women’s right to work free of unwanted sexual advances.

How did this come about? Sexual harassment law arose, first and foremost, from women acting as part of a social movement speaking out about their experiences as women at work; the term “sexual harassment” itself grew out of a consciousness-raising session Lin Farley held in 1974 as part of a Cornell University course on women and work.⁴¹ But more was required for the American legal system to recognize this experience of gendered harm as a form of legal injury, when for centuries it had refused. We could speculate for a long time about the convergence of social forces and social understandings that enabled legal recognition of the sexual harassment claim—a story involving differences in the movements for race and gender emancipation in the nineteenth and twentieth centuries, shifts in women’s labor force participation, and much more. But for present purposes I would like to consider the question in rather modest terms. What new ways of talking about the harms of a centuries-old practice enabled its recharacterization as unlawful conduct?

FEMINIST ACCOUNTS OF SEXUAL HARASSMENT
AS SEX DISCRIMINATION

As we know, the practice of subjecting employees to unwanted sexual advances at work was made legally actionable under a particular legal regime, Title VII of the Civil Rights Act of 1964.⁴² During the 1970s, lawyers, advo-

cates, and theorists had to persuade the American judiciary that sexual harassment is “discrimination on the basis of sex.” For this to happen, the injuries inflicted on women by sexual coercion at work had to be presented to courts in terms that could be assimilated to a body of law adopted to regulate practices of racial segregation in the workplace. Catharine MacKinnon’s analysis in *Sexual Harassment of Working Women*⁴³ — a stunningly brilliant synthesis of lawyering and legal theory — played a crucial role in this process.

I want now briefly to revisit the 1970s campaign, with a view to understanding the legal system’s “reception” of the sexual harassment claim, its translation into antidiscrimination discourse. By considering how MacKinnon and Farley described the injury of sexual harassment, and how judges interpreting federal employment discrimination law explained the harm of the practice, we learn much, not only about sexual harassment, but, just as important, about what law does when it recognizes claims of discrimination.

Writing in the 1970s, MacKinnon and Farley had only sketchy knowledge of the history we have just surveyed; much of this scholarship was produced as an outgrowth of the same set of social transformations that gave rise to the sexual harassment claim in the 1970s. Nevertheless, there are certain striking parallels between their arguments, and arguments advanced by Child, Rose, Stanton, Anthony, and Goldman before them. Like these early advocates, MacKinnon and Farley understood the sexual coercion women encountered at work as part of the larger political economy of heterosexuality, a social order that situates sexual relations between men and women in relations of economic dependency between men and women, an order in which marriage and market play reinforcing roles in the reproduction of women’s social subordination as a class.⁴⁴ As MacKinnon wrote in 1979: “Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men’s control over women’s sexuality and capital’s control over employees’ work lives. *Women historically have been required to exchange sexual services for material survival, in one form or another. Prostitution and marriage as well as sexual harassment in different ways institutionalize this arrangement.*”⁴⁵

Farley and MacKinnon each then proceeded to read the sexual advances constituting harassment within a semiotics of status inequality. Farley defined sexual harassment as the “unsolicited nonreciprocal male behavior that asserts a woman’s sex role over her function as a worker.”⁴⁶ Drawing on sources as diverse as Adrienne Rich and Erving Goffman, Farley asserted that the practice of sexual harassment was properly understood within the “micropolitics” of “the patriarchy.” She drew upon psychologists and sociologists to

decode the practice as part of “the communication of power between persons,” insisting that “sex is hardly the real meaning of much male behavior at work.”⁴⁷ MacKinnon, in a now-familiar voice, tersely remarked: “Sexual assault as experienced during sexual harassment seems less than an ordinary act of sexual desire directed toward the wrong person than an expression of dominance laced with impersonal contempt, the habit of getting what one wants, and the perception (usually accurate) that the situation can be safely exploited in this way—all expressed sexually. It is dominance eroticized.”⁴⁸ MacKinnon located this relationship within a system of social relations that divided the workforce into gender-marked roles that sexualized inequality on the model of marriage: “Work relationships parallel traditional home relationships between husband and wife” so that “women’s employment outside the home tends to monetize the roles and tasks women traditionally perform for men in the home.”⁴⁹

Looking back at Farley and MacKinnon’s arguments, we can discern the basic outlines of a social account of gender. Social stratification along lines of gender has material and dignitary dimensions; it is produced by the interaction of social structure (institutions, practices) and social meaning (stories, reasons);⁵⁰ sexual harassment is part of the relations of distribution and recognition both.⁵¹

This set of understandings played a central role in MacKinnon’s argument that sexual harassment was sex discrimination: “Practices which express and reinforce the social inequality of women to men are clear cases of sex-based discrimination in the *inequality* approach.”⁵² She then illustrated how sexual harassment expressed and reinforced sexual inequality as a matter of social structure and social meaning: for example, “Sexual harassment is discrimination ‘based on sex’ within the social meaning of sex, as the concept is socially incarnated in sex roles. Pervasive and ‘accepted’ as they are, these rigid roles have no place in the allocation of social and economic resources.”⁵³ Of course, in so arguing, MacKinnon was engaged in a creative act of resistance, couching the claim that sexual harassment was sex discrimination in terms that expressed the experiential and theoretical understanding of harassment that had emerged from the women’s movement, even as her arguments diverged from the conceptual framework in which the American legal system had come to apprehend race and sex discrimination by the mid-1970s.

This set of more conventional legal understandings MacKinnon termed the “differences approach”: “The basic question the differences approach poses is: how can you tell that this happened because one is a woman, rather than to a person who just happens to be a woman? The basic answer . . . is: a man in her position would not be or was not so treated.”⁵⁴ Employers may take all kinds

of adverse employment actions against women; what they may not do is treat women employees differently than they treat, or *would* treat, male employees. Note how, on this conception of discrimination, the harm of sexual harassment no longer involves interaction of social structure and social meaning, but instead reduces to an inquiry into the criteria by which an employer sorts employees. MacKinnon offered a variety of arguments that sexual harassment was sex discrimination on the differences approach, while at the same time conducting a detailed diagnosis of how the antidiscrimination tradition was misrecognizing status harm in the course of recognizing discrimination.⁵⁵ Without rehearsing the different iterations of disparate treatment and disparate impact arguments MacKinnon and others offered in briefing the sexual harassment claim in more conventional legal terms, I would like, in the interests of concision, to consider how, as a matter of history, the American legal system made sense of the proposition that sexual harassment was sex discrimination within the meaning of Title VII. Much was gained, and lost, in this act of “recognition.”

RESISTANCE AND (MIS)RECOGNITION:

HOW COURTS TRANSFORMED SEXUAL HARASSMENT DISCOURSE

At first, courts simply refused to acknowledge that sexual harassment had anything to do with employment discrimination on the basis of sex. Sexual harassment was rejected as a personal matter having nothing to do with work⁵⁶ or a sexual assault that just happened to occur at work.⁵⁷ Alternatively, judges reasoned that sexual harassment was natural and inevitable and nothing that law could reasonably expect to eradicate from work.⁵⁸ But the central ground on which courts resisted recognizing the claim was simply that sexual harassment was not discrimination “on the basis of sex.” It could happen to a man or woman or both;⁵⁹ even if its harms were inflicted on women only, they were not inflicted on all women, only those who refused their supervisors’ advances.⁶⁰ It is worth examining the objections to recognizing sexual harassment as sex discrimination set forth in these early cases, and the legal arguments that ultimately prevailed against them. By reconstructing the process through which courts came to reason that that sexual harassment discriminates “on the basis of sex,” we learn much about the ways that antidiscrimination law selectively constrains practices that sustain social stratification.⁶¹

Courts initially offered two reasons to support the judgment that supervisors who subjected employees to unwanted sexual advances did not discriminate on the basis of sex. The first objection was that the practice did not systematically differentiate among employees by sex. As one district court reasoned: “In this instance the supervisor was male and the employee was

female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.⁶² This objection was answered, famously, in the 1977 case of *Barnes v. Costle*,⁶³ by Judge Spottswood Robinson, when he located the act of class-categorical discrimination in the presumed sexual orientation of the harasser: The plaintiff in that case, he noted, alleged her supervisor had conditioned “retention of her job . . . upon submission to sexual relations *an exaction which the supervisor would not have sought from any male,*” and, Robinson noted, “there is no suggestion that appellant’s allegedly amorous supervisor is other than heterosexual.”⁶⁴ On this model, Robinson explained,

a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now: the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at bar, are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. *In the case of the bisexual supervisor, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.*⁶⁵

In this strange juridical moment, we see sexual harassment defined as sex discrimination through a narrative of sexual orientation. Monosexual harassers discriminate on the basis of sex, bisexual harassers do not.⁶⁶ Judge Robinson notes the status inequality between the supervisor and subordinate pressured for sexual attention, yet does not emphasize it in explaining why the supervisor’s sexual attentions are sexually discriminatory. Instead, Judge Robinson reasons about discrimination as differentiation, arguing that harassers who are interested only in members of one sex discriminate on the basis of sex as they select subordinates from whom to demand sexual relations. The harasser’s sexual orientation thus supplies the act of group-based differentiation that makes the sexual overture between supervisor and subordinate sexually discriminatory. So framed, there would seem to be no further ground of dispute, with a dare posed to the harasser: “Well, you’re not going to claim you’re that kind of man . . .”

The sexual orientation argument advanced in *Barnes* would ultimately prove persuasive to many. But, at the time of the decision, there was yet another ground on which defendants argued and courts held that sexual relations between supervisors and their employees did not amount to discrimina-

tion “on the basis of sex.” In the words of the district court in *Barnes*, “The substance of plaintiff’s complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in an affair with her supervisor.”⁶⁷ Even if the plaintiff’s sex was a “but-for cause” of the relationship on the “orientation” account above, her sex was not the *sole* ground of distinction; the employer selected among women employees, using some criterion in addition to and putatively distinct from the plaintiff’s “sex.”⁶⁸ Because the supervisor had targeted some, but not all, class members for sexual attention, his harassing conduct did not amount to discrimination “on the basis of sex.”

The Supreme Court itself gave stature to such arguments when it ruled in 1974 that statutes regulating employees on the basis of pregnancy were not sex-based for purposes of Fourteenth Amendment equal-protection analysis, a rule that the Court then applied to the interpretation of federal employment discrimination law in 1976.⁶⁹ In the Court’s reasoning, a policy refusing employment disability benefits to pregnant women discriminated on the basis of *pregnancy*, not on the basis of sex: “[t]he program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”⁷⁰ In other words, it was not enough for the plaintiff to show that the challenged policy affected members of one group only; the plaintiff would have to show that the challenged policy affected *all* members of the targeted group before the court would characterize the policy as discriminating “on the basis of sex.”

During the 1970s, the federal judiciary invoked this formalistic conception of discrimination to explain why some sex-dependent practices were not “sex-based” and relieve defendants of the obligation to justify them under constitutional or statutory antidiscrimination laws. Employers eagerly seized upon the defense. Businesses argued that employers were not discriminating on the basis of sex (so did not have to supply a “bona fide occupational qualification”⁷¹ defense) when they refused to give employment benefits to women who were pregnant,⁷² or to hire women with pre-school age children,⁷³ or women who were married,⁷⁴ or men with long hair,⁷⁵ or women in pants suits,⁷⁶ or gays and lesbians⁷⁷ or men with effeminate mannerisms⁷⁸ — or to retain women who wouldn’t sleep with their supervisors.⁷⁹ All these policies singled out members of one sex and imposed conditions on their employment that preserved traditional gender roles in the workplace. Yet courts applying Title VII law did not characterize the policies as openly discriminating on the basis of sex and so require employers to supply business justifications for the policies that would meet the rigorous “bona fide occupational qualification” exception to Title VII’s antidiscrimination norm. Instead, courts characterized

the challenged practices as “sex-plus” policies, policies that discriminated on the basis of “sex” “plus” some other putatively *neutral* criterion (hair length, type of dress, mannerisms, orientation, or “willingness to furnish sexual consideration”).⁸⁰ Courts elaborating sex-plus doctrine reasoned that the statutory prohibition on policies that discriminate “on the basis of sex” applied to policies that affected (1) *only* class members and (2) *all* class members. A challenged practice would have to sort all employees into two perfectly sex-differentiated groups before the sorting operation amounted to discrimination on the basis of sex.⁸¹

The court that dubbed this area of Title VII law the “sex-plus” doctrine was quite frank about the larger social concern animating the doctrine. “We must decide . . . whether Congress intended to include all sexual distinctions in its prohibition of discrimination (based solely on sex or on ‘sex plus’), or whether a line can legitimately be drawn beyond which employer conduct is no longer within reach of the statute.”⁸² After consulting the legislative history of the Civil Rights Act of 1964, the court concluded that Congress had added the prohibition on sex discrimination to the statute without much deliberation, and thus, “in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications.”⁸³ In short, the declared object of sex-plus doctrine was to protect traditional ways of doing business from disruption by the antidiscrimination statute.⁸⁴ With this goal in view, the court held that only certain sex-plus policies discriminated “on the basis of sex” within the meaning of Title VII—those that discriminated on the basis of sex “plus” an immutable trait or fundamental right (e.g., marital status or having children).⁸⁵

Given these developments in Title VII law during the 1970s, sexual-harassment defendants advanced a plausible claim when they argued, as the federal agencies defending early cases did, that sexual harassment was not discrimination on the basis of sex, but instead discrimination on the basis of “willingness to furnish sexual consideration.”⁸⁶ The two federal courts that first rejected this defense waded in long-winded fashion through a maze of Title VII precedents, searching for grounds on which logically to separate sexual harassment from the other “sex-plus” practices that federal courts had already declared did not discriminate on the basis of sex.⁸⁷ In the end, Judge Robinson, writing for the D.C. Circuit in *Barnes*, simply asserted: “A sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant’s gender are affected.”⁸⁸

But Robinson did not simply decide the matter by fiat. Reading the opinion more closely, one uncovers a normative justification for the holding in *Barnes* that sounds in a different tenor than the “bisexual harasser”—a justification

rooted in the experience and animating commitments of this civil rights pioneer.⁸⁹ (The *Barnes* opinion is written with a particularly rich consciousness of race/gender intersections as, not only the judge, but also the plaintiff and her alleged harasser, the director of the equal employment opportunity office for the Environmental Protection Agency, are black.)⁹⁰ *Barnes* concludes its discussion of the sex-plus problem by pointing to cases where employees had been dismissed for engaging in interracial sexual relations, and notes that in each of these cases “a cause of action was recognized although it did not appear that any other individual of the same gender or race had been mistreated by the employer.”⁹¹ At one and the same time, the *Barnes* opinion demonstrates that there are formal inconsistencies in the ways that Title VII law defines “discrimination on the basis of sex,” and insists that questions about how to characterize practices under the statute should be resolved on normative rather than formal grounds. Just as prohibitions on interracial sexual relationships play a role in the perpetuation of racial inequality, *Barnes* suggests, coerced sexual relations in the workplace play a role in the perpetuation of gender inequality. Thus, in taking the momentous step of recognizing sexual harassment as sex discrimination, the court reasoned about the practice as perpetuating group status inequalities and not simply group-based differentiation. Robinson concludes his opinion in *Barnes* — the first appellate opinion recognizing the sexual harassment cause of action — by quoting from *Rogers v. EEOC*,⁹² the first appellate to recognize a hostile environment claim of racial harassment under Title VII: Congress deliberately left the language of Title VII open-ended, “‘knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.’”⁹³

While the first cases recognizing the sexual harassment claim as a form of sex discrimination under Title VII labored mightily with the “sex-plus” problem,⁹⁴ the issue simply disappeared thereafter. Federal courts still use sex-plus doctrine to remove a variety of sex-specific policies from Title VII scrutiny (employers may refuse to hire women who wear pants, men who wear dresses, women who date women, men who display “effeminate” mannerisms),⁹⁵ yet no one remembers that sexual harassment was once legally grouped with these practices, disaggregated into a policy based on “sex plus refusal to furnish sexual consideration.” Plainly, if we are to account for the different doctrinal analysis of sexual harassment and sex-specific grooming codes under Title VII today, we would have to seek an explanation in the domain of social, not formal, logic. Today, under Title VII employers may not fire women who refuse to sleep with them, but they may fire women who sleep with other women. The gender transformations of the 1970s persuaded the federal judiciary that

some; though surely not all, features of heterosexual social practice were at odds with the nation's egalitarian commitments.

We can thus read the formal distinctions in the 1970s case law as remnants of a larger social struggle, doctrinal residue of a wide-ranging debate about whether and how law would intervene in a field of contested gender relations.⁹⁶ (We might liken this dispute to arguments about whether separate-but-equal was discrimination on the basis of race that took place in the thirteen years spanning *Brown*,⁹⁷ the per curiams,⁹⁸ and the Court's ruling in *Loving v. Virginia*⁹⁹ that antimiscegenation laws unconstitutionally discriminated on the basis of race—a decision the Court did not hand down until 1967, the same year that *Guess Who's Coming to Dinner?* won the Academy Awards. In our own day, we can see a similar dynamic at work as social movement protest pressures federal courts to decide whether the state's use of race in suspect descriptions amounts to discrimination “on the basis of race”—a dispute over the meaning of the equal protection clause in which a version of “race-plus” figures.)¹⁰⁰ In short, judgments about whether practices discriminate “on the basis” of sex or race may depend on evolving social intuitions about whether a practice unjustly perpetuates a status regime, rather than formal characteristics of the practice itself, as antidiscrimination discourse leads us to believe.

But if judgments about whether practices discriminate on the basis of race or sex are social constructions, shaped by social-movement protest and the like, we do not, of course, generally experience them or discuss them in such terms. Antidiscrimination doctrine selectively internalized changes in gender norms during the 1970s without acknowledging the project in which it was engaged. Even as the *Barnes* opinion recognizes that sexual harassment is discrimination on the basis of sex, it still clings to the fiction that it is merely analyzing discrimination as the practice of sorting sexed bodies: sexual harassment involves “a treatment differential allegedly predicated upon an immutable personal characteristic gender which subjected appellant to a marked disadvantage in comparison with men employed at the agency.”¹⁰¹ Sex discrimination law, like race discrimination law, pretends that it analyzes distinctions on the basis of physiologically, rather than sociologically, defined aspects of identity.¹⁰² In this way, antidiscrimination law represses the social history, social structure, and social meaning of the practice of sexual harassment in the very act of declaring the practice a legal wrong.

Consider again the way that doctrine reasons its way to the conclusion that sexual harassment is sex discrimination. At first, courts viewed the conduct constituting sexual harassment as completely distinct from practices the law

calls sex discrimination; then cases such as *Barnes* tie the practice of sexual harassment to the concept of discrimination by means of a narrative that finds discrimination in the way that persons of monosexual sexual orientation select sexual objects (on this account, discrimination is an act of differentiation, a species of taste or desire, and its objects are particular kinds of sexed bodies). Antidiscrimination law explains how sexual harassment is sex discrimination in terms that are fundamentally uninterested in the social circumstances of the harasser's target (for example, her position in an employment hierarchy, her other economic alternatives if she does not stay employed at this job). It also excludes from the formal account of why harassment is discrimination "on the basis of sex" the particulars of what the harasser does to his targets once he selects her.¹⁰³

Finally, and most important, the law's account of sexual harassment as discriminating "on the basis of sex" does not address the particular kinds of harm that sexual harassment inflicts on its targets — the ways that it *engenders* them. When the sex discrimination in sexual harassment is conceptualized as a form of desire (selecting appropriately sexed bodies given the nature of one's orientation), the act of differentiation that makes sexual harassment sex discrimination would appear to be a normal, natural, and fundamentally benign feature of social life. On this account, the harm of sexual harassment is somehow incidental to the practice of sex discrimination; the harm arises from an act of sexual coercion that just happens to be inflicted on a person with a body sexed female. (This is exactly the understanding expressed by sex-plus doctrine when it conceptualizes sexual harassment as "sex" "plus" the "neutral" criterion of "unwillingness to furnish sexual consideration.") What is more, as antidiscrimination law begins to recognize sexual harassment as sex discrimination, it treats the sexual coercion in sexual harassment as a harm so obvious as not to need explanation or account. But this very failure to explain "the obvious" means that antidiscrimination law rather unselfconsciously incorporates a gender-conventional understanding of why harassment harms women (it is a form of socially inappropriate conduct, "not a nice way to treat a lady").

And so, as antidiscrimination law recognizes sexual harassment as sex discrimination, it never acknowledges the power dynamic that women over two centuries have described: the way that men extracting sex from economically dependent women reiterate a coercive relationship that organizes heterosexual relations in marriage and the market both. Sexual harassment would be sex discrimination on this account, not because of how it sorts sexed bodies, but because of how this form of coercion, iterated across social institutions,

constructs the dignitary and material meanings of sex. Sexual harassment would be sex discrimination on this account because it engenders as it coerces, because it is a practice that “makes” women women and men men.

Thus, looking back at the 1970s, we can see that antidiscrimination law intervened, selectively, in a system of social stratification that elaborated “sex” in a series of institutions, practices, stories, and reasons that cumulatively made reasonable, natural, and just a world in which women were (so to speak) on the bottom and men on the top. But antidiscrimination law explained its decision selectively to disestablish elements of this social order without describing the system of status relations in which it was intervening; the law instead asserted that it was prohibiting arbitrary and irrational distinctions on the basis of immutable characteristics that denied persons equal opportunity.

This is not at all surprising. Antidiscrimination law intervened in the practices sustaining gender stratification in much the way it intervened in practices sustaining racial stratification — that is, without providing a systemic account of the social order sustained by “discrimination” on the basis of immutable physiological traits (like race or sex). Silence about the structure of the larger social order was, in an important sense, a precondition of the disestablishment dynamic, a narrative necessity if antidiscrimination law was going to persuade those with privilege voluntarily to cede (some of) it. Just as antidiscrimination law gave only the thinnest account of why discriminating on the basis of race was a wrong (silences that are the subject of ongoing interpretive struggle today),¹⁰⁴ so too did it give a terribly thin account of the harms of sex discrimination, in matters of sexual harassment and elsewhere. Garbling the story of the harms in issue was in an important sense a creative, enabling act, one that facilitated characterization of sexual harassment as unlawful conduct.

To summarize: even as antidiscrimination law recognized sexual harassment as a species of sex discrimination, it did so without acknowledging the larger social arrangements within which the practice of sexual harassment acquired dignitary meaning and distributive consequence. As we will see, this silence has proven consequential in various ways—especially because the practice of sexual harassment seems to have been undergoing important changes in the very era that courts began to recognize it as a form of sex discrimination under Title VII.

Contemporary Transformations in the Practice of Sexual Harassment

To this point in our story, we have considered sexual harassment as a relatively stable social practice that is an integral part of a variety of hetero-

sexual economic relationships, from slavery to secretarial work. Of course, we could identify differences in the practice of sexual harassment in these various institutional settings. For example, when the harassed worker and any offspring she might bear are the property of the harasser, different social understandings and economic incentives structure the practice than when harasser and harassee face each other as master and servant or employer and employee. Still, certain features of the practice seem relatively fixed over time and across social and legal settings: men pressure women who are working for them into sexual relations the women do not want. Antidiscrimination law describes the practice of sexual harassment as performing “desire”; feminist critics describe the practice of sexual harassment as performing “power” of a sort iterated throughout the social order. On both accounts, the harasser is using his greater economic authority and resources to secure sexual access to women he otherwise would not have.

So understood, we could say that the practice of sexual harassment persisted in relatively stable terms over the centuries prior to its recognition as an injury under Title VII. But in the very era that the courts began to recognize the sexual harassment claim, the practice itself was going through striking changes.

During the 1970s, following a period of relative stability in occupational sex segregation, women began to break into a variety of traditionally male jobs.¹⁰⁵ Different factors account for these changes, among them long-term shifts in women’s labor force participation¹⁰⁶ as well as the federal government’s growing commitment to enforce the sex discrimination provisions of the Civil Rights Act of 1964.¹⁰⁷ In fact, these changes in the degree of occupational sex segregation were relatively small, and restricted to certain occupational categories. (For example, from 1970 to 1980, the percentage of women in administrative positions increased by 11.9 percent, while the percentage of women in construction work increased by only 1.3 percent to about 1 percent of the jobs in the industry.)¹⁰⁸ But however small these changes, they were fraught with symbolic import. An active second-wave women’s movement was energetically asserting women’s right to partake in traditionally male practices, preserves, and prerogatives, especially in matters of work. Against this backdrop even marginal shifts in workplace integration resonated with larger social import. At stake was the gendered character of work itself.

There was a quite varied repertoire of tactics that men in different occupational positions used to frustrate women’s efforts to participate in forms of work that were traditionally gendered male. Sexualized attention emerged as a weapon in this turf war, a means of making women feel so unwelcome that they would eventually leave. In short, the practice of sexual harassment—which we have thus far defined as unwanted sexual relations imposed by

superiors on subordinates at work—began to play a new role in political economy of heterosexuality.

Note how, in this new context, the social meaning of the “sex” in sexual harassment changes. As early as 1978, Lin Farley—an avid student of Heidi Hartmann’s work on occupational sex segregation—described how sexual attention shifted semantic registers when directed at women in traditional and nontraditional forms of employment: “*The function of sexual harassment in nontraditional jobs is to keep women out: its function in the traditional female job sector is to keep women down.*”¹⁰⁹ We have already seen that sexualized conduct in different socioeconomic settings can express different kinds of social relationships, including relations of inequality. Farley was simply taking the point a step further: depending on the background conditions (women in traditional or nontraditional job category) sexualized attention could express gender inequality of different sorts, communicating messages of institutional subordination (sexualizing hierarchy) or institutional exclusion (gender-marking work spaces and roles).

A number of sociologists have analyzed the ways men use sexualized conduct to enforce segregation of the workplace. Barbara Bergman describes how harassment works when directed at women who have invaded traditionally male jobs or work spaces: “The sexual harassment of women already in male-dominated occupations appears to take the form of insults, which may include mock propositions to engage in sexual relations. Such behavior appears to be motivated by a desire to wound and embarrass the woman, to demonstrate the men’s contempt for her unfeminine behavior in invading their territory, to show her that they will not accept her as ‘one of the boys,’ and out of a hope that she will be made sufficiently uncomfortable to abandon the job.”¹¹⁰

Barbara Reskin and Heidi Hartmann add: “When work groups are integrated, gender becomes salient for the male occupants, who may subject the women to remarks calculated to put them in their place by emphasizing their deviant gender status. These may take the form of profanity, off-color jokes, anecdotes about their own sexual prowess, gossip about the women’s personal lives, and unwarranted intimacy toward them.”¹¹¹

To see how the social meaning of the sex in harassment changes when sexual harassment is directed at women in traditional and nontraditional jobs, we can simply compare the facts of the Supreme Court’s first two sexual harassment decisions. *Meritor Savings Bank v. Vinson*,¹¹² decided in 1986, presents the classic sexual harassment scenario involving work roles that conform to gender conventions. In the *Vinson* case, a bank teller complained that shortly after she was hired (and while she was still on probation), her supervisor invited her out to dinner, and then “suggested that they go to a motel to have

sexual relations”;¹¹³ after resisting, she capitulated. According to her complaint, she then had sex with her supervisor some forty or fifty times in the next several years, and on several occasions was raped by him.¹¹⁴ The Court’s next harassment case, *Harris v. Forklift Systems*,¹¹⁵ handed down in 1993, presents the “new” sexual harassment scenario involving work roles that do not conform to gender conventions. Here the plaintiff worked as a manager of a company that rented heavy equipment to construction companies. Hardy, Forklift’s president, harassed the plaintiff in terms that differ in important particulars from the harassment at issue in *Vinson*. For example, Hardy continually made the plaintiff the target of comments such as: “You’re a woman, what do you know” and “We need a man as the rental manager,” and at least once, he told her she was “a dumb ass woman.”¹¹⁶ These comments were interspersed with a variety of sexualized interactions. As the Supreme Court relates: “In front of others, he suggested that the two of them ‘go to the Holiday Inn to negotiate [Harris’] raise.’ . . . Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. . . . He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. . . . He made sexual innuendos about Harris’ and other women’s clothing.”¹¹⁷

In both *Vinson* and *Harris* employers ask their female employees to go to a motel, but this “proposition” does not have the same meaning in the two cases. It does not appear from the facts of the *Harris* case that the employer is the slightest bit interested in consummating sexual relations with the plaintiff, as an expression of “desire” or “power.” Rather, the “proposition” he makes reiterates his claim that “we need a man as the rental manager.” Like the other sexually demeaning performances that Hardy exacts of Harris and the other women in his employ, Hardy’s mock proposal is intended to humiliate, sending the message that, by trying to fill a man’s job, Harris has made herself contemptible: a failure, both as a woman and as a man.

Sexual harassment in nontraditional job settings communicates anxiety about male authority not as visible in harassment in traditional job settings. The harasser — who may stand to harass in the role of superior, coworker, or subordinate — uses harassment as an informal way to exclude women he lacks formal legal or institutional authority to fire. The woman has violated gendered work spaces or roles, and, as the *Harris* facts illustrate, sexualized conduct aims to restore the gendered order of work by expressing all the ways a woman invading male work space is out of her proper role and place.

As Vicki Schultz has recently emphasized, harassment in nontraditional job settings can involve many kinds of conduct, much of it not typically characterized as sexual; she demonstrates that judges in some circuits have failed to

recognize the ways that sexual harassment can enforce occupational segregation, so have refused to analyze harassing conduct that is *nonsexual* in nature — or have “disaggregated” sexual and nonsexual harassing conduct in ways that obscure their interactive exclusionary dynamics.¹¹⁸

But as this discussion should suggest, differences in the harassment dynamic in traditional and nontraditional job settings can produce confusions about the sexual elements of harassment as well. As the *Harris* case illustrates, harassment in nontraditional job settings is often accomplished by sexualized conduct. (In fact, one study reports that women in male-dominated work settings “were generally more likely than other women workers to report a variety of different kinds of social-sexual behavior in their current jobs.”)¹¹⁹ Because of the different dynamics of harassment in traditional and nontraditional job settings, there may be confusion about the kind of injury the “sex” in sexual harassment inflicts. Is the harm of sexual harassment sexual coercion? Or occupational exclusion?

In the classic harassment scenario — the kind Catharine MacKinnon first analyzed in the 1970s — a woman is forced to participate in sexual relations she does not want in order to keep her job; in these circumstances, sexual coercion enforces a traditionally gendered form of subjection that is fraught with the kinds of dignitary meanings and distributive consequences that women have protested since the first critique of marriage as legalized prostitution in the decade before the Civil War.

This classic form of harassment continues to flourish. But, as *Harris* illustrates, alongside it, there are newer forms of harassment, in which economically leveraged sexual coercion does not play the same central role. In these kinds of cases, men are not using economic power to secure sexual access to women they otherwise would not have; rather, in this new kind of harassment case that arises as women enter nontraditional jobs, men use sexualized and nonsexualized conduct to communicate to women their outsider status in the workplace. In this new scenario, the harm of sexual harassment is not a traditional kind of sexual coercion but a new cousin of it. Harm occurs — not through the traditional pathway in which the harassed woman lacks capacity to refuse an unwanted sexual relationship, — but instead because the harasser uses sexualized and nonsexualized conduct to construct the harassed woman as an outsider in the workplace — de-authorized and denigrated, in her own eyes and in the eyes of others. As *Harris* illustrates, the harm here involves forms of gender-role policing,¹²⁰ often accomplished through sexualized attention of a denigrating or mocking sort, rather than classic forms of sexual coercion.

Consider the facts of *Harris* again. When Harris’ boss suggested that he

go with her to the Holiday Inn to discuss a raise, Harris was perfectly able to say no; but the moment Hardy propositioned Harris (in front of her subordinates), he inflicted harm as directly as when he uttered the “nonsexual” remarks he was in the habit of directing her way (“You’re a woman, what do you know?” “We need a man as the rental manager,” “[You’re] a dumb ass woman”). The mock “proposition” here communicates to the plaintiff, “You’re a woman, what do you know?” “We need a man as the rental manager,” and “[You’re] a dumb ass woman—but it interpellates gender *by invoking the sexual prerogative performed in Vinson and in countless scenes like it for centuries prior*. By invoking this social memory—in the form of the mock proposition and the various commands to assume sexually compromising positions—the president of Forklift seeks to assert masculine authority over his “dumb ass woman” rental manager that she has challenged by her very presence in a traditionally male occupation.

In *Oncale v. Sundowner Offshore Services*,¹²¹ a case involving “same sex” sexual harassment, the Supreme Court acknowledged the existence of different scenarios or paradigms in sexual harassment case law. In *Oncale*, a group of men on an oil platform in the Gulf of Mexico harassed a male coworker, in ways Justice Scalia was too uncomfortable to discuss, but which, according to the plaintiff, involved different forms of assaultive sexualized conduct: not only threats to rape the plaintiff, but part- or mock-performances of the act (holding the plaintiff down while placing their penises up against his body, grabbing him in the shower and doing the equivalent, or more, with a piece of soap).¹²² The Court held that the plaintiff could sue his employer for sexual harassment under Title VII so long as the plaintiff could show that the conduct in question amounted to discrimination on the basis of sex. The Court’s discussion of the different ways that sexual harassment plaintiffs can demonstrate sex discrimination provides a revealing account of the case law:

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. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. *But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. . . .* Whatever evidentiary route

the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted “*discriminat[ion]* . . . because of sex.”¹²³

This passage in *Oncale* acknowledges that there is a divide running through the sexual harassment cases, a difference between “desire” and “hostility” cases. There do seem to be different dynamics at work in the sexual harassment cases, and recognizing some of these differences could well help clarify why certain cases and not others should be actionable. But dividing the cases into harassment that concerns “desire” and harassment that concerns “hostility to women in the workplace” may obscure as much as it illuminates. However we characterize the cases—and there is no reason to think that there are only two paradigms to be found in them—it will not help to ground the enterprise in an account that views the classic harassment scenario as a scene of “desire.”

As feminist commentators have been emphasizing since the marriage-as-“legalized prostitution” arguments of the nineteenth century, heterosexual “desire” has a political economy: a set of institutions, rules, and roles governing the exchange of sex and money that gives men power over women in marriage and market both. It is only by considering the larger social order that is the background condition for the “desire” expressed in classic sexual harassment cases that we can begin to read the power dynamics expressed through the sex, in either the classic or newer harassment scenarios. The sex in *Vinson* is performed in gender-traditional roles and expresses the inequality in power and status that sex coerced under those background conditions would. And, when women take or challenge men’s traditional roles at work, *Harris* illustrates how harassment tries to restore a gender-traditional order, with sex summoning the “memory” of the gender-traditional scene, a scene in which men’s power over women is secure. With no appreciation of this connection, the sex in *Harris* is merely offensive, as in, crude, a breach of good manners, not a nice way to treat a lady. With an appreciation of this connection, the sex in *Harris* becomes a particularly visceral way of reminding women of their proper place in matters of work and sex—at the bottom, where gender conventions of the traditional order would have them be.

There is a risk, of course, in overemphasizing the genealogical connection between the sex “scenes” in *Vinson* and *Harris*. The harassment cases quite wonderfully illustrate how the sex in sexual harassment morphs in meaning as gender bends at work. Constructing a set of rigid legal presumptions about the meaning of sex in sexual harassment would entrench a set of understandings that is quite literally contested, in every sense, in the harassment cases. At the

same time, there is a danger in underreading the sex here, in ways that sever it from its genealogical referents. Sex between men and women is part of the semiotics of status between men and women — surely as expressive as “You’re a woman, what do you know?” and “We need a man as the rental manager.” If sex has been taken up in the defense of gender-traditional work roles, as a mechanism for enforcing the code that marks some work roles “male” and others “female” — it would make little sense to ignore it because there was no real risk of sexual coercion in the traditional-scenario sense.

Which brings us back to the “rape” scene in *Oncale*. Where, if at all, do we find sexual harassment on these facts? The Court seems confident that there is sexual harassment on these “same-sex” facts, if *Oncale*’s harassers are gay. Then, by the Court’s logic, what *Oncale*’s harassers are doing to him reflects “desire” and, by reason of the harassers’ orientation, would count as an act of discrimination “on the basis of sex.” If, however, *Oncale*’s harassers are not gay, then, by the Court’s logic, it is unlikely that what they are doing is “discrimination on the basis of sex” unless it reflects “hostility to women in the workplace.” The Court’s aversion to contemplating the facts of this case and considering how they might enact discrimination on the basis of sex (even as the *Oncale* opinion insistently — and somewhat remarkably for a discrimination case — reminds us that sexual harassment doesn’t arise in every act of gender differentiation but instead requires context-attentive interpretation of the facts)¹²⁴ suggests that the Court doesn’t in fact see harassment on these facts, unless the men harassing *Oncale* are gay.

But our reading of *Harris* reveals how sexualized conduct can parodically “recall” the traditional gender order and mark certain work roles “male.” Suppose the men harassing *Oncale* are straight. The male-male harassment in *Oncale* could well be assimilated to the male-female harassment in *Harris*. On this view, *Oncale*’s harassers would be deploying sexualized conduct to gender-mark work roles, even though no women are on the scene — in some important sense to ensure that no women ever appear on the scene. Oil platforms in the Gulf of Mexico, just like construction-equipment rental companies, are “male” space, and performing certain masculinities in the course of performing one’s work is apparently an important mechanism for keeping them so.

Suppose, by contrast, the men harassing *Oncale* are gay. The hypothetical case the Court seems to think an easy case of “sex discrimination” in *Oncale* — the case involving “credible evidence that the harasser was homosexual”¹²⁵ — is one that we would have to think about much harder. On these facts, involving an attempted rape, there would be no doubt whatsoever in calling the conduct an actionable assault — but do we want to call it sex

discrimination? If we vary the facts some, and substitute a scene involving a sexual overture or advance in the workplace rather than an attempted assault, would we want to say that, *as between persons of the same sex*, the overture presents the same harm as a classic heterosexual scenario? Would its meanings be the same, along the axis of either sexual coercion or gender-role policing? Can we make sense of same-sex relations by assimilating them to the heterosexual model, or do same-sex relations have independent semantic structure? Even if they might, how far is it possible to disaggregate gender and sexuality in this way? And should we do so by dividing the social world along lines of "orientation," or are there queer alternatives that would subvert these constructions of the sexual?

Sexual Harassment Law: Future Directions

Sexual harassment is now unlawful under Title VII, yet remains a seemingly unending source of controversy.

Americans who agree that harassment of the sort alleged in *Vinson and Harris* is sex discrimination disagree about the reasons why this is so. As this discussion demonstrates, disagreement about the normative basis of the prohibition on sexual harassment in turn produces dispute about the range and types of practices the prohibition constrains. Debate is not restricted to lawyers, but can take heated form in workplaces, in the media, and on the streets. Nor is it likely to abate any time soon. As we have seen, the practice of sexual harassment is evolving, assuming new forms as groups formerly excluded from positions of economic authority seek equal access to the workplace. At the same time, the regulation of sexual harassment, and debates over it, imbue workplace interactions with new significance. These macro and micro transformations in the ecology of work change the meaning of particular overtures, actions, and utterances.

Harassment continues to have enormous dignitary and distributive consequences, but the practices through which it is accomplished may well vary, across workplace settings and over time. In some settings, sexual invitations continue to function in the political economy of heterosexuality as they long have, as coercive threats. Yet sexual proposals in work relationships do not always coerce. The speaker may lack supervisory authority over the addressee, or may wear it in such a way as to assure the addressee that she is free to refuse his attentions without adverse consequence. Such utterances and overtures may nonetheless denigrate the addressee, deprive her of authority, exclude her, or undermine her competence in the workplace. Or they may not. Employees

may experience a sexual invitation as harmless — an occasion of social discomfort, or instead of deep delight. In some workplace settings, sexualized attention may have little dignitary or distributive consequence, and nonsexualized utterances and actions may play a more important part in gendering work than the sexual interchanges that are most commonly understood to harass.

Americans debating the proper contours of sexual harassment law invoke all these scenes, countering story with story, and harm with harm. Just as discrimination “on the basis of sex” shifted in meaning during the 1970s and 1980s as courts began to recognize harassment as discrimination, it continues to evolve in our own day as advocates and critics of the sexual harassment claim argue about how law can best secure liberty and equality in work, education, and other arenas of civic importance.

The chapters in this volume engage this conversation from a variety of vantage points. In Part I, *Contexts*, Andrea Dworkin, Guido Calabresi, Anne Simon, Pamela Price, and Gerald Torres offer brief observations on the law’s role in regulating sexual harassment; some speak of their pioneering work in litigating early cases; others reflect on the aspirations of this body of law as it has matured. Thereafter the chapters address points of deep normative conflict in the law of sexual harassment today.

In Part II, *Unwelcomeness*, Carol Sanger, Louise Fitzgerald, Kathryn Abrams, Jane Larson, and Robin West address the role of consent. Under current case law, when will courts find that sexual relations to which a plaintiff has consented are nonetheless harassing? In what ways must plaintiffs communicate that sexual attention is unwelcome for the conduct to be actionable? Does requiring a showing of unwelcomeness make sense where the harassment does not take the form of sexual overtures? Or where the sexual overture itself is openly denigrating? Can mutually desired sexual relations ever serve as the basis of a harassment claim?

What kinds of same-sex sexual overtures ought law proscribe as sex discrimination under Title VII? Is sexual or nonsexual denigration directed at persons of same-sex orientation ever sex discrimination? In Part III, *Same-Sex Harassment*, William Eskridge, Katherine Franke, Janet Halley, Marc Spindelman, and Christopher Kendall debate such questions in ways that expose profound disagreement about the relation of gender and sexuality, and the role that law plays in regulating sexual relations. Is sexual interaction at work a field of latent harm from which law can emancipate employees? Or is it a valued form of performance or expression that law threatens to muzzle?

Even if we can agree about the kinds of conduct law should prohibit as sexual harassment, there are still deep questions about the ways the state

should attempt to vindicate these commitments. Who should be sanctioned for harassing conduct, and how? In Part IV, *Accountability*, Judith Resnik, David Oppenheimer, Deborah Rhode, Ann Scales, Cass Sunstein, and Judy Shih explore questions of institutional responsibility for sexual harassment in both employment and education settings. Should liability vary with forms of harassment, or with changes in institutional context? How ought considerations of efficiency and justice shape the ways law endeavors to deter or remedy harassment?

Part V, *Speech*, considers how, if at all, law ought take account of speech values in the ways it defines and regulates sexual harassment. Frederick Schauer, Dorothy Roberts, Robert Post, Kingsley Browne, Janine Benedet, and Jack Balkin address the question. There has been remarkably little discussion of how the First Amendment constrains antidiscrimination law, with most attention devoted to the speech implications of harassment law itself. What does this pattern—of attention and inattention—reveal about the underlying structure of First Amendment doctrine? How does wrestling with the question alter the way we understand speech or equality law? Should we modify antidiscrimination law to vindicate speech values in the harassment context? If not, why not?

Sexual harassment doctrine has inaugurated profound changes in the ways we understand questions of gender justice, racial justice, and values of equality more generally. In Part VI, *Extensions*, Sally Goldfarb, Adrienne Davis, Tanya Hernández, Lea VanderVelde, and Diane Rosenfeld trace the life of the sexual harassment paradigm in a variety of contexts. How does harassment illuminate the intersection of race and gender inequality? In what ways might the sexual harassment paradigm provoke us to reconceive other relationships? What new kinds of law reform might it prompt?

Part VII, *Transnational Perspectives*, considers sexual harassment law in comparative perspective. Orit Kamir, Susanne Baer, Abigail Saguy, Yukiko Tsunoda, Martha Nussbaum, and Christine Chinkin, respectively, analyze sexual harassment law in Israel, Germany, France, Japan, India, and in international human rights law. As the harassment paradigm crosses borders, it assumes new forms, simultaneously illuminating the features of other legal cultures and our own.

An afterword by Catharine MacKinnon concludes the volume by assessing the changes wrought by sexual harassment law in the past quarter century. Anchoring her case in the national debates spanning the Thomas-Hill hearings and the Clinton impeachment, MacKinnon charts the norms and practices this body of law has transformed—as well as the entrenched understandings and arrangements that it has yet to disturb.

Notes

1. Slave women were subject to sexual coercion by masters and overseers. See Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South* 49, 297–99, 325–26 (1988); Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* 20, 28, 37–38 (1985); Melton A. McLaurin, *Celia, A Slave: A True Story* 24–25 (1991). For a discussion of the literature on the sexual exploitation of slave women, see Catherine Clinton, “Caught in the Web of the Big House: Women and Slavery,” in *The Web of Southern Relations* 19–35 (Walter Fraser, Jr., et al., eds. 1985). For sources discussing the law governing slave rape, see *infra* note 11.

2. On the sexual exploitation of African-American women working as domestic servants in the South in the decades after emancipation, see Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* 86–87 (1984); Tera W. Hunter, *To ‘Joy My Freedom: Southern Black Women’s Lives and Labors After the Civil War* 34, 106 (1997); Jones, *supra* note 1, at 150; Bettina Berch, “‘The Sphinx in the Household’: A New Look at the History of Household Workers,” 16 *Review of Radical Political Economics* 105, 115–16 (1984). On the predicament of women in domestic service generally, see Kerry Segrave, *The Sexual Harassment of Women in the Workplace, 1600–1993*, at 23–39 (1994) (analyzing sexual abuse of women working in domestic service and comparing practices in United States and various European countries); see also Faye E. Dudden, *Serving Women: Household Service in Nineteenth-Century America* 213–19 (1983) (discussing prevalence of sexual relations in domestic service, focusing on seduction and abandonment); Gerda Lerner, *The Majority Finds Its Voice: Placing Women in American History* 57 (1979), quoted in Giddings, *supra*, at 48–49 (“Victorian morality applied to the ‘better class’ only. It was taken for granted during the period and well into the twentieth century that working-class women—and especially Black women—were freely available for sexual use by upper-class males”).

3. For an overview of factory working conditions in the United States and several other nations in the period from 1800 to the mid-1900s, see Segrave, *supra* note 2 at 40–73; see also Mary Bularzik, “Sexual Harassment at the Workplace: Historical Notes,” 12 *Radical America*, 25, 28–38 (1978). On clerical workers, see Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900–1918*, at 152–55 (1982) (discussing prostitutes who reported sexual harassment in previous employment as domestic or clerical workers); Bularzik, *supra*, at 25; see also Alice Kessler-Harris, *Out to Work: A History of Wage Earning Women in the United States* 102 (1982) (quoting report of the U.S. Commission on Industrial Relations) (“‘A good many girls in department stores have got to give in to the demands . . . of certain . . . buyers, managers, and floor walkers . . . if they want to hold their positions’”).

4. For sources discussing how sexual exploitation of slave women was rationalized as an expression of the natural promiscuity of African-American women, see bell hooks, *Ain’t I a Woman: Black Women and Feminism* 52 (1981) (“White women and white men justified the sexual exploitation of enslaved black women by arguing that they were the initiators of sexual relationships with men”); Deborah Gray White, *Ar’n’t I a Woman: Female Slaves in the Plantation South* 61 (1985); Regina Austin, “Sapphire Bound!” 1989 *Wisconsin Law Review* 539, 570 (1989) (“Jezebel was the wanton libidinous black

woman whose easy ways excused white men's abuse of their slaves as sexual 'partners'"); Peter Bardaglio, "Rape and the Law in the Old South: 'Calculated to Excite Indignation in Every Heart,'" 60 *Journal of Southern History* 749, 757. On domestic servants, see Dudden, *supra* note 2, at 217 ("Some observers thought that prostitution recruited many ex-servants because service was filled with 'low' women"); Segrave, *supra* note 2, at 26–27 (discussing reputed promiscuity of servant girls).

5. See McLaurin, *supra* note 1, at 81; accord Kristin Hoganson, "Garrisonian Abolitionists and the Rhetoric of Gender, 1850–1860," 45 *American Quarterly* 558, 571–73 (1993) ("[T]he many images of slave women as victims of seduction and rape that permeated abolitionist publications contradicted Southern images of the slave woman as Jezebel"); see also Karen Sanchez-Eppler, *Touching Liberty: Abolition, Feminism, and the Politics of the Body* 83–104 (1993) (analyzing account of sexual exploitation in Harriet Jacobs's *Incidents in the Life of a Slave Girl*).

6. See Dudden, *supra* note 2, at 213–19.

7. Helen Campbell, *Prisoners of Poverty: Women Wage-Workers, Their Trades and Their Lives* 234 (1887), quoted in Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* 39 (1978).

8. See, e.g., Campbell, *supra* note 7, at 22–29, 87, 135–56.

9. Upton Sinclair, *The Jungle* (1960) (1905).

10. *Id.* at 109 (emphasis added).

11. Masters who raped their female slaves were not held legally accountable. See McLaurin, *supra* note 1, at 93; Bardaglio, *supra* note 4, at 756–60; Margaret A. Burnham, "An Impossible Marriage: Slave Law and Family Law," 5 *Law and Inequality Journal* 187, 219–22 (1987); A. Leon Higginbotham, Jr., and Anne F. Jacobs, "The 'Law Only as an Enemy': The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia," 70 *North Carolina Law Review* 969, 1055–58 (1992) (describing the legal impunity with which white men raped black women).

12. 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* 607–16 (5th ed. 1872).

13. As one nineteenth-century treatise explained the "utmost resistance" requirement, "Nature has given her hands and feet with which she can strike and kick, teeth to bite and a voice to cry out—all these should be put in requisition in defense of her chastity"; the treatise went on to explain that there should be "some marks of violence upon the person of the alleged ravished woman, and her statement is greatly strengthened if the marks are found to have been present and seen by others immediately after the commission of the offense." Ira M. Moore, *A Practical Treatise on Criminal Law and Procedure in Criminal Cases Before Justices of the Peace and in Courts of Record in the State of Illinois* 299–301 (1876), quoted in Lea VanderVelde, "The Legal Ways of Seduction," 48 *Stanford Law Review* 817, 856 (1996). For additional nineteenth-century commentary on the utmost resistance requirement, see *id.* at 855–58.

14. *People v. Dohring*, 14 N.Y. 374, 384 (1874) (emphasis added).

15. For instance, in *Christian v. Virginia*, 23 Grattan 954 (Va. 1873), a black man was acquitted for attempted rape of a black woman, even though he had "laid hold of her, pushing her down on a pile of lumber, choking her, and trying to pull up her cloths." *Id.* at 955. The court reasoned that the burden of proof varies from case to case, depending on "the character and condition of the parties." *Id.* at 958. Even though such actions would

have been a “shocking outrage toward a woman of virtuous sensibilities . . . how far it affected the sensibilities of the prosecutrix does not appear,” since the defendant’s actions might simply have been an attempt to “work upon her passions.” *Id.* at 959. Racial bias in rape cases persists today. See Elizabeth M. Iglesias, “Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality,” 49 *Vanderbilt Law Review* 869, 880–86 (1996) (discussing studies in Gary D. LaFree, *Rape and Criminal Justice* [1989], showing that conviction rates depend on the victim’s race as well as on the defendant’s).

16. See Bardaglio, *supra* note 4, at 756–57 (observing that, according to an influential treatise on slave law, “only the master could seek compensation in the courts because ‘the violation of the person of a female slave, carries with it no other punishment than the damages which the master may recover for the trespass upon his property’”) (quoting Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* 99 [1858]).

17. See VanderVelde, *supra* note 13, at 837–41 (1996) (quoting Chitty’s 1832 edition of Blackstone as stating that “In no case whatever, unless she has had a promise of marriage, can a woman herself obtain any reparation for the injury she has sustained from the seducer of her virtue”). Where touching was sexual, the common law incorporated the assumptions of rape law, including presumptive consent; moreover, the common law resisted commodifying what it understood as a “moral” rather than “economic” injury. On the understandings underlying the common law’s failure to provide victims of rape a private action for recovery, see VanderVelde, *supra*, at 842–67. On the tort claim available to fathers alleging loss of their daughters’ services by reason of their seduction, see *id.* at 867–91. On the use of the tort to redress sexual injury inflicted on women employed outside their own household, see *id.* at 837 n.90 (noting that of 287 nineteenth-century reported seduction cases studied, forty-six indicate that the seducer was either the woman’s employer or his son).

18. See *id.* at 854–67 (analyzing tort of seduction as elaborated in nineteenth-century treatises and case law); see also Lisa Granik, “Running in Hermeneutic Circles: Challenging/Embedding Social Hierarchies Through Litigation” 198–210 (J.S.D thesis, Yale Law School, 1997) (analyzing tort actions for indecent assault filed by women against their employers from the mid-nineteenth century to the mid-twentieth century).

19. See Granik, *supra* note 18, at 205–208.

20. See VanderVelde, *supra* note 13, at 883–97 (charting the evolving meaning, and legal elements, of the seduction action over the course of the nineteenth century).

21. *Id.* at 895. Even after statutory reforms nominally accorded women in some states the right to sue for seduction, courts continued to reject their claims on the ground that a woman’s “consent” to intercourse defeated her seduction action. See M. B. W. Sinclair, “Seduction and the Myth of the Ideal Woman,” 5 *Law and Inequality* 33, 51–52 (1987); see also Thomas M. Cooley, *The Elements of Torts* 86 n.1 (1895) (noting that a woman could not recover if she was “equally guilty with the man”); Right of Seduced Female to Maintain Action for Seduction, 121 *American Law Reports* 1487, 1487–92 (1939) (citing statutory rape cases, where consent was a legal impossibility, as exceptions to a general policy of disallowing women’s seduction suits).

22. See VanderVelde, *supra* note 13, at 896.

23. See Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 51–63 (1985); Ariela R. Dubler, “Wifely Behavior: A Legal History of Acting Married,” 100 *Columbia Law Review* 957, 1002–1003 (2000) (comparing anti-common law marriage statutes to anti-heartbalm legislation); Jane E. Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’”: A Feminist Rethinking of Seduction,” 93 *Columbia Law Review* 374, 393–401 (1993); Sinclair, *supra* note 21, at 72–98.

24. Hoganson, *supra* note 5, at 571.

25. Harriet Jacobs, *Incidents in the Life of a Slave Girl, Written By Herself* (L. Maria Child ed., 1861).

26. Hunter, *supra* note 2, at 34 (protesting sexual assaults on women in domestic service in year after war ended).

27. See Barbara J. Berg, *The Remembered Gate: Origins of American Feminism* 211–12 (1978) (describing petition drives for statute criminalizing seduction in New York that collected nearly 20,000 signatures in 1840, and another involving almost as many signatures that same year in Ohio); Larry Whiteaker, *Seduction, Prostitution, and Moral Reform in New York, 1830–1860*, at 142 (1997) (reporting that by 1841 Moral Reform Society had forwarded “some 40,000 petitions” to the state legislature seeking a law criminalizing seduction); Larson, *supra* note 23, at 391.

28. *American Female Moral Reform Society, Advocate of Moral Reform* 41 (1844), quoted in Berg, *supra* note 27, at 210 (1978).

29. See Reva B. Siegel, “Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880,” 103 *Yale Law Journal* 1073, 1121–22 (1994) [hereinafter Siegel, “Home as Work”].

30. “Woman’s Rights Convention in New York,” *Liberator*, Dec. 5, 1856, at 196; see also *id.* (reporting that Henry Blackwell asserted that “[h]alf the marriages [which] were now contracted would not be, were women pecuniarily independent”).

31. For accounts of the legalized prostitution argument, see Rosen, *supra* note 29, at 55–57; Siegel, “Home as Work,” *supra* note 29, at 1121–22 & n. 166; see also Reva B. Siegel, “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,” 44 *Stanford Law Review* 261, 308–14 (1992) (describing claims about marriage as legalized prostitution in nineteenth-century debates about abortion); Jill Elaine Hasday, “Contest and Consent: A Legal History of Marital Rape,” 88 *California Law Review* 1373, 1455 (describing claims about marriage as legalized prostitution in nineteenth-century debates about marital rape).

32. See Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of an Independent Women’s Movement in America, 1848–1869*, at 145–47 (1978); Segrave, *supra* note 2, at 29–30.

33. DuBois, *supra* note 32, at 146.

34. On pardon, see Segrave, *supra* note 2, at 30. On the location of the Vaughn case in the postwar movement’s advocacy agenda, see Pillsbury, “The Hester Vaughn Meeting at Cooper Institute,” *Revolution*, Dec. 10, 1868, at 361; see also Elizabeth Pleck, “Feminist Responses to ‘Crimes Against Women,’ 1868–1896,” 8 *Signs* 451 (1983).

35. Jane E. Larson, “‘Even a Worm Will Turn at Last’: Rape Reform in Late Nineteenth-Century America,” 9 *Yale Journal of Law and Humanities* 1 (1997).

36. See, e.g., *id.* at 15. In her investigation of Alameda County, California, records of statutory rape prosecutions from 1910 to 1920, Mary Odem found a disproportionate number of forcible assault cases involving male employers of domestic servants. See Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920*, at 58-59 (1995).

37. See Bularzik, *supra* note 3, at 36.

38. See Segrave, *supra* note 2, at 52-60 (discussing instances where sexual harassment became "one of the issues, or the major issue, that precipitated a strike"); Bularzik, *supra* note 3, at 34-35 (observing that "sexual harassment was addressed in *Life and Labor*, the publication of the National Women's Trade Union League").

39. See Granik, *supra* note 18, at 213-20.

40. Emma Goldman, *The Traffic in Women and Other Essays on Feminism* 20 (Alix K. Shulman, ed. 1970) (emphasis added).

41. See Farley, *supra* note 7, at xi-xiii (recounting first use of term in 1974).

42. 42 U.S.C. § 2000e (2000). For an account of some of the other legal fora—notably state unemployment insurance systems—in which advocates pressed the sexual harassment claim during the 1970s, see Farley, *supra* note 7, at 125-33; Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 77-81 (1979) [hereinafter MacKinnon, *Sexual Harassment*].

43. MacKinnon, *Sexual Harassment*, *supra* note 42.

44. See, e.g., Farley, *supra* note 7, at 49 ("Depression of female earning power reinforces the domestic division of labor, which in turn reinforces job segregation, which in its own turn reinforces depressed female wages").

45. MacKinnon, *Sexual Harassment*, *supra* note 42, at 174-75 (emphasis added); see also *id.* at 58 ("If women's sexuality is a means by which her access to economic rewards is controlled, relations between the sexes in the process of production affect women's position throughout the society, just as women's position throughout the society makes her sexuality economically controllable").

46. Farley, *supra* note 7, at 14-15.

47. *Id.* at 15-16, 17.

48. MacKinnon, *Sexual Harassment*, *supra* note 42, at 162.

49. *Id.* at 18.

50. See Reva B. Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification," 88 *California Law Review* 77, 82-83 (2000), reprinted in Robert Post et al., *Prejudicial Appearances* (2001) [hereinafter "Discrimination in the Eyes of the Law"].

51. See Nancy Fraser, *Justice Interruptus: Critical Reflections on the Postsocialist Condition* (1997).

52. MacKinnon, *Sexual Harassment*, *supra* note 42, at 174 ("Sexual harassment of working women is argued to be employment discrimination based on gender where gender is defined as the social meaning of sexual biology").

53. *Id.* at 178.

54. *Id.* at 192.

55. As MacKinnon dryly remarked, "The central conceptual difficulty (which often occurs as a difficulty of proof) arises because of the necessity to infer from a context, a

frequency distribution, a single event, or proximate circumstances that a given discrimination is sex-specific, without deeply investigating the concrete social meaning of gender status." *Id.*

56. See *Corne v. Bausch and Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (supervisor's conduct was "nothing more than a personal proclivity, peculiarity or mannerism"; supervisor was "satisfying a personal urge" and "no employer policy [was] involved" nor was the company "benefited in any way").

57. See *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) ("Title VII is "not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.")

58. See *Miller v. Bank of America*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) ("The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions"); cf. *Corne v. Bausch and Lomb*, 390 F. Supp. 161, 163-64 (D. Ariz. 1975) ("The only sure way an employer could avoid [sexual harassment] charges would be to hire employees who were asexual").

59. See *infra* notes 62-66 and accompanying text.

60. See *infra* notes 67-100 and accompanying text.

61. See generally Siegel, "Discrimination in the Eyes of the Law," *supra* note 50 (analyzing this question with respect to the law of race discrimination).

62. *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976); see also *Corne v. Bausch and Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975) ("It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit").

63. 561 F.2d 983 (D.C. Cir. 1977).

64. *Id.* at 989-90 and n.49 (emphasis added).

65. *Id.* at 97 n.55 (emphasis added). See also *Williams v. Saxbe*, 413 F. Supp. 654, 659 (D.D.C. 1976) (similar analysis, incorporating bisexual harasser exception, as basis for finding that sexual harassment discriminates on the basis of sex).

66. For a remarkably astute discussion of this turn in sex discrimination discourse from the early days of sexual harassment law, see Kerri Weisel, Note, "Title VII: Legal Protection Against Sexual Harassment," 53 *Washington Law Review* 123, 134 (1977). And for a provocative account of the lacunae in our sexual self-accountings that the figure of the bisexual threatens to reveal, see Kenji Yoshino, "The Epistemic Contract of Bisexual Erasure," 52 *Stanford Law Review* 353 (2000); *id.* at 432-58 (discussing bisexuality and sexual harassment law).

67. *Barnes v. Train*, 13 F.E.P. Dec. 123 (D.D.C. 1974), 1974 WL 10628, *1 (D.D.C.) ("This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex").

68. The federal government mounted this defense to sexual harassment charges leveled

against its employees in at least two cases in the early 1970s. See *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (ground of discrimination not sex, but refusal “to furnish sexual consideration”); *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (“since the primary variable in the claimed class is willingness *vel non* to furnish sexual consideration, rather than gender, the sex discrimination proscriptions of the Act are not invoked”).

69. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974); *Gilbert v. General Electric Co.*, 429 U.S. 125 (1976). Note that *Gilbert* was statutorily “overruled” by Congress when it enacted the Pregnancy Discrimination Amendment to Title VII in 1978. See Pregnancy Discrimination Act, Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1994).

70. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974). See *Gilbert*, 429 U.S. at 135 (quoting this passage as a basis for holding that, under Title VII, employment policies that discriminate on the basis of pregnancy do not discriminate on the basis of sex).

71. See 42 U.S.C. § 2000e-2(e) (2000).

72. *Gilbert v. General Electric Co.*, 429 U.S. 125 (1976); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977)

73. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970) (holding that policy violates Title VII).

74. *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) (striking down policy forbidding female, but not male, flight attendants to marry).

75. *Willingham v. Macon Telegraph Publ'g. Co.*, 507 F.2d 1084 (5th Cir. 1975).

76. See, e.g., *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1391 (W.D. Mo. 1979) (applying “sex-plus” doctrine to uphold discharge of female employee who violated dress code by wearing a pantsuit) (“plaintiff’s affection for pantsuits is not an ‘immutable characteristic’”); cf. *Devine v. Lonschein*, 621 F. Supp. 894, 897 (S.D.N.Y. 1985) (“At least until that dreadful day when unisex identity of dress and appearance arrives, judicial officers . . . are entitled to some latitude in differentiating between male and female attorneys, within the context of decorous professional behavior and appearance”).

77. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979) (“We must again reject appellants’ efforts to ‘bootstrap’ Title VII protection for homosexuals. . . . [W]hether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes”).

78. *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

79. See *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (ground of discrimination not sex, but refusal “to furnish sexual consideration”); *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (“[S]ince the primary variable in the claimed class is willingness *vel non* to furnish sexual consideration, rather than gender, the sex discrimination proscriptions of the Act are not invoked”).

80. See, e.g., *Stroud v. Delta Air Lines, Inc.*, 548 F.2d 356, 1977 WL 25929, at *2 (5th Cir. 1977) (unpublished opinion) (holding that in an all-female pool, discriminating against married women does not violate Title VII) (“[C]ertain women — stewardesses who

are unmarried—are favored over certain other women—stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex”); *Knott v. Missouri Pacific Railroad Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (upholding different grooming standards for men and women) (“While no hair length restriction is applicable to females, all employees must conform to certain standards of dress. Where, as here, such policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities”); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1092 (1975) (upholding different grooming standards for men and women) (“This frame of analysis removes Willingham’s complaint completely from the Sec. 703 (a) ‘sex-plus’ category, because both sexes are being screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted community standards of dress and appearance”).

81. Cf. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974) (“The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes”).

82. *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc).

83. *Id.*

84. See *id.* at 1092.

85. See *id.* at 1091–92.

86. See *supra* note 67 and accompanying text.

87. See, e.g., *Williams v. Saxbe*, 413 F. Supp. 654, 657–61 (D.D.C. 1976) (distinguishing pregnancy cases and “so-called ‘hair cases’” and insisting that “[t]he requirement of willingness to provide sexual consideration in this case is no different from the ‘pre-school age children’ and ‘no-marriage’ rules” in cases where a sex-plus policy was held to be sex discrimination in violation of statute).

88. See *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977).

89. Robinson played a key role in litigating *Shelley v. Kraemer*, 334 U.S. 1 (1948), and was part of the NAACP team that argued *Brown v. Board of Education*, 347 U.S. 483 (1954). He also served as dean of Howard University Law School, where he and his colleagues and students developed many of the central legal theories of the civil rights movement. See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* 253–55, 485–505, 667–69 (1976).

90. See *id.* at 984. A number of the early sexual harassment plaintiffs were African-American women, some suing white male supervisors. See, e.g., *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1977) (black female clerk suing white male supervisor); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977) (black female assistant manager suing white male employer). Other early cases, like *Barnes*, involved intraracial harassment. For discussions of several of the early cases and their racial dynamics, see MacKinnon, *Sexual Harassment*, *supra* note 42, at 61–62, 65–68; Elvia R. Arriola, “‘What’s the Big Deal?’ Women in the New York City Construction Industry and Sexual Harassment Law, 1970–1985,” 22 *Columbia Human Rights Law Review* 21, 41–42 (1990).

91. *Barnes*, 561 F.2d at 993–94 (footnotes omitted).

92. 454 F.2d 234 (5th Cir. 1971).

93. *Barnes*, 561 F.2d at 994 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

94. See, e.g., Weisel, *supra* note 66, at 129–32.

95. See generally Mary Anne Case, “Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence,” 105 *Yale Law Journal* 1 (1995).

96. For an account of how sexual harassment was discussed in popular magazines during the 1970s (and the ways that account deviated from feminist criticisms of the practice), see Arriola, *supra* note 90, at 44–47.

97. 347 U.S. 483 (1954).

98. For a summary of the per curiam Supreme Court opinions invalidating segregation policies in noneducational contexts, see Derrick Bell, *Race, Racism and American Law* 118–19 (3d ed. 1992).

99. 388 U.S. 1 (1967).

100. At present, the American judiciary is relying on a version of “race-plus” to argue that the state can conduct searches using suspect descriptions containing race without engaging in race-based state action of the sort that would trigger heightened scrutiny. See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 337–38 (2d Cir. 2000) (“This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault—a description that included race as one of several elements—defendants did not engage in a suspect racial classification that would draw strict scrutiny”). See generally, Richard Banks, “Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse,” 8 *U.C.L.A. Law Review* 1075, 1095 (2001) (“This sole factor/one-of-many-factors distinction is undeniably prominent in many discussions of racial discrimination, including the Supreme Court’s recent redistricting decisions”). Courts exempt suspect descriptions from strict scrutiny on the grounds that race is only one of several selection criteria employed, hence the practice is said not to discriminate on the basis of race. But there is no general equal-protection rule to this effect. Courts often apply strict scrutiny to practices that employ race along with several other selection criteria; the classic case is affirmative action.

101. *Barnes*, 561 F.2d at 991 n. 57.

102. See Siegel, “Discrimination in the Eyes of the Law,” *supra* note 50, at 90–91, 98–102 (discussing race discrimination case law).

103. These particulars are regulated through the remaining doctrinal criteria that define the elements of harassment. For instance, EEOC guidelines provide that “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. 1604.11 (1999). The requirement that the plaintiff communicate to her harasser that his attentions were

“unwelcome” is one much-criticized definitional element. *See, e.g.*, Susan Estrich, “Sex at Work,” 43 *Stanford Law Review* 813, 815–16 (1991) (arguing that the law of sexual harassment imports many of the “rules and prejudices” endemic in traditional rape law, including a misplaced emphasis on the victim’s conduct).

104. *See* Siegel, “Discrimination in the Eyes of the Law,” *supra* note 50, at 109–13 (analyzing how dynamic interaction of antidiscrimination rhetoric and status-enforcing practices gave rise to dispute about whether civil rights law was best understood to embody an “antidiscrimination” or an “antisubordination” principle).

105. In a much relied upon study of sex segregation in employment, Andrea Beller reports that occupational segregation from 1972 to 1981 experienced “a rate of decline almost three times as large as that during the 1960s.” *See* Andrea H. Beller, “Trends in Occupational Segregation by Sex and Race, 1960–1981,” in *Sex Segregation in the Workplace* 12 (Barbara F. Reskin ed., 1984).

106. *See* Barbara F. Reskin and Patricia A. Roos, *Job Ques, Gender Ques: Explaining Women’s Inroads into Male Occupations* 3–90 (1990) (examining socioeconomic factors that might account for changing sex composition of occupations during 1970s and 1980s).

107. *See id.* at 64. The EEOC was at first extremely reluctant to enforce Title VII’s prohibition on sex discrimination. *See* Cynthia Harrison, *On Account of Sex: The Politics of Women’s Issues, 1945–1968*, at 187–205 (1988). Under pressure from the National Organization for Women (NOW), formed partly in response to the EEOC’s foot-dragging, the commission gradually became more responsive to feminist concerns. *See* Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972*, at 205–32 (1990). By the early 1970s, enforcement of Title VII’s sex discrimination provision had become a more significant priority for the EEOC. *See* Reskin and Roos, *supra* note 106 at 54–55 (describing sex discrimination litigation during the 1970s involving nontraditional job categories such as banking and insurance).

108. *See* Reskin and Roos, *supra* note 106, at 17–19 tbls. 1.6, 1.7. While in many jobs, such as managerial, administrative, and clerical work, there was a significant increase in sex integration (*see id.* at 17), other occupations, such as construction and other traditionally male blue-collar work, remained overwhelmingly male, with women making up only 1 or 2 percent of the field — percentages that remained static or dropped during the period in question. *See id.* at 19. *See also* Barbara R. Bergmann, *The Economic Emergence of Women* 70 (1986) (tables demonstrating that the percentage of women in the Occupational Group of “Operators, fabricators, and laborers” rose only from 24 percent in 1972 to 25 percent in 1985, whereas women rose from 33 to 42 percent of the “Managerial and professional specialty” workers over this same period).

109. Farley, *supra* note 7, at 90 (emphasis added).

110. Bergmann, *supra* note 108, at 106.

111. Barbara F. Reskin and Heidi I. Hartmann, eds., *Women’s Work, Men’s Work: Sex Segregation on the Job* 53 (1986).

112. 477 U.S. 57 (1986).

113. *Id.* at 60.

114. *Id.*

115. 510 U.S. 17 (1993).

116. *Id.* at 19.

117. *Id.*

118. Vicki Schultz, "Reconceptualizing Sexual Harassment," 107 *Yale Law Journal* 1683 (1998).

119. Barbara A. Gutek and Bruce Morasch, "Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work," 38 *Journal of Social Issues* 55, 67 (1982). ("For all seven categories of social-sexual behavior assessed, women in nontraditional occupations and jobs reported more experiences of them on their current jobs than were reported by working women in general or by women in sex-integrated work who also interact predominantly with men." In this study, "31.5 percent of the women in male-dominated occupations and jobs reported being touched sexually compared to 15 percent of working women in general"). Gutek and Morasch observe that these results may reflect the fact that these nontraditionally employed women actually did experience more social-sexual behaviors than the average working woman. However, it may also be an indication of their awareness of such behavior." *Id.*

120. See Katherine M. Franke, "What's Wrong with Sexual Harassment?" 49 *Stanford Law Review* 691 (1997). On Franke's account, "sexual harassment—between any two people of whatever sex—is a form of sex discrimination when it reflects or perpetuates gender stereotypes in the workplace." *Id.* at 696. Franke argues that sexual harassment should be reconceptualized as "gender harassment." "Understood this way, sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex, not because it is sexual, and not because men do it to women, but precisely because it is a technology of sexism." *Id.*

121. 523 U.S. 75 (1998).

122. See *id.* at 76–77.

123. *Id.* at 80 (emphasis added).

124. See *id.* at 81–82 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed"; judgments in sexual harassment cases require "[c]ommon sense, and an appropriate sensitivity to social context").

125. *Id.*