Preserving Normal Heterosexual Male Fantasy: The Severe or Pervasive Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence

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Recommended Citation
Cunningham, E. Christi () "Preserving Normal Heterosexual Male Fantasy: The Severe or Pervasive Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence," University of Chicago Legal Forum: Vol. 1999: Iss. 1, Article 7. Available at: http://chicagounbound.uchicago.edu/uclf/vol1999/iss1/7
Preserving Normal Heterosexual Male Fantasy: The "Severe or Pervasive" Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence

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Rape is fun, for the rapist. When individuals exercise power to obtain sex, they enjoy it. Sexual harassment, whether explicitly sexual or not, is the exercise of power, and harassers enjoy it. The difference between severe or pervasive sexual harassment and mild or sporadic sexual harassment is simply a matter of degree.

If harassers enjoy harassing and liberty means having freedom from government interference to do to whomever you want, whatever you want, whenever you want, then Title VII curtails liberty. Liberty, however, has never meant that. Title VII, including sexual harassment law, does not curtail liberty because liberty is not doing to whomever, whatever, whenever. Liberty does not include subordinating others. Even when the country was founded, the freedom to do whatever, whenever, extended

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§ See Catharine A. MacKinnon, Sexual Harassment: Its First Decade in Court, in Feminism Unmodified 111 (Harvard 1987):

[Women] cannot bear to have their personal account of sexual abuse reduced to a fantasy they invented, used to define them and to pleasure the finders of fact and the public. I think they have a very real sense that their accounts are enjoyed, that others are getting pleasure from the first-person recounting of their pain.

Throughout this Article, I argue that while sex is a fantasy, sexual abuse and the harm of the unwelcomed imposition of fantasy is real regardless of its frequency or severity.

§ Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 forbids an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex." Pub L No 88-352, 78 Stat 241, 255 (1964), codified at 42 USC § 2000-2(a)(1) (1994).
only to owners' treatment of their African and Native American slaves. Despite their subordinated status, white women and non-Christian servants had limited protections from the arbitrary treatment of others, and certainly free, Christian, property-owning men faced restrictions in their treatment of each other. Drucilla Cornell suggests that liberty often conflicts with equality when some individuals are not viewed as fully human:

If, in fact, a politically liberal state's only legitimacy stems from the recognition of basic rights to persons, what is at stake, certainly for adult women, is then whether they can continue to participate in societies in which they are treated as anything less than full persons. The demand that the moral community expand the class of those included initially as persons, is utopian only to the extent that it conflicts with basic patriarchal institutions. As Jacques Derrida has argued, it is the logic of carnophallologocentrism, where the sacrifice of interests of others helps to prop up the very idea of the phallic man, that limits who is then qualified as people. This propping up of the phallic man, however, can hardly be a legitimate state project in a politically liberal society.

The Civil Rights Act of 1964 was recognition of some of the "basic rights" of persons. Title VII, as part of the 1964 Act, was enacted to protect certain liberty interests. However, the courts' severe or pervasive standard sacrifices the interest of women (and men) in working without being sexually harassed, unless that harassment rises to the "extreme" level of being severe or pervasive.

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8 Faragher v City of Boca Raton, 118 S Ct 2275, 2284 (1998) ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment").
This standard is contrary to the principles of the statute as well as the express language of the of the statute as amended. The severe or pervasive standard protects a fantasy of normal male sexuality against the interests of others. This propping up cannot be a legitimate state function.

Some civil libertarian concerns regarding the effects of antidiscrimination law are based on assumptions of scarcity and zero sum calculations. Critics often reason as if freedom were finite — more civil rights for some necessitate fewer civil liberties for others. Arguments that frame sexual harassment questions in terms of balancing interests assume that one person's gain is necessarily weighed against another's loss. However, if the imposition of sex on others is not a liberty interest, then no balancing is required. Linda Greene observes:

The First Amendment concerns raised in the context of sexual harassment regulation are legitimate and important ones, but their constitutional valence adds weight to the growing chorus of objections to continued equality efforts. We may observe a trend in discursive strategies that transforms all discussions of inclusion of historically excluded people into a discussion about the harm to historically privileged people . . . . These sound-bite discursive strategies provide effective ideological cover to proponents of a limited version of equality that tolerates token entry but nonetheless requires submission to subordinating practices.

The perception that equality requires a negative trade-off with liberty is false. If Congress makes a statutory investment to increase the total sum of liberties in the workplace, then Congress

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9 See, for example, Martin D. Carcieri, A Progressive Reply to the ACLU on Proposition 209, 39 Santa Clara L Rev 141, 150 (1998) ("Former United States Attorney General Richard Thornburgh recently summed it up, 'it's a zero-sum game: when one person is favored because of race another is disfavored because of race."") (citation omitted).

10 See, for example, Note, Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives, 3 Wm & Mary J Women & L 277, 290–91 (1997) ("According to the dominance theory, cultural and sexual domination of men structures social and legal relations between the sexes. The exertion of power is often a result of zero-sum thinking, a growing trend in our society. People view desired resources and statuses as being limited; in other words, the pie cannot increase, it can only be divided up among the various competitors.") (citations and internal quotation marks omitted).

has increased, rather than abridged, liberty and created equality.\textsuperscript{12}

If, however, we assume that the harasser's ability to harass is a liberty interest, then there are three jurisprudential possibilities for appropriate state action. The first option looks to the fact that the harasser and the victim of harassment are private actors and concludes that they should both be free from statutory government intervention.\textsuperscript{13} The second option posits a false conflict between liberty and equality and suggests that the liberty interests of the sexual aggressor and the equality interests of the victim should be balanced. Thus, the sexual aggressor's entertainment from harassing should be conditional. He should only be permitted to exercise power for sex under certain circumstances — if he is the victim's co-worker, or if the harassment is expressive, or if the harassment is not violent, or if the victim does not report it, or if the harassment is part of some religious practice, or if the victim dresses provocatively, or if the harassment is not severe or only occurs occasionally. The third possibility for appropriate state action protects women's (and men's) liberty interest in being free from perpetrators' enjoyment of the exercise of power for sex, absolutely. This third option defines sex equality. As long as men's enjoyment of the exercise of power for the sake of sex supersedes women's right to be free from that exercise of power, there is no sex equality. This includes the use of power, however conditioned and to whatever degree, when it is used because of sex. This Article argues that there is a jurisprudential and statutory mandate for the third option and that the severe or pervasive standard operates contrary to that mandate.\textsuperscript{14}

The Supreme Court's decisions from the 1998 Term on sexual harassment reaffirmed the severe or pervasive standard originating in \textit{Harris v Forlifk Systems, Inc}\textsuperscript{15} and the landmark \textit{Meritor Savings Bank, FSB v Vinson}.\textsuperscript{16} In \textit{Meritor}, the Court estab-

\textsuperscript{12} But see Nadine Strossen, \textit{Regulating Workplace Sexual Harassment and Upholding the First Amendment — Avoiding a Collision}, 37 Vill L Rev 757, 758 (1992) ("allowing broader regulation of workplace sexual harassment . . . could well undermine rather than advance women's equality").


\textsuperscript{15} 510 US 17 (1993). \textit{Harris}, the case which purportedly clarified the parameters of the hostile work environment claim, was similarly conservative, concluding that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." Id at 22.

\textsuperscript{16} 477 US 57 (1986).
lished that sexual harassment is sex discrimination. Nevertheless, the Court held that only sexual harassment that is sufficiently severe or pervasive as to alter the terms or conditions of employment constitutes an unlawful employment practice. The Court attempted to clarify this standard in 


In its decisions from the 1998 Term, the Court noted that, in the absence of a tangible job consequence, sexual harassment must be severe or pervasive to be actionable. The Court explained that the requirement that sexual harassment be severe or pervasive is necessary in order to prevent the statute from “expanding into a general civility code.” According to the Court, the statute does not address “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.” Only conduct “so objectively offensive” as to alter the conditions of employment and create an environment that a reasonable person would find hostile or abusive is prohibited by the statute.

I argue in this Article that the severe or pervasive standard reaffirmed by the Court during the 1998 term constitutes the doctrinal and jurisprudential reification of sex inequality in the workplace. I demonstrate that the severe or pervasive standard, viewed from varying interpretative positions, is inconsistent with the statute and is contrary to the 1991 Amendments to the Civil Rights Act. I also demonstrate that the courts’ failure to address many forms of sexual harassment is a result of a judicial proximity analysis which limits the reach of the statute to conduct that is outside of a fantasized zone of normal (white) heterosexual male conduct. Thus, the scope of current sex discrimination law

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17 Id at 66–67.
18 Id at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of (the victim’s) employment and create an abusive working environment.'") (citation omitted).
19 Harris, 510 US at 21–23.
20 Burlington Industries v Ellerth, 118 S Ct 2257, 2264 (1998) ("For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.").
22 Id.
23 Id.
24 See text accompanying notes 150–52.
25 By referring to the “norm” or what is “ordinary” or “common,” I am in no way condoning an idea that any particular conception of sex is normal or natural. In fact, I am
is a function of the degree to which the sex discrimination is essential to the ordinary exercise of power underlying the male heterosexual fantasy.

Part I discusses the meaning of discrimination "because of sex," arguing that sex is a fantasy and that problems of (dis)aggregation noted by some scholars could also be viewed as problems of the proximity of notions of sex to the image of normal heterosexual male behavior. Part II discusses the severe or pervasive standard and demonstrates that it was invalidated by the 1991 Amendment to the Civil Rights Act, and using alternate theories of interpretation, that it is inconsistent with this statute. Part III outlines how the severe or pervasive standard conflicts with conclusions regarding employer liability reached by the Court in the 1998 decisions. Part IV proposes the following framework for evaluating sexual harassment that is consistent with the statute: In the absence of a tangible job consequence, where there is direct evidence of sexual harassment that is a motivating factor affecting the terms, conditions or privileges of an individual's employment by an employer (including the employer's supervisor), whether or not the sexual harassment is severe or pervasive, then the employer would be liable. The damages available to the plaintiff would be limited by the terms of the Civil Rights Act of 1991. An employer may establish an affirmative defense where the employer proves that it has created a sexually equal workplace.

I. "BECAUSE OF... SEX"

Sexual harassment is discrimination "because of... sex." But what is "sex"? In this part, I seek to accomplish two objectives. First, I explain a commonality in the theories of Professors Katherine Franke, Vicki Schultz, Mary Anne Case, and Francisco Valdes regarding the inadequacy of sex discrimination law. Specifically, I argue that the following four theories all concern the same problem, namely, courts' application of the nature and parameters of "sex": (1) the failure of sex discrimination law due to suggesting the contrary — that sex is fantasy. I argue that a particular viewpoint (that of white heterosexual men) is protected or privileged by the severe or pervasive standard, thus adopting a norm or what the Court refers to as that which is "genuine but innocuous." Oncale, 523 US at 81.

27 42 USC § 1981(a) (1994) (allowing compensatory and punitive damages, but capping them at varying amounts between $50,000 and $300,000 according to the number of persons employed by the defendant).

the disaggregation of sex from gender,28 (2) the failure of sex discrimination law due to the disaggregation of sexual and "non-sexual" harassment,29 (3) the failure of sex discrimination law due to the conflation of gender with sex and sexual orientation,30 and (4) the failure of sex discrimination law due to the disaggregation of sex, gender, and sexual orientation.31 Second, I propose a definition of "sex" as fantasy.

My intention is to incorporate, within this definition, conceptions of sex as sexual desire, biological designation, gender, and sexuality. While sex is fantasy, the harms of imposed fantasy are very real. As part of my definition of sex as fantasy, I propose a definition of sexual harassment as the (unwelcomed)32 imposition of a particular fantasy by the harasser.33 I argue that courts have interpreted Title VII protections to vary with the degree to which the imposition of a particular fantasy of sex facilitates or is necessary to common heterosexual male sexual desire. In other words, the severe or pervasive standard functions to protect a fantasy of normal behavior from the reach of the statute. Courts, through the severe or pervasive standard, prohibit some conduct, such as force or touching, while allowing other conduct based on the proximity of the conduct to a fantasy of normal male heterosexuality. The failures described by these theories would be addressed by prohibiting any imposition of fantasy, rather than...

32 I am not unambivalent about the "unwelcomeness" element in sexual harassment. Many scholars have criticized it. See, for example, Martha Chamallas, Writing About Sexual Harassment: A Guide to the Literature, 4 UCLA Women's L J 37, 44–45 (1993) (discussing unwelcomeness requirement); Estrich, 43 Stan L Rev at 826–34 (cited in note 14) (same); Mary F. Radford, By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases, 72 NC L Rev 499, 524–43 (1994) (same); Note, Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases, 77 Cornell L Rev 1558, 1574–92 (1992) (same). My point is merely that where sex is imposed, liability should not turn on the degree of imposition.
33 Everyone has fantasies. I focus, in this Article, primarily on the fantasies of sexual harassers and courts because it is their shared fantasies that the severe or pervasive standard preserves. By this focus, I do not intend to ignore the fantasies of others; rather, I intend to create space for them by identifying the ways in which courts have privileged certain imposed fantasies.
conditioning the prohibition according to common heterosexual male sexual pleasure. The severe or pervasive standard is an example of the Court’s balancing of sex discrimination and an individual’s freedom from it according to the proximity of the discrimination to common heterosexual male sexual pleasure. Eliminating the severe or pervasive standard would be a step toward realizing the statutory goal of workplace equality.

A. Aggregating and Disaggregating Sex

One of the central questions plaguing society and even the President at the end of the twentieth century is: “What counts as sex?” This question is the common problem addressed by several of the leading sex discrimination scholars. Their theories demonstrate the ways in which courts permit various forms of discrimination because they are not considered acts based on “sex,” as envisioned by the courts. In this Article, I contend that the collective concerns of these theories would be addressed if the courts were to apply a definition of sex as fantasy.

1. Definitions.

The meanings of the operative terms are by no means unambiguous. Professor Francisco Valdes discusses many of the inconsistencies and conflations in the uses of the terms “sex,” “gender,” and “sexual orientation.” For example, he discusses the confusion of (physical and biological) sex with “penis” or “vagina.” The confusion, according to Valdes, has been the assumption that the presence or absence of a vagina or penis determines the sex of a person. As Valdes notes, however, genitalia are only one of several elements cumulatively considered to constitute sex. Like Valdes, I recognize that sex commonly denotes physical attributes of the body — external genitalia for men and internal and external genitalia for women; however, categorizations based on physical differences, including genitalia, may be ideological choices. I, therefore, generally refer to what is traditionally understood as sex as biological or physical sex.

34 See Valdes, 83 Cal L Rev at 20–23 (cited in note 30).
35 Id at 20.
36 Id.
37 Id.
38 Valdes, 83 Cal L Rev at 21 (cited in note 30).
39 See notes 48–72 and accompanying text.
40 As Valdes notes, there are several elements cumulatively considered to constitute sex, including chromosomal sex, antigenic sex, gonadal sex, prenatal hormonal sex, internal morphologic sex, external morphologic sex, pubertal hormonal sex, and assigned sex.
“Gender,” as both Valdes and Case discuss, is often confused with biological sex. Gender generally refers to social or cultural traits such as feminine or masculine. Nevertheless, the term gender is sometimes used as a polite way of saying biological sex. This civility, however, conflates traditional understandings of what is biological and what is cultural. The reconceptualization that I propose views gender as part of what is sex yet recognizes that biological sex and gender are different forms of the social construction of sex.

“Sexual orientation,” as I use it, refers to the affectional interests of individuals. As Valdes notes, sexual orientation is distinct from sexual conduct. Although some research suggests that sexual orientation may be attributable to biology, it is not necessarily static, just as biology is not necessarily static. The reconceptualization that I propose recognizes sexual orientation as another aspect of sex.

2. The Disaggregation of Sex from Gender Impedes Workplace Equality.

In her article, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, Professor Kather-
Franke argues that sex discrimination law fails due to the acceptance of biological sexual difference as something real. She asserts that sex-based biological differences are simply deeply engrained gender prescriptions:

[S]exual equality jurisprudence has uncritically accepted the validity of biological sexual differences. By accepting these biological differences, equality jurisprudence reifies as foundational fact that which is really an effect of normative gender ideology. This jurisprudential error not only produces obvious absurdities at the margin of gendered identity, but it also explains why sex discrimination laws have been relatively ineffective in dismantling profound sex segregation in the wage-labor market, in shattering "glass ceilings" that obstruct women’s entrance into the upper echelons of corporate management, and in increasing women’s wages, which remain a fraction of those paid men.

In other words, according to Franke, the disaggregation of sex from gender permits continued discrimination based on the most harmful gender stereotypes through the cultural fiction that gender is social while biological sex is natural.

Franke argues that two fundamental elements of sexual equality jurisprudence must be reconceptualized. First, sexual identity must be disassociated from physicality. She contends that "what it means to be a woman and what it means to be a man ... must be understood not in deterministic, biological terms, but according to a set of behavioral, performative norms that at once enable and constrain a degree of human agency and create the background conditions for a person to assert, I am a woman." Second, she argues that the concept of sex discrimination must be extended to categories beyond biological sex.

In reconceptualizing sexual equality jurisprudence, Franke divides her investigation of sex discrimination law into several parts. She begins by exploring the ways in which courts and legislatures have made steps toward formal equality while main-
taining a "belief in real differences between men and women which the law should take into account." She argues that the confusion has been compounded by overlapping uses of the term "sex" that include biological sex, core gender identity, gender role, and sexual behavior.

She continues by showing "the absurdity of disaggregating sex from gender" through the example of sex discrimination claims brought by transgendered people. She uses *Ulane v Eastern Airlines* and *Underwood v Archer Management Services, Inc.* to illustrate the absurdity of a definition of sex discrimination that means treating a man differently from a woman where the meaning of man and woman is determined by assumptions of biological fact. "Under this formation, the goal of Title VII is a biological recognition followed by legal erasure of sexual difference."

Both cases involved transgendered women who were initially perceived or hired as men and were terminated when they underwent procedures to have their bodies match their core identities as women. In dismissing plaintiffs' claims, both courts asserted "sex" to mean biological sex. Franke explains that the cases illustrate the tensions among immutability, body, sex, and gendered identity. "According to the traditional view, the sexed body — one's inside — is immutable, whereas gender identity — one's outside — is mutable. Yet for the transgendered person, the sexed body — one's outside — is regarded as mutable while one's gendered identity — one's inside — is experienced as immutable." Thus, Franke explains that the courts' treatment of transgendered people exposes the biological determinism used in interpreting the meaning of "sex." At the same time, she explains that this biological differentiation, "biological dimorphism," is rarely a motive in cases of sex discrimination.

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56 Id at 6–7.
57 Franke, 144 U Pa L Rev at 7 (cited in note 28).
58 Id.
59 742 F2d 1081 (7th Cir 1984).
60 857 F Supp 96 (D DC 1994).
61 See Franke, 144 U Pa L Rev at 31–35.
62 Id at 32.
63 Id.
64 Id.
65 Franke, 144 U Pa L Rev at 35.
66 Id.
67 Id at 36.
Only in very rare cases are acts of sex discrimination based on biology. Indeed, even employers hiring individuals for jobs in which body strength is a reasonable qualification have abandoned hiring policies based on biological sex because most studies of male and female physical skills and abilities have revealed more significant within-group differences than between-group differences. As a result, Franke concludes that biology and genitals operate for the courts as "false proxies" for sex. The inconsistency is that sex discrimination law has defined "sex" to mean biology or anatomy even though discrimination because of sex generally occurs for reasons other than biology or anatomy.

Franke continues the exploration of this inconsistency in sex identity cases, looking at cases in which courts have attempted to police gender identity and at matrimonial cases in which a court is called upon to determine the "true sex" of a partner in the formation or dissolution of a marriage. Later in her article, she argues that the disaggregation of sex from gender is wrong as a historical matter, in that conceptions of opposite sexes and sex immutability are relatively modern and that the inconsistencies revealed by cases involving transgendered individuals are not limited to that context but are also present in cases involving parties considered to be more conventional or mainstream. She concludes that biological definitions of sexual identity and discrimination must be abandoned for more behavioral or performative conceptions of sex.

3. The Disaggregation of Sexual and "Non-Sexual" Harassment Impedes Workplace Equality.

Both Professor Franke and Professor Vicki Schultz argue that courts fail to reach a wide array of discrimination because sexual harassment involving sexual desire has been disaggregated from sexual harassment that is "non-sexual" — not motivated by desire. Franke argues that desire-based conceptions of sexual harassment fail to support the jurisprudential equation of sexual harassment and sex discrimination. Franke writes:

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68 Franke, 144 U Pa L Rev at 36 (cited in note 28).
69 Id at 40.
70 Id at 40–70.
71 Id at 70–98.
Sexual harassment cannot and should not be understood as sex discrimination just because it may be an expression of sexual desire. Rather, sexual conduct, whether or not motivated by desire, becomes sex discrimination when it operates as a means of enforcing gender norms. To the extent that desire plays a role in actionable sexual harassment, it does so secondarily.\(^7\)

Schultz argues that the result of the disaggregation of sexual and "non-sexual" harassment is that "non-sexual" harassment often goes unpunished:

The courts’ traditional failure to comprehend the magnitude of women’s gender troubles at work, in fact, has only been exacerbated by the prevailing paradigm’s emphasis on sexual forms of harassment. Singling out sexual advances as the essence of workplace harassment has allowed courts to feel enlightened about protecting women from sexual violation, while at the same time relieving judges from the responsibility to redress other, broader gender-based problems in the workplace.\(^7\)

Both Franke and Schultz seek to reconceptualize sexual harassment beyond a desire-based model. Schultz, for example, distinguishes sexual harassment that is desire-driven from that which consists of gender-based attacks on women’s competence.\(^7\) Yet, men attack women’s competence in the workplace in order to preserve male power in and out of the workplace. MacKinnon explains:

Sexuality is the social process that creates, organizes, expresses, and directs desire. Desire here is parallel to value in marxist theory, not the same, though it occupies an analogous theoretical location. It is taken for a natural essence or presocial impetus but is actually created by the social relations, the hierarchical relations, in question. This process creates the social beings we know as women and men, as their relations create society. Sexuality to

\(^7\) Franke, 49 Stan L Rev at 734 (cited in note 29).
\(^7\) Schultz, 107 Yale L J at 1690 (cited in note 29).
\(^7\) See id at 1692–96 (discussing the sexual desire-dominance paradigm) and id at 1762–69 (discussing the competence-undermining function of sexual harassment).
feminism is, like work to marxism, socially constructed and at the same time constructing.\footnote{MacKinnon, \textit{Desire and Power}, in \textit{Feminism Unmodified} at 49 (cited in note 1).}

Sexual harassment that is not explicitly sexual differs from sexual harassment that is explicitly sexual only in the degree to which they are directly related to male power, to the "propping up"\footnote{Cornell, 3 Animal L at 9 (cited in note 5).} of the fantasy of normal male sexual behavior. Fantasies of women’s roles and women’s competence are linked to men’s fantasies of dominance and sexuality.

Schultz argues that "[m]uch of what is harmful to women in the workplace is difficult to construe as sexual in design."\footnote{Schultz, 107 Yale L J at 1689 (cited in note 29).} Yet, she acknowledges that "non-sexual" harassment fosters the masculine role:

\begin{quote}
[M]any of the most prevalent forms of harassment are actions that are designed to maintain work — particularly the more highly rewarded lines of work — as bastions of masculine competence and authority. Every day, in workplaces all over the country, men uphold the image that their jobs demand masculine mastery by acting to undermine their female colleagues' perceived (or sometime even actual) competence to do the work. The forms of such harassment are wide-ranging. They include characterizing the work as appropriate for men only; denigrating women's performance or ability to master the job; providing patronizing forms of help in performing the job; withholding the training, information, or opportunity to learn to do the job well; engaging in deliberate work sabotage; providing sexist evaluations of women’s performance or denying them deserved promotions; isolating women from the social networks that confer a sense of belonging; denying women the perks or privileges that are required for success; assigning women sex-stereotyped service tasks that lie outside their job descriptions (such as cleaning or serving coffee); engaging in taunting, pranks, and other forms of hazing designed to remind women that they are different and out of place; and physically assaulting or threatening to assault the women who dare to fight back.\footnote{Id at 1687.}
\end{quote}
These not explicitly sexual, but gendered, attacks on women’s competence described by Schultz are merely sublimated acts of sexual dominance. Men attack women’s competence in order to “perform” (demonstrate their power) or out of “performance anxiety” (insecurity regarding their power as men). Men harass and undermine women in certain jobs because they view women as challenging male ability. Women in jobs traditionally held by men disrupt the fantasy of male dominance and male uniqueness. Ironically, Schultz’s description of men’s “non-sexual” motivation is pregnant with connotations of male sexual potency and performance. She writes:

By maintaining a hold on highly rewarded employment, men secure a host of advantages in and outside the workplace. Some of these advantages are material: Wage superiority over women, for example, ensures men’s position at the head of the household as well as their place at the helm of most powerful institutions in society. Equally significant are powerful psychological factors: Both bread-winning and work competence are central to the dominant cultural understanding of manhood. By protecting their jobs from incursion by women, or by incorporating women only on inferior terms, men sustain the impression that their work requires uniquely masculine skills. Maintaining their jobs as repositories of masculine mastery, in turn, assures men a sense of identity (even superiority) as men.81

It is difficult to conceive that motivations to “ensure men’s position,” sustain the impression of “uniquely masculine skills,” and maintain “repositories of masculine mastery” are as “non-sexual” as Schultz suggests. If a woman is equally competent in the male position, performing masculine skills, what is left to the fantasy of heterosexual male virility? Nevertheless, Schultz’s central concern, that courts address some forms of harassment while ignoring sex-based attacks on women’s competence, is a crucial contribution to the sexual harassment scholarship.82

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81 Id at 1690–91 (emphasis added).
82 Schultz’s attack on radical feminists and the dominance paradigm, however, is misdirected. Courts’ unwillingness to acknowledge the relationship between male power and male sexuality, between men’s desire to perform and men’s desire to perform, is a failure of the courts as recipients of the message rather than the radical feminist messengers. By laying the blame for the disaggregation of explicitly sexual and non-explicitly sexual harassment at the feet of the dominance paradigm, Schultz blames the courts’
4. The Aggregation of Gender with Sex and Sexual Orientation Impedes Workplace Equality.

Franke argues that courts disaggregate sex and gender to permit continued discrimination on the basis of presumed physical differences while curtailing gender-based discrimination.\(^3\) Franke and Schultz both argue that courts’ disaggregation of the sexual from the “non-sexual” in sexual harassment cases is a failure in the law of sex discrimination. Professor Mary Anne Case argues that courts have imperfectly disaggregated gender from sex and sexual orientation such that some gender discrimination, especially against the feminine and particularly when manifested in men, persists despite prohibitions of sex discrimination.\(^4\) Case argues that existing law should be reframed to recognize gender discrimination against the feminine.\(^5\) She begins her analysis by defining the relationship between sex, gender, and sexual orientation and how sex and gender have been conflated.\(^6\) She examines the concept of gender, including the valuing of masculinity and devaluing of femininity.\(^7\)

The heart of Case’s argument is her discussion of the manifestations of gender discrimination,\(^8\) focusing on discrimination against individuals whose gender does not match what is deemed appropriate for their biological sex. In particular, she examines

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\(^{3}\) See text accompanying notes 48–72.

\(^{4}\) See text accompanying notes 48–72.

\(^{5}\) Case, 105 Yale L J at 2–3 (cited in note 31).

\(^{6}\) Id at 4.

\(^{7}\) Id at 9–18.

\(^{8}\) Id at 18–36.

\(^{9}\) According to Case, the first generation of sex stereotyping recognized by the courts focused on the assumption that an entire sex conformed to gender stereotypes. Case, 105 Yale L J at 37–38 (cited in note 31). Title VII unambiguously prohibits this type of discrimination. Id at 38–39. The second generation of sex stereotyping focused on assumptions that individual members of a particular sex conformed to gender stereotypes. Id at 39–40. The third generation of sex stereotyping recognized by the courts required an individual’s gender to conform to stereotypical expectations for the individual’s sex. Id at 41–46. The fourth generation of stereotyping, which Case seeks to expose, stereotypes the job and its requirements rather than the person holding or applying for it. See id at 37–38, 47.
the example of effeminate men. She argues that while courts have recognized that forced sex/gender conformity is a violation of Title VII in the case of masculine women, they have not given equal treatment to cases involving effeminate men. Case attributes this inconsistency to the conflation of gender and sexual orientation — effeminate men are assumed to be homosexual. Case notes that discrimination against the feminine is generally permitted even though discrimination against the masculine is generally prohibited.

While Case advocates the passage of laws outlawing discrimination on the basis of sexual orientation, she does not argue that Title VII currently prohibits discrimination on the basis of sexual orientation; rather, she argues that gender discrimination that is directed at men, and which is prohibited under Title VII, is often mistaken as discrimination on the basis of sexual orientation and, as a result, disregarded.

5. The Aggregation of Sex, Gender, and Sexual Orientation.

Professor Valdes' theory is similar to Case's in some respects. Like Case, he discusses the conflation of sex, gender, and sexual orientation and the privileging of the masculine. Rather than focusing on gender, however, Valdes treats sex, gender, and sexual orientation as an inseparable triad. Taking sex, gender and sexual orientation as endpoints of a triangle, the first leg is the conflation of sex and gender. The second leg of the triangle is the conflation of gender and sexual orientation, and the third leg is the conflation of sex and sexual orientation. Valdes' "[p]roject... reveals and concludes that each strain and every act of discrimination always 'implicates' all three endpoints precisely
because the trio operates as a bundled, or conflated, set. According to Valdes, the conflation of sex, gender, and sexual orientation means that "there is no such thing as discrimination 'based' solely or exclusively on sexual orientation . . . discrimination deemed based on sexual orientation also and necessarily is based on sex or on gender (or on both)." Valdes’ method, then, is to examine how sex, gender, and sexual orientation are "(dis)aggregated" and to show how the conflation furthers an ideology of inequality.

One of Valdes’ many insights is that the random and strategic conflation of sex, gender, and sexual orientation by the courts both circumvents equality principles and invigorates "traditionalist androcentric and heterocentric biases in law and society." Valdes discusses how plaintiffs are viewed as conforming to or deviating from conflationary norms and how these characterizations affect the legal outcome of cases. In this regard, Valdes explains:

Conflationary discrimination and decisions, therefore, not only exploit heterosexism to facilitate the circumvention of sex and gender equality principles, they also help affirmatively to invigorate both traditionalist androcentric and heterocentric biases in law and society: on the whole, this skew helps to legitimize and foster the elevation of masculinity over femininity as well as the elevation of heterosexuality over all other forms of sexuality. The conflation thus invigorates hetero-patriarchy within legal culture in much the same way(s) as it does throughout modern culture.

Valdes’ theory of the conflationary triangle of sex, gender, and sexual orientation diagrams an ideology of normal male heterosexuality in the law.

\[100\] Id at 19.
\[101\] Id at 16.
\[102\] Id at 9.
\[103\] Valdes, 83 Cal L Rev at 9 (cited in note 30).
\[104\] Id at 125.
\[105\] See id at 122–25.
\[106\] Id at 125.
B. Sex as Fantasy

The theories of Franke, Schultz, Case, and Valdes are extremely significant contributions to the jurisprudence on sex equality. Each has uncovered a facet of the inadequacy of sex discrimination law as it is currently applied by courts. Each has suggested a framework for addressing existing conceptual problems in sex discrimination law. While they differ substantively, these theories are ultimately the same at their foundation; they all attempt to explain how the courts' manipulation of the meaning of sex, whether as biology, desire, gender, or sexuality, has weakened sex discrimination law. All of the substantive concerns that they identify, however, would be addressed by courts' application of a definition of sex as fantasy.

Moreover, a definition of sex as fantasy exposes the severe or pervasive standard as a mechanism used by the courts to preserve a particular viewpoint. Consider, for example, the Court's statement in Oncale that “[w]e have always regarded [the severe or pervasive standard] as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace — such as male-on-male horseplay or intersexual flirtation — for discriminatory ‘conditions of employment.’” The Court's use of the terms “ordinary” and “intersexual” is not superfluous. The severe or pervasive standard preserves a particular viewpoint of sex — that which courts determine is “ordinary.” The preservation of this fantasy of sex is illustrated by the specification of “intersexual” flirtation. In other words, in the course of prohibiting same-sex sexual harassment under the statute, the Court revealed what it was preserving — ordinary heterosexuality.

Sex, including this view of sex, is fantasy. By “fantasy,” I mean the colloquial implications of the word and more. Fantasy, as I mean it in defining sex, has at least seven characteristics: (1) the fantasy of sex is created; (2) the fantasy of sex is illusory or subjective; (3) the fantasy of sex involves desire; (4) the fantasy of sex carries psychoanalytic implications; (5) the fantasy of sex is

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107 See Rosenberger v Rector and Visitors of the University of Virginia, 515 US 819, 828 (1995) (“In the realm of private speech or expression, government regulation may not favor one speaker over another.”). See also Patricia M. Worthy, Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue, 18 Hastings Commun & Enter L J 509, 517 (1996).

108 Oncale, 523 US at 81 (emphasis added).

individualized; (6) the fantasy of sex is shared; and (7) the fantasy of sex has tangible effects. While sex is fantasy, the harm that results from the imposition of sex is not.

The first characteristic defining the fantasy of sex is that it is something that is created, like a daydream or a drawing. Everyone fantasizes. By fantasy, each of us creates for ourselves what it means to be human in the world. We assume, when we speak of an individual's identity, that the individual's identity is constituted, at least in part, by something called sex as manifested by that individual. Sex is a verb as well as a noun. Saying that sex is a verb as well as a noun means that in addition to being something possessed by an individual and projected by him or her to the world (noun), sex is also something done to an individual and something that an individual does to herself (verb). In other words, beyond its colloquial meaning, to sex someone or to "do" someone, in the literal sense, means making an assignment or designating a sexual identity to someone. Sexual meaning is split between each individual and the world between the dreams and the visions of the dreamers. Although we strive to define ourselves as individuals, sex, in many respects, is a fantasy done to us.

When a plaintiff brings a claim of sex discrimination, she is naming what was done to her, unwillingly. She experienced disparate treatment or harassment due to a supervisor's fantasy of what she was, was not, or should have been — that she was too

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110 See Ethel S. Person, By Force of Fantasy 1 (Penguin 1995).
111 Compare this description of identity with MacKinnon's portrayal of sexuality:

[S]exuality is to feminism what work is to marxism. I mean that both sexuality and work focus on that which is most one's own, that which most makes one the being the theory addresses, as that which is most taken away by what the theory criticizes. In each theory you are made who you are by that which is taken away from you by the social relations the theory criticizes.

MacKinnon, Desire and Power, in Feminism Unmodified at 48 (cited in note 1).
114 In a previous article, I explain that part of the fallacy in lower court protected class doctrine is an assumption that the disparate treatment analysis requires membership in a protected class. Title VII, however, does not assume or require any particular identification or classification. Rather, it prohibits that behavior, classification, or discrimination based on some perception of an individual's race, color, sex, national origin or religion. e. christi cunningham, The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases, 30 Conn L Rev 441, 469–79 (1998).
115 Id at 469–79 (distinguishing identity from the act of discrimination).
aggressive, that she was not aggressive enough, that she was an object of sexual desire,¹¹⁶ that she was not a proper object of sexual desire, that s/he should have been either male or female but was not.¹¹⁷

Second, as commonly viewed, fantasy means reverie, that which is imaginary,¹¹⁸ illusory, or, at the very least, subjective.¹¹⁹ The definition of sex as fantasy demystifies the centrality of illusions of maleness, masculinity, and hetero-patriarchy¹²⁰ in sex equality equations. That which is male, masculine, or heterosexual is not only dethroned from the seat of normality by the definition of sex as fantasy, it is disrobed of the veil of objectivity.

The third characteristic of the definition of sex as fantasy centers on the substance of fantasy, which involves sexual desire or that which enables sexual desire.¹²¹ Sexual desire is obviously fantasy. Sexual advances occur as the result of a fantasy of desire. One participant has an image of who he or she is, what he or she desires, and that his or her sexual object is desirable or acceptable. In the paradigmatic case, a man fantasizes a woman as the object of his sexual attention.¹²² Sometimes the fantasy in-

¹¹⁶ See Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 179 (Yale 1979) ("[A] sex stereotype is present in the male attitude, expressed through sexual harassment, that women are sexual beings whose privacy and integrity can be invaded at will, beings who exist for men's sexual stimulation or gratification.").
¹¹⁸ But see Person, By Force of Fantasy at 34 (cited in note 110) ("Fantasizing is a mental process that the fantasizer knows to be an act of the imagination. However pleasing the fantasy may be, the fantasizer knows that it is imaginary, a self-generated fiction. In the process of generating fantasy and manipulating it, the fantasizer is almost always aware of creating and directing the script and able to distinguish fantasy from reality just as the child distinguishes make-believe play from reality.").
¹¹⁹ Webster's Dictionary defines fantasy as: "1. Hallucination. 2. Fancy, the free play of creative imagination. 3. A creation of the imaginative faculty whether expressed or merely conceived as a) a fanciful design or invention b) a chimerical or fantastic notion c) fantasia d) imaginative fiction featuring esp. strange settings and grotesque characters." Webster's Ninth New Collegiate Dictionary 449 (Merriam-Webster 1986).
¹²¹ See Person, By Force of Fantasy at 2 (cited in note 110).
¹²² Although the male harasser and the female object is the paradigmatic model, I by no means intend to imply that the preservation of normal male heterosexual fantasy is confined to such exchanges. The preservation of normal male heterosexual fantasy is also effected through the courts' treatment of same-sex sexual harassment cases. See generally Franke, 49 Stan L Rev at 733–62 (cited in note 29).
volves a willing participant. Sometimes the fantasy involves an object who is indifferent or unwilling. Who we desire is affected by fantasies of beauty, health and propriety, images of who our mothers and fathers were or were not, perceptions of power, and a host of other illusions and delusions. Sex and sexual desire include that which facilitates or is necessary for a particular sexual fantasy. This may include fantasies regarding the proper role of men or women, fantasies about competence, fantasies about power relations.

Fourth, by defining sex as fantasy, I mean to include the psychoanalytic implications of fantasy. In psychoanalytic terms, fantasy is the theater of the mind in which the fantasizer is the author of the fantasy, a player (usually the star) in the drama, and “the audience for whom the fantasy was devised.” In By Force of Fantasy, Ethel Person explains that fantasies originate in childhood memories and experiences. She notes that Freud asserted that fantasy was wish fulfillment directed at both the frustrations in the external world as well as internal conflict. As fantasy, individuals’ views of desire, biological sex, gender, and sexual orientation stem from formative experiences. An attraction to women in subordinate positions, for example, or a fear or dislike of women in authority may have origins in childhood experiences and unfulfilled wishes.

The fifth characteristic, that fantasies and sex are individualized, follows from the fourth. Perceptions and expectations of manhood, masculinity and virility vary from person to person and within an individual over time. Fantasies of sex are shaped by individual contexts — experiences, education, and needs. Individuals project fantasies of their own sex and the sex of others to the world in different ways.

The sixth characteristic of fantasy is that although fantasies are individual creations, they are also shared. Fantasies are

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125 Person, By Force of Fantasy at 7 (cited in note 110).

126 Id at 10.

127 Id at 35.

128 Id at 122-49.
shared through histories. Fantasies are shared through culture. They are taught and policed. Romance, for example, requires shared fantasy. Person writes:

We imbue all our significant relationships with fantasy, and intimate relationships provide the ideal medium in which shared fantasies can proliferate. Sharing fantasies intensifies the emotional and psychological connections between people. In fact, the deepest emotional ties generally occur between people who have congruent or complementary fantasies, whether explicitly shared or communicated through subliminal cues.

While shared fantasies are important in good relationships, shared fantasies also are imposed on unwilling subjects. Fantasies about women’s impotence or incompetence, pornographic fantasies about women, and fantasies about male physical strength or masculinity are all fantasies that are shared by some and imposed on others.

Finally, fantasy has concrete effects. Fantasy is not merely playful or intangible:

There is a common assumption that fantasy has tended to be excluded from the political rhetoric of the left because it is not serious, not material, too flighty and hence not worth bothering about. . . . Like blood, fantasy is thicker than water, all too solid — contra another of fantasy’s more familiar glosses as ungrounded supposition, lacking in foundation, not solid enough.

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129 See also Jacqueline Rose, States of Fantasy 5 (Clarendon Press 1996) (“For one line of thinking, the concepts of state and fantasy are more or less antagonists, back to back, facing in opposite directions towards public and private worlds. But fantasy, even on its own psychic terms, is never only inward-turning; it always contains a historical reference in so far as it involves, alongside the attempt to arrest the present, a journey through the past.”).

130 Culture is only one way in which fantasies are shared. Of course, cultures are mixed and varied. See Francisco Valdes, Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities, 9 La Raza L J 1, 8 (1996) (“[S]ameness/difference discourses are compelling to Latinas/os because the category “Latina/o” is itself a conglomeration of several peoples from varied cultures and localities, all of which have managed to become thoroughly embedded in American society through different yet similar experiences.”). Part of the invidiousness of the severe or pervasive standard is that it privileges a particular culture through the fantasy of the normal (white) heterosexual male.

131 Person, Force of Fantasy at 123 (cited in note 110).

132 Rose, States of Fantasy at 5 (cited in note 129).
Both individual and mutual fantasies have concrete effects. Mutual fantasies are helpful or rewarding to others. For example, shared fantasies about masculinity may be imputed to a supervisor as competence. Fantasies of desire may be warmly received. On the other hand, "[i]f fantasy can be grounds for license and pleasure . . ., it can just as well surface as fierce blockading protectiveness, walls up all around our inner and outer, psychic and historical, selves." Imposed fantasies stereotype, undermine, harass or harm others in ways that are concrete and unlawful.

These characteristics of the fantasy of sex provide a conception of sex capable of addressing the concerns of Franke, Schultz, Case and Valdes. By identifying the fantasy of sex as something that is created, the objective assumption of biological sex that Franke critiques is challenged. The value assigned to biological traits is identified as something manufactured rather than something given. The characterization of the fantasy of sex as something that is created also reflects the sense of all four scholars that sex is something manipulated by the courts.

By defining sex as something subjective or illusory, the second characteristic addresses at least part of Franke's concern with objective assumptions. Courts should no longer assume biological difference as a given exception to sex equality. Biological sex as a relevant difference is a socially constructed fantasy (subjective creation), just as gender is.

Defining sex as something subjective addresses the concern of Franke and Schultz regarding the disaggregation of sexual and "non-sexual" harassment. Assuming the possibility of sex-based harassment that is not driven in some way by concerns of desire, both desire and gender roles are subjective. Thus, the definition of sex as a fantasy includes the non-explicit sexual discrimination that has been disaggregated under sexual harassment law. The definition of sex discrimination as the (unwelcome) imposition of a fantasy of sex re-integrates non-explicit harassment with explicit harassment. The non-sexually explicit gender differences and sex-based images of women's (and men's) roles and women's (and men's) competence are actions based on illusion.

The imposition of these illusions, however, has concrete effects. The definition of sex as fantasy explains courts' invention of a sexual/"non-sexual" distinction and segregation of evidence of harassment that is explicitly based on desire from harassment

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133 Id at 4.
134 See notes 129–32 and accompanying text (discussing "shared fantasy").
that is not explicitly based on desire; the sexual/“non-sexual” dis-
tinction delineates relative proximity to the fantasy of normal male heterosexual identity. Explicit sexual harassment may be normal heterosexual male behavior, but it is sufficiently removed from the fantasy of ordinary heterosexual male identity to be cur-
tailed by law. Non-explicit sexual harassment is the power at the heart of the fantasy of the objectively dominant role of heterosexual men. To curtail such harassment by law would challenge the fantasy of objectivity and neutrality “propping up” male domi-
nance.

The illusory aspect of the definition of sex as fantasy also ad-
dresses the elevation of the masculine over the feminine that Case and Valdes identify. The existence of and distinctions be-
tween the feminine and masculine are fantasy, just as biological distinctions and desire are fantasy. Substituting the words “valu-
able” and “less valuable” for the characteristics masculine and feminine reveals the illusion. The illusion is not that certain indi-
viduals possess particular characteristics. Instead, the illusion is
that (1) the characteristics necessarily correspond to a particular sex and can be grouped accordingly, or that (2) the characteristics carry value according to the sex to which they correspond. A defi-
nition of sex as fantasy perpetuates the conflation of gender with sex and sexual orientation, which Case critiques. Nevertheless, it provides an avenue for addressing the bias against the femi-
nine that Case and Valdes uncover. The application by the courts of a definition of sex discrimination as the imposition of fantasy would prohibit employers from discriminating against employees because they failed to display the favored gender because a defi-
nition of sex as fantasy would incorporate gender fantasies, whether masculine or feminine. Therefore, the imposition of such fantasies could easily be identified as a statutory violation. Un-
like Case, who concedes that employers should be permitted to insist upon a particular gender in certain instances, a view of sex as fantasy categorically denies the propriety of imposing gen-
der perceptions. Because images of what is feminine and what is masculine are illusory and transient, employers should be pro-
hibited from discriminating on the basis of such fantasies, in-
cluding femininity.

The characteristic that the fantasy of sex entails desire chal-
lenges Franke’s and Schultz’s idea that sex-based harassment

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135 See generally Case, 105 Yale L J 1 (cited in note 31).
136 See id at 76.
can be “non-sexual.” Nonetheless, it addresses the problem of the disaggregation of claims that Franke and Schultz identify because it asserts that both explicit and non-explicit acts of sexual harassment are unavoidably linked to sexual desire and that which facilitates it. Assertions of control over gender roles and women’s competence preserve an environment conducive to male sexual dominance.

The sixth and seventh characteristics explain the harms of the fantasy of sex as it manifests in sexual harassment law and as it manifests in the aggregation and disaggregation described by Franke, Schultz, Case, and Valdes. Once created, subjective desire-based fantasies may be shared to create a harassing environment or to enforce gender roles. When these fantasies are imposed they produce concrete effects. Shared fantasies create real effects from what is illusory, and on that basis, individuals’ employment, including their emotional, physical and financial well-being, is affected.

The fantasy of sex is sometimes innocent, frequently pleasurable, and often important to us. We want our mothers to fulfill a particular fantasy, and each of us has a particular fantasy regarding who our significant other should be. The concept of sex as fantasy acknowledges the complexity of female, male and transgendered subjects and leaves room for wholist self-definition. But when the fantasy adversely affects an individual’s employment, then it violates Title VII.

My argument is that sex, as described by Franke, Schultz, Case, and Valdes, is part of a fantasy of sex, and that, in individual cases, courts have allowed or disallowed the unwelcome imposition of the fantasy depending upon the proximity of the fantasy to the male heterosexual norm. In this way, fantasy is an instrument of the state.

In the introduction to her book, States of Fantasy, Jacqueline Rose explains her central thesis — that “there is no way of understanding political identities and destinies without letting fantasy into the frame. More, that fantasy — far from being the antagonist of public, social, being, plays a central, constitutive role

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138 Fantasy preservation impedes the ability of men and transgendered persons, as well as women, to challenge the enforcement of fantasy norming. See Franke, 49 Stan L Rev at 696–97 (cited in note 29) (categorizing forms of same-sex harassment); see generally Case, 105 Yale L J 1 (cited in note 31) (discussing discrimination against effeminate men).
in the modern world of states and nations.\textsuperscript{139} My argument speaks to a particular use of fantasy by the courts. Put another way, the courts, in balancing male enjoyment of the exercise of sexual power\textsuperscript{140} with individuals' rights to be free from the exercise of that power, defend the right to be free from that exercise of power only under conditions not essential to a shared fantasy of ordinary male sexuality. The courts' protection of the right to be free from the exercise of power because of sex is thus limited, and that conditionality is as much a function of a fantasy of men's pleasure as it is of women's liberty. As the relationship of the sexual fantasy to ordinary heterosexual male pleasure increases, the scale tips away from the individual's right to be free from the imposition of the fantasy through Title VII protections. Thus sex discrimination law is a function of the degree to which the fantasy imposed on a plaintiff is essential to the ordinary exercise of power for the male heterosexual fantasy.

This description of sex discrimination law explains the problems identified by Franke, Schultz, Case, and Valdes that would be addressed by a definition of sex as fantasy. Franke critiques sexual harassment theories based on formal equality, desire, and dominance for failing to address the ways in which sexual harassment "perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men."\textsuperscript{141} She argues that sexual harassment is a tool for ensuring gender conformity.\textsuperscript{142} By defining sex discrimination as the imposition of (sex) fantasy, I suggest that courts should prohibit discrimination that entails the enforcement of gender norms (which, according to Franke, implicate biological norms and which, according to Valdes, implicate biology and sexuality). My contention is that sexual harassment law has failed to the extent that courts have determined that a certain degree of enforcement of normal male

\textsuperscript{139} Rose, \textit{States of Fantasy} at 4 (cited in note 129).

\textsuperscript{140} Dominance theory describes the power relationship between men and women. Rather than theorizing equality in formal terms, treating women the same as men, dominance theory critiques the power imbalance. According to Catharine MacKinnon, "the social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual — in fact, is sex. Men in particular, if not men alone, sexualize inequality, especially the inequality of the sexes." MacKinnon, \textit{Feminism Unmodified} at 3 (cited in note 1) (footnote omitted). Specifically, MacKinnon explains that "[t]he question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy, which — as power succeeds in constructing social perception and social reality — derivatively becomes a categorical distinction, a difference." MacKinnon, \textit{Difference and Dominance}, in \textit{Feminism Unmodified} at 40 (cited in note 1).

\textsuperscript{141} Franke, 49 Stan L Rev at 696 (cited in note 29).

\textsuperscript{142} Id.
heterosexual fantasy is acceptable and that the severe or pervasive standard is the exact doctrinal point at which that fantasy is preserved.

Most courts interpret Title VII to prohibit the imposition of fantasies of sex when the fantasies involve violence or forced intercourse or forced touching because violence or forced intercourse or forced touching is not perceived to be closely tied to the fantasy of "normal" male heterosexual sexual pleasure.\textsuperscript{143} Where such fantasies are more closely tied to the fantasy of "normal" male heterosexuality, however, courts fail to recognize the discrimination claim as actionable under the statute.\textsuperscript{144} So, for example, Franke's theory of the failure of Title VII to reach discrimination based on supposed biological sexual difference because such differences are viewed by the courts as natural or inherent\textsuperscript{145} can also be explained by the degree or proximity of the fantasy of sexual biological difference to the ordinary fantasy of heterosexual male sexual pleasure. Because the fantasy of the existence of two sexes with distinct and immutable physical characteristics is closely tied to ordinary heterosexual male sexual pleasure, courts do not interpret Title VII to protect plaintiffs from the imposition of the fantasy.

\textsuperscript{143} See, for example, Bailey v Runyon, 167 F3d 466, 467 (8th Cir 1999) (reversing summary judgment for employer where male co-worker grabbed male plaintiff's crotch and asked for oral sex); Van Steenburgh v Rival Co, 171 F3d 1155, 1157–58 (8th Cir 1999) (reversing summary judgment for the employer where male co-worker grabbed, put arms around, and touched breast of female plaintiff); Panasewich v Dayton Hudson Corp, 1999 US Dist LEXIS 9186, *15 (D Or) (denying summary judgment for employer and finding that physical intimidation by male employee, which included throwing boxes and pushing carts at the plaintiff, did not involve occasional sexual horseplay and would constitute severe and pervasive conduct). See also Moore v Sam's Club, 55 F Supp 2d 177, 183, 188 (S D NY 1999) (denying employer's motion for summary judgment where a lesbian employee was allegedly raped by her male co-worker).

\textsuperscript{144} See, for example, Penry v Federal Home Loan Bank of Topeka, 155 F3d 1257, 1260–62 (10th Cir 1998) (finding that plaintiff's environment was hostile due to gender-neutral antics and thus not actionable, where male co-worker followed plaintiff to the bathroom, compared a building to women's breasts and referred to assistants as "gals" and not by name); Sandvik v Secretary, Dept of Health and Human Services, 1999 US Dist LEXIS 8798, *15 (D Or) (finding that comments by male co-worker calling plaintiff a "bitch", display of nude photographs to plaintiff and discussion of penile enlargements were insufficient to create actionable hostile environment and were "sporadic abusive language" and "isolated instances") (internal quotation marks omitted); Unrein v Payless Shoesource, Inc, 51 F Supp 2d 1195, 1206 (D Kan 1999) (finding that male co-worker's reference to women as "bitches" and request that plaintiff prepare food for him might be gender-related, but were insufficient to demonstrate that all aggressive behavior toward plaintiff was motivated by her gender); Yoho v Tecumseh Products Co, 43 F Supp 2d 1021, 1026–27 (E D Wis 1999) (finding sexual graffiti about plaintiff and her daughter to be in poor taste and insensitive, but insufficient to constitute actionable harassment).

\textsuperscript{145} See notes 48–72 and accompanying text.
Where physical or biological differences are less proximate to the heterosexual male sexual standard, courts interpret Title VII to protect plaintiffs from the imposition of the fantasy. Similarly, courts' acquiescence to sexual harassment that is not explicitly sexual could be explained as an attempt to prohibit sexual harassment that is relatively distant from a fantasized norm while preserving behavior that is more closely tied to the traditional male image even if the behavior is harassing. Consider, for example, the Supreme Court's admonition that "the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."148

Likewise, the bias of the courts against the feminine reflects the courts' regulation of discrimination by degrees. Masculinity in men and women is protected, while femininity in neither is protected, because valuing femininity is the greater challenge to the traditional male norm. Femininity in men is a critique of traditional male sexual dominance, whether or not femininity is conflated with sexual orientation. The discrimination against effeminate men that Case discusses can thus be explained in terms of degree and proximity to male heterosexual sexual dominance. Prohibiting discrimination against masculine women in male jobs challenges traditional norms; however, as Case points out, it does not challenge the value that society places on masculinity. Prohibiting discrimination against feminine women in traditional


148 Oncale, 523 US at 81.

149 See Case, 105 Yale L J at 32–33 (cited in note 31). MacKinnon also notes:

Women who wish to step out of women's traditional relations with men and become abstract persons, to be exceptional to women's condition rather than to receive the protections of it, are treated as if we are seeking to be like men, without any realization that that concedes the gender of the standard. Women who seek to meet this standard under sex discrimination doctrine are served equality with a vengeance. To win sex discrimination cases under the equality rubric, athletes, academic women, professional women, blue-collar women, and military women, for instance, have to meet the male standard: the standard that men are trained and prepared for socially as men.

MacKinnon, On Exceptionality: Women as Women in Law, in Feminism Unmodified at 72 (cited in note 1).
male roles, on the other hand, would attack the core of the fantasy of what is valuable.\textsuperscript{180} The ability of feminine men and women to perform comparably in traditional masculine positions challenges the sanctity of male virility. The bias against the feminine that Case identifies, then, may also be explained as a function of the proximity of imposed fantasies of sex to the image of common male heterosexual sexuality.

The "proximity analysis," then, is a method used by the court to protect a particular fantasy or viewpoint. Acts of sex discrimination are either prohibited or not depending upon the degree to which they challenge the fantasy norm. Under the severe or pervasive standard, sexual harassment is either prohibited or condoned depending upon its proximity to the protected zone. Consider, for example, the Supreme Court's assurance that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace."\textsuperscript{181} The implication here is that conduct involving some degree of unwelcomed sexual harassment falls within the zone of normal behavior and to prohibit it would be to require asexuality or androgyny — something that apparently is not normal (according to the Court).

Of course, everyone, at home\textsuperscript{182} or at work, is free to have as many and whatever sex-based fantasies she chooses, and reciprocal fantasies of sex, gender, sexuality, or desire are lovely. However, the imposition of fantasies (of sex, gender, sexuality and/or desire) may not affect the hiring, firing, compensation, terms, conditions or privileges of any individual in the workplace.

\textbf{II. THE SEVERE OR PERVERSIVE STANDARD IS CONTRARY TO TITLE VII}

How closely does complained-of behavior resemble the fantasy or image of normal male heterosexuality? If the challenged behavior too closely resembles the image of normal heterosexual male behavior, then courts will apply proximity analysis to preserve the fantasy and the discrimination. As the theories of Franke, Case and Schultz demonstrate, courts applying Title VII have defended biological sexual distinctions, masculinity (even when asserted by women), and attacks on the competence of

\textsuperscript{180} See Case, 105 Yale L J at 32–34 (cited in note 31).
\textsuperscript{181} \textit{Oncale}, 523 US at 81.
\textsuperscript{182} But see Michelle Adams, \textit{Knowing Your Place: Theorizing Sexual Harassment at Home}, 40 Ariz L Rev 17 (1998).
women performing in traditionally masculine positions — all of which doctrines support the fantasy of heterosexual male power. When courts prohibit conduct under Title VII, they do so often because the conduct is not something that "the boy next door" might do. But what if the boy next door acts in ways that impede women's equality? The problem with the Court's proximity analysis and with the severe or pervasive standard is that they exclude from the reach of Title VII "normal" conduct that propagates inequality.

The proximity analysis of the severe or pervasive standard is analogous to the societal problems of the glass ceiling, acquaintance rape, and pay inequity. It is the plateau of sex equality. While women have made significant progress into traditional male and masculine territory, glass ceilings exist because some core male and masculine havens are especially difficult for women to shatter. Title VII has failed to break the glass ceiling because the remaining degree of inequality is essential to the maintenance of male power in the workplace, and, therefore, women's inability to break the glass ceiling persists.

Women fail to report acquaintance rape and the criminal justice system often views it as consensual, because acquaintance rape is sometimes difficult to distinguish from normal heterosexual male behavior, and the harm done to women is a consequence of ordinary human interaction. Pay inequity persists because at some point, as women's incomes approach men's, the inequity is viewed as negligible.

Nothing in Title VII legitimates limiting individuals to a certain degree of equality and no more. That limitation, as mani-
fested in the severe or pervasive standard, is contrary to the statute. The severe or pervasive standard is inconsistent with a dynamic interpretation of the statute because it is contrary to the 1991 amendments to the statute. The severe or pervasive standard is also inconsistent with the original meaning of the statute based on intentionalist, purposive, and textual analysis.

A. The Severe or Pervasive Framework

The assumption which underlies the severe or pervasive framework is that some sexual harassment does not alter the terms, conditions or privileges in the workplace. The mantra of Title VII sexual harassment jurisprudence is that harassment must be severe or pervasive in order to be legally cognizable.


*Meritor Savings Bank, FSB v Vinson* established a standard for sexual harassment cases that the Court derived from national origin and racial harassment cases. The plaintiff in *Meritor* was a bank teller who, out of fear of losing her job, submitted to repeated demands from her supervisor for sexual favors. The two had sexual intercourse forty to fifty times over the course of four years. In addition, her supervisor “fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.” Adopting the existing EEOC Guidelines, the Court concluded that sexual harassment which creates a hostile or offensive environment is an

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160 See Joseph M. Pellicciotti, *Sexual Harassment in the Workplace: A Consideration of Post-Vinson Approaches Designed to Determine Whether Sexual Harassment is Sufficiently Severe or Pervasive*, 5 DePaul Bus L J 215 (1993) (discussing methods used by courts to determine whether sexual harassment is sufficiently severe or pervasive).


163 See *Rogers v EEOC*, 454 F2d 234, 238 (5th Cir 1971) (stating that “mere utterance of an ethnic or racial epithet” does not violate Title VII, which was aimed instead at “working environments so heavily polluted with racism as to destroy completely the emotional and psychological stability of minority group workers”); *Cariddi v Kansas City Chiefs Football Club, Inc*, 568 F2d 87, 88 (8th Cir 1977) (holding that ethnic slurs directed against plaintiff “did not rise to the level necessary to constitute a violation of Title VII”).

164 477 US at 60.

165 Id.

166 Id.

unlawful employment practice. The Court noted, however, that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." The Court established the severe or pervasive standard, concluding, as circuit courts had, that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"

In *Meritor*, the Court established that sexual harassment is sex discrimination. The Court determined that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive environment." It is important to note that by the Court's own terms, sexual harassment does not become sex discrimination only when it is severe or pervasive. Sexual harassment is sex discrimination. By proving that sexual harassment created a hostile environment, the plaintiff proves that the discrimination altered the terms, conditions, or privileges of employment, thus constituting an unlawful employment practice. Therefore, under the current framework, the argument cannot be sustained that sexual harassment that is not severe or pervasive is not sex discrimination — only that sexual harassment that is not severe or pervasive does not alter the terms, conditions or privileges of employment.

*Meritor*, however, left the terms "hostile work environment" and "severe or pervasive harassment" unclear. The Court later attempted to clarify the severe or pervasive standard in *Harris v Forklift Systems, Inc.* In *Harris*, the plaintiff alleged that the defendant's president often insulted her and made her the target of unwanted sexual innuendoes: he called her a "dumb ass woman," and told her, "You're a woman, what do you know" and "We need a man as the rental manager." The president also suggested that the plaintiff negotiate her raise at a hotel and

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169 Id at 67.
170 See Rogers, 454 F2d at 238 (applying precursor to severe or pervasive standard in national origin discrimination context); *Henson v Dundee*, 682 F2d 897, 902 (11th Cir 1982).
171 *Meritor*, 477 US at 67 (citation omitted).
172 Id at 66.
173 *Faragher*, 118 S Ct at 2284 ("We have made clear that conduct must be extreme to amount to a change in the terms and conditions of employment.").
175 510 US at 19.
asked Harris and other women to retrieve coins from his front pocket and to pick up objects that he had intentionally dropped.\textsuperscript{176} Harris quit when the president suggested, in front of other employees, that she had successfully arranged a deal by promising to have sex with a customer.\textsuperscript{177} The Court concluded that actionable harassment need not be so severe as to cause psychological injury — so long as the environment is objectively hostile or abusive, and is perceived as such by the plaintiff.\textsuperscript{178} The Court noted that this test is not mathematically precise but depends on all the relevant circumstances.\textsuperscript{179} Critical factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."\textsuperscript{180} The Court thus reaffirmed the assumption that some sexual harassment is not actionable. Conduct that is not severe or pervasive is outside the scope of Title VII.\textsuperscript{181}


In all three of the Court's 1998 Title VII sexual harassment opinions, \textit{Oncale v Sundowner Offshore Services, Inc},\textsuperscript{182} and the companion cases \textit{Burlington Industries, Inc v Ellerth}\textsuperscript{183} and \textit{Faragher v City of Boca Raton},\textsuperscript{184} the Court reaffirmed the standard that sexual harassment must be "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment."\textsuperscript{185}

\textit{Oncale} considered a sexual harassment claim under the hostile working environment framework of \textit{Meritor} and \textit{Harris}. Plaintiff was a roustabout who worked as part of an oil platform crew.\textsuperscript{186} He alleged that he was subjected to repeated sex-related, humiliating actions, including physical assault of a sexual nature and the threat of rape.\textsuperscript{187} The Court addressed the issue of

\begin{itemize}
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id at 22.
\item \textsuperscript{179} \textit{Harris, 510 US at 22–23.}
\item \textsuperscript{180} Id at 23.
\item \textsuperscript{181} Id at 21.
\item \textsuperscript{182} 523 US 75 (1998).
\item \textsuperscript{183} 118 S Ct 2257 (1998).
\item \textsuperscript{184} 118 S Ct 2275 (1998).
\item \textsuperscript{185} Faragher, 118 S Ct at 2283 (citation and internal quotation marks omitted); see also Ellerth, 118 S Ct at 2264–65; Oncale, 523 US at 81.
\item \textsuperscript{186} Oncale, 523 US at 77.
\item \textsuperscript{187} Id.
\end{itemize}
“whether workplace harassment can violate Title VII’s prohibition against ‘discriminat[ion] . . . because of . . . sex’ when the harasser and the harassed employee are of the same sex.” The Court held that same-sex sexual harassment violates the statute, reasoning that Title VII would not be transformed into “a general civility code” because sexual harassment must be severe or pervasive.

_Ellerth_ involved a salesperson’s claim that she was subjected to constant sexual harassment by her supervisor’s supervisor, a mid-level manager, despite the company’s policy against sexual harassment. For approximately one year, plaintiff Ellerth suffered, but did not report, frequent boorish and offensive remarks, comments about her breasts, threats that her life would be harder if she did not loosen up or wear shorter skirts, and uninvited rubbing of her knee. Burlington Industries appealed an en banc reversal of summary judgment for the defendant. The Court stated that the question at issue was whether, under Title VII, “an employee who refuses the unwelcome and threatening advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor’s actions.” After discussing the relevance of the categories of quid pro quo sexual harassment and hostile working environment sexual harassment, the Court reaffirmed the requirement that sexual harassment that is not tied to a tangible employment action be severe or pervasive.

The facts of _Faragher_ are similar to _Ellerth_ and the result is the same with respect to the severe or pervasive standard. Plaintiff Faragher, during her five-year tenure as a lifeguard for the City of Boca Raton, experienced continued harassment by her supervisors despite the city’s pro forma sexual harassment policy. The supervisors repeatedly touched the bodies of female employees without invitation, put their arms around the plaintiff.

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188 Id at 76 (citation omitted).
189 Id at 80.
190 _Oncale_, 523 US at 81.
191 _Ellerth_, 118 S Ct at 2262.
192 Id.
193 Id at 2265 (“When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.”).
194 The Court noted that neither the supervisors nor many of the lifeguards were aware of the policy because it had not been disseminated. _Faragher_, 118 S Ct at 2293.
and other female lifeguards, touched the plaintiff's buttocks, touched another woman's body in a manner simulating sex, made crudely demeaning references to women, commented disparagingly on plaintiff's shape, and suggested during a job interview that the applicant's willingness to have sex with male lifeguards was relevant to her qualification for the position. Although the plaintiff did not file a formal complaint, she did discuss the matter informally with another supervisor. In deciding in plaintiff's favor, the Court reaffirmed the requirement that conduct must be extreme to constitute actionable sexual harassment.

B. The Severe or Pervasive Framework Is Not a Dynamic Interpretation and Is Contrary to the 1991 Civil Rights Act

The Court's interpretations of Title VII have been dynamic in several respects. The Court's definition of sexual harassment as sex discrimination, its application of Title VII to the hostile work environment or in the absence of a tangible job consequence, and its application of the doctrine to same-sex harassment clearly demonstrate the Court's appreciation for statutory and societal evolution. Nevertheless, in the context of the severe or pervasive standard, the Court has not kept pace with the progression toward workplace equality.

1. Dynamic Statutory Interpretation.

In his influential text on statutory interpretation, William Eskridge argues that statutes are dynamic and that statutory meaning changes with time, interpreter, and context. Dynamic theory views statutory interpretation as a fluid process, involving "policy choices and discretion by the interpreter over time as she applies the statute to specific problems, and [responds] to the current as well as the historical political culture." Dynamic statutory methods are fluid because statutes are fluid:

Changed circumstances have important consequences for statutory interpretation. Statutes are enacted by their drafters with certain consequences in mind, but whether those consequences actually occur (or undesirable consequences do not occur) depends on a series of assumptions.

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195 Id at 2281.
196 Id.
197 Id at 2284.
198 See William N. Eskridge, Jr., Dynamic Statutory Interpretation 14 (Harvard 1994).
199 Id at 48.
about people and institutions, about society and its mores, and about law and policy. If those assumptions unravel over time, the statute will not have its intended consequences, and however the statute is applied by decision makers, it will be interpreted dynamically — that is, subsequent interpreters will apply the statute in ways unanticipated by the original drafters.²⁰⁰

Rather than having a fixed original meaning, statutory meaning evolves, with time, as the statute is applied.²⁰¹ "When successive applications of the statute occur in contexts not anticipated by its authors, the statute’s meaning evolves beyond original expectations."²⁰² Rather than discerning some objective statutory meaning, dynamic interpreters consider what the statute ought to mean:

Practical experience in both Europe and the United States ... suggests that when statutory interpreters apply a statute to specific situations, the interpreter asks not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society.²⁰³

Determining what a statute “ought to mean” according to societal goals involves a process of evaluating political and social conditions, changing circumstances, and the practical realities of the statute’s application and effectiveness.

[A] statute is a political response to a problem or cluster of problems, and the statutory drafters expect their product to be applied in a manner that advances the overall political enterprise as well as its specific goal. Indeed, they realize that, in an important sense, statutory meaning is not fixed until it is applied to concrete problems. Pragmatic thought understands application as a process of practical reasoning. Every time a statute is applied to a problem, statutory meaning is created.²⁰⁴

²⁰⁰ Id at 52.
²⁰¹ Id at 48–49.
²⁰² Eskridge, Dynamic Statutory Interpretation at 49.
²⁰⁴ Id at 50.
Dynamic interpretations reflect laws' synergism with the development of society.

Dynamic interpretation may be particularly relevant to sexual harassment law given that the prohibition of sexual harassment is an evolution in anti-discrimination law. The dynamism of statutes is affected by issues that were suppressed or unresolved during the legislative process and issues that were overlooked or unanticipated. While the elimination of discrimination was an issue confronted and resolved by the legislature, the recognition of harassment as an unlawful practice was an outgrowth of the application of sex discrimination law. The argument can be made that the interpretation of sexual harassment law should evolve to reflect societal changes and the effectiveness or ineffectiveness of sexual harassment interpretations to accomplish current goals of workplace equality.

The workplace is undoubtedly radically different than it was prior to the publication of Catharine MacKinnon's Sexual Harassment of Working Women in 1979, the 1986 Meritor decision, or even the confirmation of Justice Thomas in 1991. Yet, thirty-five years after the enactment of Title VII, the workplace remains saturated with unlawful sex discrimination.

Dynamic interpretations of Title VII should examine the accomplishments of the doctrinal framework as well as ways in which it has fallen short of what the statute ought to accomplish. Sexual harassment law has drastically increased awareness of, and reduced women's exposure to, the most egregious forms of sexual assault and harassment in the workplace.

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205 Id at 51. Eskridge also discusses the effect of social and political resistance to the dynamic nature of statutes. Id.
208 See generally Chamallas, 4 UCLA Women's L J 37 (cited in note 32) (tracing the history of sexual harassment law and literature).
209 See Faragher, 118 S Ct at 2288 ("It is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, co-employees) is a persistent problem in the workplace.") (citation omitted).
211 See Deborah Zalesne, Sexual Harassment Law: Has It Gone Too Far, or Has the Media?, 8 Temp Polit & Civ Rts L Rev 351, 354 (1999) ("What has changed is our awareness of the problems relating to sexual harassment, our willingness to put up with inap-
It has not, however, altered the overall paradigm of sex inequality. Rather, it has been met with resistance by some that eliminating sex discrimination will mean altering "normal" behavior. In other words, the current view is that prohibitions on sexual harassment are fine as long as boys can still be boys.\textsuperscript{211}

Consider, for example, the reasoning in \textit{Abernathy v Walgreen Co.}\textsuperscript{213} Although the plaintiff's misconduct justified the court's preliminary denial of injunctive reinstatement, the court's description of plaintiff's complaint regarding the actions of his co-workers is illustrative of the boys will be boys attitude. Abernathy, a black man, held the position of Executive Assistant Manager at Walgreen.\textsuperscript{214} While at work, Militello, a white male co-worker, told a "crude 'joke'" to another male employee in Abernathy's presence.\textsuperscript{215} Because the "joke" concerned a matter about which Abernathy was personally sensitive, he felt as if he had been targeted.\textsuperscript{216} Walgreen responded by giving Militello a "final warning' that he would be fired if a similar incident occurred in the future."\textsuperscript{217} Dissatisfied with this result, Abernathy sent a letter and the disciplinary report that he had written about Militello to the equal employment officer at Walgreen and several civil rights and civic leaders outside of the company.\textsuperscript{218} Abernathy was fired because the disciplinary report was a Walgreen internal record, and he had distributed it to individuals outside of the company.\textsuperscript{219} Abernathy claimed that his discharge was retaliation for his opposition to unlawful discrimination by Walgreen in failing to discipline properly Militello for violating Walgreen's sexual harassment policy due to racial bias.\textsuperscript{220} To establish a prima facie case of retaliatory discrimination, Abernathy was required to

\begin{footnotes}
\item[211] See, for example, \textit{Oncale}, 523 US at 81 ("The statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.").
\item[213] 836 F Supp 817 (M D Fla 1992).
\item[214] Id at 818.
\item[215] Id.
\item[216] Id. The court noted, however, that there was no evidence that Militello was aware of plaintiff's sensitivity to the subject matter. Id.
\item[217] \textit{Abernathy}, 836 F Supp at 818.
\item[218] Id. The list of external recipients included: (1) the president of the local NAACP, (2) the president of the local Urban League, (3) a former DET enrollee in the city Department of Employment and Training, (4) a prominent civil rights advocate, (5) the Mayor of Tampa, and (6) the pastor of a local black church.
\item[219] Id at 819.
\item[220] Id.
\end{footnotes}
demonstrate "that he had a reasonable belief that the employer was engaged in unlawful employment practices." 221

The court rejected plaintiff's request for injunctive reinstatement because the court determined that the plaintiff had failed to establish a substantial likelihood of success in showing that he reasonably believed that Militello's joke was sexual harassment. 222 Assuming that the court's denial of reinstatement was proper, a question remains, nonetheless: why was Abernathy's belief that Militello's conduct violated the company's sexual harassment policy unreasonable?

Among other things, the policy stated: "It is illegal and against the policies of this Company for any employee, male or female, to sexually harass another employee by: ... creating an intimidating, hostile, or offensive working environment by such conduct." 223 The court concluded that "Abernathy could not have had a good faith or reasonable belief that the 'joke' violated the sexual harassment policy." 224 Why could Abernathy not have a good faith belief that Militello's conduct was sexual harassment? The court's conclusion is remarkable in light of the fact that Walgreen disciplined Militello for his conduct. 225

The answer appears to be related to the Abernathy court's perception of what is normal. The court was impressed by the fact that Militello's joke was told among men. According to the court, "plaintiff complain[ed] about a single incident of one male employee ... telling a crude 'joke' to another male employee in the presence of a third male employee, [the plaintiff]." 226 The court's assessment of the reasonableness of plaintiff's belief seems to be affected by a viewpoint that boys will be boys, that locker-room behavior among men is normal: "Abernathy's belief that an isolated yet crude 'joke,' told among men only ... fails to establish a basis from which to conclude that his belief [that Militello's conduct was sexual harassment] was reasonable." 227 The court's acquiescence to the view that boys will be boys, even in the context of sexual harassment, enforces the proposition that Title VII and the workplace can only evolve so far so as to eliminate sexually harassing behavior.

221 Abernathy, 836 F Supp at 821, quoting Payne v McLemore's Wholesale & Retail Stores, 654 F2d 1138 (5th Cir 1981).
222 Id at 821.
223 Id at 819 n 2.
224 Id at 822.
225 Abernathy, 836 F Supp at 821.
226 Id.
227 Id.
In addition to examining what the statute ought to accomplish, dynamic interpretation involves a “bottom up” approach to statutory meaning.228 The perspectives of private parties, agencies, and lower courts are considered, rather than only the Supreme Court’s periodic proclamations.229 Despite Court efforts to clarify the standard, the severe or pervasive standard from the perspective of private parties and lower courts is arbitrary and diverse. When is harassment pervasive? What harassment is severe? At what point do an employee’s subjective feelings of harassment become objective? What notice does a harasser have that he is about to cross the line? Divergent results for factually similar cases in the lower courts reveal that the severe or pervasive standard is no standard in practice.230 As a result, some defendants lack notice that their behavior is prohibited while others are encouraged by the fact that their conduct is normal.

When the Court has failed to interpret Title VII dynamically, Congress in some instances has brought the Court up to speed by amending the statute.231 Notable examples of the dynamism of Title VII in the form of subsequent congressional action include the recognition of pregnancy discrimination as sex discrimination and the elimination of the requirement of “but for” causation where there is direct evidence of discrimination.232

a) Pregnancy discrimination

In General Electric Co v Gilbert,233 female employees alleged that the employer’s disability plan, which denied benefits for claims arising from pregnancy, discriminated on the basis of sex in violation of Title VII.234 The Court, applying the rationale from its Equal Protection decision in Geduldig v Aiello,235 held that the plan did not violate Title VII because discrimination on the basis of pregnancy was not discrimination because of sex.236 Subse-

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228 See Eskridge, Dynamic Statutory Interpretation at 69 (cited in note 198).
229 Id at 69–70.
230 See generally Comment, Toward a New Standard: Hope for Greater Uniformity in the Treatment of Hostile Work Environment Claims, 78 Marq L Rev 190 (1994) (arguing that treatment of hostile work environment claims by EEOC and lower courts has been ad hoc).
231 See Eskridge, Dynamic Statutory Interpretation at 49 (cited in note 198) (discussing threat of congressional override as dynamic force).
232 See notes 233–38 and accompanying text.
234 Id at 128–29.
quently, Congress amended Title VII with the Pregnancy Discrimination Act, which provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work and nothing in section 2000 e-2(h) of the title shall be interpreted to permit otherwise.\textsuperscript{237}

Since Congress enacted the Pregnancy Discrimination Act, the Court has not wavered in construing discrimination against pregnant women as sex discrimination.\textsuperscript{238}

b) Mixed motive cases

The dynamic nature of Title VII is also evident in the interpretation of mixed motive cases.\textsuperscript{239} \textit{Price Waterhouse v Hopkins}\textsuperscript{240} involved the claim of a senior manager that she was denied partnership on the basis of sex. Hopkins received excellent performance evaluations, but she was at times "overly aggressive, unduly harsh, difficult to work with and impatient with staff."\textsuperscript{241} Nevertheless, some of the negative reaction to Hopkins stemmed from the fact that she was a woman who exhibited allegedly masculine traits.\textsuperscript{242} Partners at Price Waterhouse described Hopkins as "ma-

\textsuperscript{238} See \textit{UAW v Johnson Controls}, 499 US 187, 198–99 (1991); \textit{California Federal Savings and Loan Assoc v Guerra}, 479 US 272, 277 (1987); \textit{Newport News Shipbuilding & Dry Dock Co v EEOC}, 462 US 669, 675–76 (1983). Testimony from the Senate floor debate reveals that Congress passed the PDA to fill a "gaping hole in the protection which title VII affords to working women" that was left by the Supreme Court's decision in \textit{Gilbert}. 123 Cong Rec S 29385 (Sept 15, 1977) (statement of Sen Williams). The contortions that the Supreme Court attempted in \textit{Gilbert} in order to avoid the clear intent of Congress were exposed by congressional declarations that the PDA was enacted to restore the "commonsense' view' of the meaning of sex discrimination. Amending Title VII, Civil Rights Act of 1964, S Rep No 95-331, 95th Cong, 1st Sess 3 (July 6, 1977).
\textsuperscript{239} Since the enactment of the Civil Rights Act of 1991, the Court has not addressed the issue of causation in mixed motive cases directly. However, some lower courts have applied the amendment. See, for example, \textit{Board v Children's Hospital of Los Angeles}, 1996 US App LEXIS 25312, *8–10 (9th Cir) (unpublished disposition).
\textsuperscript{240} 490 US 228 (1989).
\textsuperscript{241} Id at 235 (citation and internal quotation marks omitted).
\textsuperscript{242} Id.
cho,” “overcompensat[ing] for being a woman,” and in need of “a course at charm school”; one advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry.” The Supreme Court granted certiorari in order to determine the allocation of burdens of proof in cases involving a mixture of legitimate and illegitimate motives.

The defendant argued that even if Hopkins proved that sex played a part in the employment decision, she still had to prove that defendant's employment decision would have been different absent the discrimination. Plaintiff argued that proof that sex played any part in the employment decision was sufficient for liability and proof that the discrimination did not affect the ultimate outcome would be relevant at the remedial stage only. For the Court, the “truth [lay] somewhere in between.” The Court explained that it was attempting to preserve “the balance between employee rights and employer prerogatives.” As a result of this balancing, the Court concluded that “the preservation of [the employer's] freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.” Congress soon made clear, however, that workplace equality is not subject to judicial compromise. Under the Civil Rights Act of 1991, the plaintiff need only prove with direct evidence that illegal discrimination was “a motivating factor for any employment practice, even though other factors also motivated the practice.

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243 Id (citation and internal quotation marks omitted).
244 Price Waterhouse, 490 US at 232.
245 Id at 237–38.
246 Id at 238.
247 Id.
248 Price Waterhouse, 490 US at 239.
249 Id at 242.
250 According to the legislative history of the Civil Rights Act of 1991, the Act was enacted to accomplish the goal of workplace equality as well as to correct the errors of the Supreme Court. Upon introducing the legislation, Representative Jack Brooks stated that the bill "was essential to give all women the same rights as those available to minorities, to overcome the roadblocks in civil rights that were raised by the Supreme Court's decisions, and to continue moving forward toward the greater goal of equal opportunity for all Americans." 137 Cong Rec E 229 (Jan 3, 1991) (statement of Rep Brooks introducing the Civil Rights Act of 1991). The 1991 Act and the PDA reinforce, unequivocally, Congress's transformative intent for the statute.
2. The Civil Rights Act of 1991 Invalidates the Severe or Pervasive Standard.

By maintaining the severe or pervasive standard in its 1998 decisions, the Supreme Court has ignored evidence from the 1991 Civil Rights Act of the continued transformative evolution of the statute.\(^{262}\) The 1991 Civil Rights Act amended Title VII to correct the Court’s decision in *Price Waterhouse*.\(^{263}\) In *Price Waterhouse*, the Court held that if a defendant were able to prove that unlawful discrimination was not the “but for” cause of an employment practice, then the defendant would escape liability.\(^{264}\) Congress amended Title VII so that where there is direct evidence that unlawful discrimination was a motivating factor for an employment practice, even if not a but for cause, the statute is violated.\(^{265}\) The 1991 Amendment provides, in pertinent part:

Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.\(^{256}\)

A change in the compensation, terms, conditions or privileges of employment is an employment practice under Title VII.\(^{257}\) If that change occurs because of sex, including sexual harassment, then the statute has been violated. Sexual harassment that is severe or pervasive alters the terms or conditions of the workplace.\(^{258}\) In other words, severe or pervasive sexual harassment is the “but for” cause of a change in the terms or conditions of the


workplace. However, because the Civil Rights Act of 1991 amended Title VII to eliminate the “but for” causation requirement, if a plaintiff proves that the terms or conditions of her workplace have changed and she presents direct evidence that sexual harassment, though not severe or pervasive, was a motivating factor in the change in terms or conditions, then her claim of sexual harassment should prevail.

Plaintiffs who bring claims under Title VII allege some negative employment experience—failure to hire, termination, discipline, failure to promote, change in terms, conditions, privileges or compensation. The cost of litigation, in terms of money and time, would suggest that most plaintiffs have suffered adverse circumstances in their employment that motivated them to bring their claim. Many plaintiffs are very unhappy in their jobs. Many quit or fail to progress. Therefore, the question in most individual discrimination cases is not whether there was a negative employment practice or change in conditions; rather, the question concerns the intent or cause of the negative employment experience. In the context of sexual harassment, the question is whether a cause or motivation for the change in terms, conditions or privileges of employment is harassment because of sex, either explicitly or not. While many sexual harassment cases involve direct evidence of sexual harassment, some sexual harassment

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259 Compare Franke, 49 Stan L Rev at 730–47 (cited in note 29) (arguing that “but for” causation in sexual harassment doctrine is linked to particular equality theories).

260 See notes 239–56 and accompanying text.


263 See Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L Rev 1169, 1218 (1998) (noting that sexual harassment impedes victims in job performance and may deprive them of professional camaraderie and mentoring); Dolkart, 43 Emory L J at 187–88 (cited in note 261) (noting that 66 percent of sexual harassment victims quit or were fired because of sexual harassment, and that those who remain in their jobs face hardships such as exclusion and loss of confidence).
cases inevitably involve circumstantial proof. If a plaintiff proves that she was harassed, but is unable to prove with direct evidence that the harassment (either explicit or not) was because of sex (as opposed to personality, for example), then the plaintiff has failed to prove sexual harassment.

Of course, not all workplace conflicts between men and women are because of sex. For example, in *Scott v Central School Supply, Inc.*, the district court rejected the jury's finding that the plaintiff suffered sexual harassment and discriminatory discharge, because there was no evidence that sex was a factor in any conduct affecting plaintiff. The court granted defendant's motion for judgment as a matter of law because plaintiff's allegations were "sex neutral" and because acts of personal animosity do not, in and of themselves, constitute sexual harassment.

Although the conduct in *Scott* was not explicitly sexual, it may have been sex-based nonetheless. Starting from a definition of sex as fantasy, the court would make that determination by considering whether the conduct occurred because of an individual or shared illusion of plaintiff's identity, based on gender (including biology), desire (explicit or not) and/or sexuality.

In many cases, however, the issue is not whether the harassment was because of sex; often the nature of plaintiffs' evidence — pornography, propositions, comments — is explicitly sexual. The question of severity or persuasiveness, then, does not refer to the existence of sexual harassment; rather it concerns the extent to which the sexual harassment caused the change in

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264 But see Brookins, 59 Albany L Rev at 75–81 (cited in note 255) (arguing that direct evidence standard is problematic).


266 Id at 528–29. Plaintiff alleged that her supervisor (1) yelled at her and another woman to get out of his office; (2) asked her to "humor" him while he moved a partition in her office; (3) remarked that he had two store managers and only one (a male) understood him; (4) remarked to a male manager that plaintiff could have any fluorescent posterboard there was in the warehouse; (5) was late in getting out Christmas advertising for two stores; and (6) responded that he was "grow[ing] weary" of plaintiff's petty complaints when she complained that he was "holding up" her orders. Id at 524.

267 Id at 529. Although plaintiff testified that her supervisor was generally insensitive, abrupt and rude to his subordinates but not to his superiors, the court did not characterize this behavior as sexual even though most of the subordinates were women and most of the supervisors were men. See id at 524.

268 913 F Supp at 529 (citations omitted).

269 But see *Dornfeld v Omega Optical, Co, LP*, 1998 US Dist LEXIS 1081, *9–10 (E D La) (rejecting mixed motive framework in quid pro quo sexual harassment case because there was no direct evidence that the employer, as opposed to female supervisor, sexually harassed male plaintiff).
The severe or pervasive requirement is an inquiry into whether the sexual harassment was the "but for" cause of the change in terms or conditions or whether the change was due to some other factor.

In granting summary judgment against plaintiff's hostile work environment claim, the court in Gearhart v Sears, Roebuck & Co, Inc, noted that "Hostile work environment sexual harassment is behavior that would not occur but for the sex of the employee." In that case, plaintiff alleged that other employees told jokes with a sexual connotation (including a joke regarding women's undergarment liners), that a manager used non-sexual profanity, that plaintiff received faxes with a sexual connotation, and that female employees were referred to as "girls" and badgered because they lacked college degrees.

After Meritor was decided in 1986, and prior to the 1991 Amendment, it was reasonable to inquire into whether or not the harassment had caused a change in plaintiff's terms, conditions or privileges. After the 1991 Amendment, however, such an inquiry is simply improper. Even if the sexual harassment, standing alone, did not change the employee's terms, conditions or privileges of employment, a plaintiff should have a valid claim if the sexual harassment contributed to the adverse conditions. That the harassment was mild does not mean that the statute has not been violated; it merely means that the sexual harassment was not the "but for" cause of the adverse change in the terms, conditions or privileges of employment.

Schultz notes that sexual harassment proof is often split between disparate treatment and hostile work environment claims. Evidence of harassment that does not explicitly involve sexual desire is often analyzed under the disparate treatment framework, while explicitly sexual evidence is analyzed under the

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270 See text accompanying notes 172–73 (explaining that severe or pervasive requirement is not a determination of whether or not sexual harassment is sex discrimination but whether or not the sexual harassment altered the terms or conditions of employment).


272 Id at 1271 (emphasis added) (internal quotation marks omitted).

273 Id at 1269.

274 Meritor, 477 US 57 (1986); see also notes 160–71 and accompanying text.

275 See Schultz, 107 Yale L J at 1707–08 (cited in note 29) ("According to the court [in King v Board of Regents of the University of Wisconsin System, 898 F2d 533 (7th Cir 1990)], the difference between disparate treatment and hostile work environment harassment is that whereas 'claims of disparate treatment must affect the term or conditions of employment,' in a hostile work environment claim, 'a loss of a tangible job benefit is not necessary since the harassment itself affects the terms or conditions of employment' (so long as it is sufficiently severe or pervasive).") (footnotes omitted).
hostile work environment framework. Absent a tangible job consequence, evidence of non-explicit sexual harassment is insufficient to prove a claim of disparate treatment, and isolated from evidence of non-explicit harassment, explicit sexual harassment evidence is insufficient to meet the "but for" causation standard of severity and pervasiveness. At least part of the problem that Schultz identifies would be resolved if courts recognized a violation of the statute where the sexual harassment is mild, but nonetheless contributes to the hostility in the work environment. In other words, after the enactment of the 1991 Amendment, given a work environment that is somehow hostile (constituting a change in terms, conditions or privileges), sexual and sex-based harassment need not cause the hostile work environment, but simply must be a motivating factor in the hostile work environment.

One might argue that Congress's amendment of Title VII to require only proof that the employment action was a motivating factor, rather than proof that the employment action was a "but for" cause, should be limited to disparate treatment cases because that provision of the 1991 Amendment was a response to the Court's decision in Price Waterhouse. However, nothing in the 1991 Amendment limits its application to disparate treatment cases. The Amendment refers to "any" employment practice. Altering the terms, conditions, or privileges of employment, like failing to hire or terminating an employee, is an employment practice. Because altering the terms, conditions, or privileges of employment by harassment, like the failure to promote, for example, was an "employment practice" when the 1991 Amendment

See id at 1714–15 ("Despite the origin of hostile work environment in the law of disparate treatment, courts have developed analyses that distinguish the two causes of action and endow each with a life of its own; to many courts, the two claims have become 'factually and legally distinct.'"). See also Franke, 49 Stan L Rev at 716–18 (cited in note 29) (noting that where sexual harassment is not explicitly motivated by desire, courts often require proof that the conduct was based upon sex).

See Schultz, 107 Yale L J at 1718 (cited in note 29):

The problem with disaggregation should be obvious by now. It weakens the plaintiff's case and distorts the law's understanding of the hostile work environment by obscuring a full view of the culture and conditions of the workplace. Both the hostile work environment and the disparate treatment claims are trivialized. When removed from the larger discriminatory context, the sexual conduct can appear insignificant. For this reason, courts often conclude that the harassment was not sufficiently severe or pervasive to alter the conditions of employment and create a hostile or abusive work environment.

See notes 255–56 and accompanying text.

was enacted, the Amendment thus requires only that sex be a motivating factor in altering the work conditions in sexual harassment cases, just as it requires only that a prohibited form of discrimination be a motivating factor in cases involving the failure to promote. To require that sexual harassment be severe or pervasive is to require, contrary to the 1991 Amendment, that the sexual harassment alone “alter” the conditions of employment (be a “but for” cause) rather than require that sexual harassment be a motivating factor in the alteration of the conditions of employment. Thus, Congress’s enactment of the 1991 Amendment supersedes the severe or pervasive requirement.

In *Llampallas v Mini-Circuits Lab, Inc*,” a case involving events occurring prior to November 1991, a Florida district court applied the *Price Waterhouse* analysis to a quid pro quo sexual harassment claim. The plaintiff and her lover both worked for defendant Mini-Circuits. The court found direct evidence of sexual harassment because during their relationship, plaintiff’s lover, who was the general manager for the defendant, told plaintiff that she would cause plaintiff to be fired if their relationship ever ended. When their relationship eventually ended, the plaintiff’s former lover told the defendant’s president that she could not work with plaintiff. The defendant then terminated the plaintiff. The court found direct evidence of sexual harassment. Because the defendant argued that the plaintiff’s termination was due to a legitimate motive, plaintiff’s poor work performance, the court applied the *Price Waterhouse* analysis to the plaintiff’s complaint. The court reasoned, “Once the plaintiff has come forth with direct evidence of sexual harassment violative of Title VII, to avoid liability, the defendant must prove by a preponderance of the evidence that it would have made the same decision irrespective of the harassment.” The defendant failed to meet this burden, and the plaintiff prevailed.

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199] “SEVERE OR PERVERSIVE” AS MALE FANTASY 247

280 *Oncale*, 523 US at 81 (“[Title VII] forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.”). Requiring that sexual harassment alter work conditions is a “but for” condition contrary to the statute.

281 1995 US Dist LEXIS 21199 (S D Fla).


285 Id at *17–18.
In Stacks v Southwestern Bell Yellow Pages, Inc,\textsuperscript{286} the district court’s application of Price Waterhouse to a pre-1991 hostile work environment claim was reversed. Plaintiff Stacks alleged that she had been harassed and discharged because of her sex.\textsuperscript{287} She presented direct evidence of both sexually explicit harassment and harassment that was not explicitly sexual in nature.\textsuperscript{288} Stacks alleged that business parties were held in hotel rooms to which male representatives brought “dates,” whom they referred to as “road whores” and “berated, talked down to, made fun of, and passed around.”\textsuperscript{289} At one party, a videotape was shown in which two female sales representatives in a car exposed themselves to male representatives.\textsuperscript{290} The demeaning nature of the parties affected Stacks and made her uncomfortable with co-workers.\textsuperscript{291} The plaintiff also presented evidence of sexually offensive comments, “jokes” about masturbation, references to “tits and ass,” and comments about sales representatives’ breasts.\textsuperscript{292}

Additionally, Stacks alleged that Hudson, plaintiff’s immediate supervisor, treated her differently than he treated white males.\textsuperscript{293} She testified that he “humiliated, degraded, and raked her over the coals” in front of co-workers.\textsuperscript{294} She alleged that despite her excellent sales results, he treated less successful males better, and that Hudson’s abusive behavior made her feel “worthless” and that she could do nothing right.\textsuperscript{295} Hudson admitted stating, “[W]omen in sales were the worst thing that had happened to this company.”\textsuperscript{296} Other employees testified that Hudson had also stated, “[T]he business had gone downhill since the company had started hiring women and blacks” and “[T]here isn’t a woman alive that can make it with [this company].”\textsuperscript{297} Plaintiff was also subjected to an unusual grievance procedure.\textsuperscript{298}

Defendant, however, presented lawful motives for plaintiff’s treatment and termination. Although the plaintiff was a top sales

\textsuperscript{286} 27 F3d 1316 (8th Cir 1994).
\textsuperscript{287} Id at 1318.
\textsuperscript{288} Id at 1318–21.
\textsuperscript{289} Id at 1320.
\textsuperscript{290} Stacks, 27 F3d at 1320.
\textsuperscript{291} Id.
\textsuperscript{292} Id at 1321.
\textsuperscript{293} Id at 1319.
\textsuperscript{294} Stacks, 27 F3d at 1319.
\textsuperscript{295} Id.
\textsuperscript{296} Id at 1318.
\textsuperscript{297} Id.
\textsuperscript{298} Stacks, 27 F3d at 1318.
representative,299 she was terminated when her supervisor allegedly became concerned that she had "lost control" of her job, disregarded Hudson’s instructions, and lied about her whereabouts on the job.300 After an incident in which the plaintiff burst into tears when corrected, the plaintiff told Hudson that the job was "too much stress and strain" and wrote him a note stating that she "quit."301 Hudson tore up the note and persuaded her to stay. When Stacks’ performance allegedly continued to lag, the defendant suspended her for five days and then terminated her.302 Plaintiff testified that she “quit” in order to stop the harassment and that no male employee had been suspended for the performance problems attributed to her.303

Both the district court and the court of appeals treated the plaintiff’s termination claim separately from her hostile work environment sexual harassment claim.304 After the trial court found no discrimination, Stacks appealed. The court of appeals remanded because the district court had failed to apply the Price

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299 Id at 1321.
300 Id at 1319.
301 Id at 1318–19.
302 Stacks, 27 F3d at 1319.
303 Id at 1319–20. Defendant alleged that plaintiff failed to return phone calls. Id at 1320.
304 See generally Schultz, 107 Yale L J 1683 (cited in note 29) (questioning the separate treatment of sexual and sex-based harassment claims). The district court in Chapin v FDIC, 1994 US Dist LEXIS 605 (N D Ill) rejected plaintiff’s claim of sexual harassment based on sex stereotyping. Id at *3–5. Defendants argued that plaintiff’s claim should be dismissed because “sex stereotyping ... cannot constitute sexual harassment.” Id at *3. The district court agreed, concluding “[t]he Supreme Court held in Price Waterhouse v Hopkins that reliance by an employer on sexual stereotypes when making employment decisions constitutes sex discrimination in violation of Title VII, not sexual harassment.” Id at *4 (citation omitted).

Not only is the court’s failure to apply Price Waterhouse in the sexual harassment context an example of the disaggregation of sex-based harassment from sexual harassment, it exemplifies the misconception of causation in sexual harassment cases when there is no tangible job consequence beyond plaintiff’s discomfort and lack of success. But see Doe v City of Belleville, 119 F3d 563, 580–81 (7th Cir 1997) (applying Price Waterhouse "but for" analysis to determine viability of same-sex sexual harassment claim); Rasmusson v Copeland Lumber Yards, Inc, 988 F Supp 1294, 1300 (D Nev 1997) (same). The court in Chapin held that "In order to successfully state a claim for hostile environment sexual harassment, plaintiff must allege facts that show that defendants' sexual harassment, as defined by the Seventh Circuit, caused a hostile work environment." Chapin, 1994 US Dist LEXIS 605 at *3.

The imposition of the hostile work environment requirement on sexual harassment claims where there is no tangible job consequence is the imposition of a but-for causation requirement. In other words, the hostile work environment is proof that but for the sexual harassment, the plaintiff would have prospered in the workplace. The 1991 Amendment removed the but-for causation element. See text accompanying notes 275–80. It is enough that the harassment be mild or sporadic and the environment unpleasant. If plaintiff proves that a fantasy of relevant difference was a factor affecting her employment, then plaintiff has proven sexual harassment according to the motivating factor standard.
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Waterhouse analysis. On remand, the district court applied pre-1991 Amendment Price Waterhouse analysis to both the termination and sexual harassment claims, and found no violation of the statute.306

On appeal, the Eighth Circuit reversed the district court's decision regarding the plaintiff's termination claim, and found that Hudson had participated in the employment decision and that his comment that "women were the worst thing" indicated discriminatory animus even though Hudson characterized the comment as a joke.306 Additionally, the court found "ample circumstantial evidence"307 as well as undisputed direct evidence that Stacks was treated differently from her male counterparts in the disciplinary actions leading to her termination.308 Moreover, the court determined that the division sales manager had "set [plaintiff] up to fail by notifying her of the suspension five days before the end of [a major sales event] and then refusing to offer her any assistance in completing her assignments."309 Having determined that Stacks was discriminatorily discharged, the court concluded, based on evidence supporting plaintiff's discharge as well as evidence of incidents of a sexual nature,310 that the defendant maintained a hostile work environment.311

In reaching its conclusion, however, the court rejected the application of a Price Waterhouse analysis in hostile work environment cases. According to the court,

[t]he mixed-motives analysis is inapplicable to a hostile-work-environment claim. The analysis was designed for a challenge to "an adverse employment decision in which both legitimate and illegitimate considerations played a part." An employer could never have a legitimate reason for creating a hostile-work-environment. "Rather, the key issue" in analyzing a hostile-work-environment claim "is whether members of one sex are exposed to disadvanta-

306 Stacks, 27 F3d at 1323.
306 Id at 1323–26.
307 Id at 1325.
308 Id at 1325–26.
310 In its initial decision, the district court had concluded that plaintiff's sexual harassment claim was barred because Stacks had not detailed incidents of a sexual nature before the EEOC. Id at 1326 n 4. See generally Schultz, 107 Yale L J 1683 (cited in note 29) (discussing disaggregation of sexual claims from non-sexual claims in the sexual harassment context).
311 Stacks, 27 F3d at 1326–27.
geous terms or conditions of employment to which members of the other sex are not exposed.\textsuperscript{312}

The court's conclusion is inconsistent with the theory of mixed-motive cases.\textsuperscript{213} An employer could have many legitimate (that is, lawful) reasons for creating a hostile work environment.\textsuperscript{314} The employer may not like smokers or people who are slightly overweight or morning people. The employer may be having personal problems or be overworked. Any of these factors and a host of others may lawfully motivate an employer to create a hostile work environment. The creation of the hostile work environment may not, however, be motivated by any fantasy of sex.

In \textit{Stacks}, where the harassment was both severe and pervasive, the court's failure to apply a \textit{Price Waterhouse} analysis was of no consequence. But where the sexual harassment is not severe or pervasive, the failure to apply the motivating factor analysis could alter the result of the litigation. Applying the motivating factor test, plaintiffs who, because of sexual harassment, might have felt marginalized, languished, lost interest or confidence in their work, or experienced discomfort in the workplace, would have cognizable claims if the conduct was motivated by sex, even if the conduct was neither severe nor pervasive.

\textit{Roark v Kidder, Peabody & Co}\textsuperscript{315} illustrates the point. The plaintiff, Candice Roark, was a securities sales assistant who alleged that her work environment was hostile. In addition to specific acts of sexual harassment, plaintiff alleged that on four occasions, the branch manager, McLochlin, failed to sign trade correction documents that she had submitted for authorization, that McLochlin reprimanded plaintiff for errors that co-workers commonly made without being subject to reprimand, and that McLochlin "walked toward her while she was speaking to co-workers [and] addressed the co-workers by name and ignored [her]."\textsuperscript{316} In addition, Roark alleged that when she complained about McLochlin's conduct to the Human Resources department, McLochlin

\begin{footnotes}
\footnote{312}{Id at 1326 (citations omitted).}
\footnote{313}{But see Bisom-Rapp, 1995 Utah L Rev at 1047–48 (cited in note 254) (discussing difficulty of untangling legitimate and illegitimate motives).}
\footnote{314}{Compare \textit{EEOC v Farmer Brothers Co}, 31 F3d 891, 898 (9th Cir 1994) (suggesting that harassers may have a "mixed motive" as between sexual desire and hatred of women), with Franke, 49 Stan L Rev at 719–20 (cited in note 29) (accepting that the court's reasoning in \textit{Stacks} "may be true," but asserting bisexual harassment as illegitimate, yet nondiscriminatory).}
\footnote{315}{959 F Supp 379 (N D Tex 1997).}
\footnote{316}{Id at 381.}
\end{footnotes}
called her into a meeting with her immediate supervisor and "yelled and screamed at her and called her selfish."\footnote{Id.} Roark testified that she was frightened and upset, began crying, felt nauseated, and feared that her heart, which was regulated by a pacemaker, would fail.\footnote{Id at 381–82.} While still crying, Roark ran from McLochlin’s office down 39 flights of stairs and again telephoned a Human Resources representative. She then fainted and was taken by ambulance to the hospital, where she was treated and released.\footnote{Id.} The employment situation deteriorated and plaintiff ultimately was asked to resign.\footnote{Id at 380–81.}

Setting aside specific instances of sexual harassment, there was evidence that plaintiff’s workplace was hostile. The next question, then, should be whether there was direct evidence that sex was a motivating factor, even if not a “but for” cause, in the hostility of plaintiff’s workplace. Roark based her hostile work environment claim on four events: two “non-sexual” hugs, a comment by McLochlin to a temporary worker that “Gloria and Candi (Plaintiff) are great people if you can keep them sober,” and a comment regarding plaintiff’s attire.\footnote{Id.} It is arguable that the two hugs were not only “non-sexual”\footnote{See text accompanying notes 71–78 (challenging the non-sexual/sexual distinction).} but also not sex-based\footnote{Roark described the hugs as “non-sexual” and said that she was not offended when they occurred. \textit{Roark}, 959 F Supp at 380. However, she testified that the hugs contributed to the hostility of the work environment in retrospect when another co-worker told her that McLochlin gave her several “unwanted hugs” that “put [the co-worker] in fear and made her cry.” \textit{Id} at 384. During deposition, however, the co-worker denied ever telling Roark that the hugs that she received were inappropriate. \textit{Id}. The court resolved the conflict in testimony in Roark’s favor for purposes of summary judgment. \textit{Id}.} and that the comment regarding Roark’s sobriety was also not sex-based. In regard to plaintiff’s attire, however, McLochlin said, "Those boots have 1-900 numbers written all over them. Now I know how you really make your money with your brokers."\footnote{Id at 380–81.} Roark testified that the comment was made in the presence of co-workers and a client and that she felt “severely humiliated and embarrassed."\footnote{Id.} This comment regarding her attire was direct evidence that sex was a motivating factor in the hostility of the work environment.

The court, however, concluded that plaintiff had failed to establish a genuine issue of material fact with regard to her claim
of sexual harassment based on a hostile work environment.\textsuperscript{326} According to the court, "Two hugs and two jokes do not constitute conduct of the level necessary to maintain a claim for sexual harassment."\textsuperscript{327} The court reasoned that the "conduct was by no means frequent, severe or threatening, nor did it unreasonably interfere with Plaintiff's work performance."\textsuperscript{328} The court’s conclusion is particularly illustrative because the court explicitly stated that it considered both sexual and "non-sexual" evidence in determining that Roark had failed to establish a hostile work environment.\textsuperscript{329} According to the court, "Conduct does not need to be sexual in nature to constitute sexual harassment. It only needs to be unlawfully based on gender.... Assuming that the entirety of McLochlin's actions are included in Plaintiff's claim, Plaintiff still fails to meet her evidentiary burden."\textsuperscript{330}

The court determined that most of the conduct plaintiff complained of was not sex-based.\textsuperscript{331} However, without the severe or pervasive standard, plaintiff's case could have at least survived summary judgment because plaintiff's allegations would have presented an issue of material fact that sex was a motivating factor in the hostility of the workplace, applying the 1991 Amendment. If the court finds that the alleged sexual harassment was mild and sporadic, plaintiff would be limited to declaratory and injunctive relief as provided by the statute.

C. The Severe or Pervasive Standard is Contrary to Title VII's Original Meaning

The basic textbook rule for statutory construction is that courts must construe statutes according to the intent of the legislature:

In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of

\textsuperscript{326} Id at 385. The court, however, found that plaintiff's retaliation claim was sufficient to survive defendant's motion for summary judgment. Id at 387.
\textsuperscript{327} Roark, 959 F Supp at 384.
\textsuperscript{328} Id. The court also considered the fact that the hugs and comments stopped after Roark told McLochlin that she was offended. Id at 384–85.
\textsuperscript{329} Id at 385. See text accompanying notes 73–82 (addressing the significance of the non-sexual/sexual distinction).
\textsuperscript{330} Id (citations omitted).
\textsuperscript{331} Roark, 959 F Supp at 385.
the legislature, and to carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the legislature.\[332\]

The intentionalist view conceptualizes a collective congressional mindset and looks to that congressional intent for statutory meaning and authority. Intentionalist method\[333\] is based on a respect for the constitutional role of the legislature as lawmaker.\[334\]

With the resurgence in discourse concerning interpretive methodology,\[335\] however, scholars have noted the degrees to which Supreme Court interpretations diverge from the pursuit of legislative intent. William Eskridge identifies intentionalism as

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\[333\] In Oregon, the courts are directed by statute to conform their construction of statutes to legislative intent. Or Rev Stat § 174.020 (1995) (“In the construction of a statute the intention of the legislature is to be pursued if possible.”). In Portland General Electric Co v Bureau of Labor & Industries, 859 P2d 1143, 1145–47 (1993), the Oregon Supreme Court held that “the intention of the legislature” could be discerned by first examining the text of the statute in its context and then, if necessary, the legislative history and other interpretive aids. See also Carl E. Brody, Jr., A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court, 29 Akron L Rev 291, 313–21 (1996) (discussing legislative intent of constitutional and statutory provisions regarding affirmative action). But see Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv J L & Pub Pol 61, 65–66 (1994) (arguing that subjective intent is irrelevant in construing the intention of the legislature).

\[334\] In The Interpretation and Application of Statutes (Little, Brown 1975), Dickerson notes:

[The legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches.

The facts that this separation of powers is not absolute, and that the allocation is complicated rather than simple, in no way detract from the simple assertion that, within the domains of lawmaking in which they are constitutionally permitted to operate and within the differing means by which they make their pronouncements, any conflict between the legislative will and the judicial will must be resolved in favor of the former. It is assumed, therefore, that within these boundaries the judicial branch must remain appropriately deferential to the properly promulgated views of the legislature.

Id at 7–8 (footnote omitted).

one of three categories of originalist method.\textsuperscript{336} Besides discerning the intent of Congress, originalists also refer to congressional purpose\textsuperscript{337} and/or the strict text\textsuperscript{338} as authority for the meaning of the statute.\textsuperscript{339}

1. Intentionalist Analysis.

Sexual harassment is not mentioned in the legislative history of the 1964 Civil Rights Act. However, the legislative history of Title VII reveals the lawmaker's transformative intent. The plan of the Act,\textsuperscript{340} as stated in the House Judiciary report, was "to eliminate" unlawful discrimination.\textsuperscript{341} While Congress's transformative intent with regard to race, religion, color, and national origin is clear, some may argue that this intent with regard to sex is less clear. By some accounts, the word "sex" was inserted into the statute as a subversive measure.\textsuperscript{342} Originally, the statute

\textsuperscript{336} Eskridge, Dynamic Statutory Interpretation at 14–25 (cited in note 198).
\textsuperscript{337} Id at 25–34.
\textsuperscript{338} Id at 34–47.
\textsuperscript{339} Jane Schacter notes that "It is common, even mundane, to observe that the Supreme Court's approach to statutory interpretation has become increasingly 'textualist' in character — that is, more oriented to statutory language and the assertedly 'objective' meaning of statutory text than to the collective subjective intent behind the legislation." Schacter, 51 Stan L Rev at 2 (cited in note 335).
\textsuperscript{340} Andrew E. Taslitz discusses the view of intent as legislative "plan":

One can view collective intent as a concept related to, but slightly different from, individual intent. As Justice Breyer has noted, we commonly ascribe group intent to group actions without practical difficulties. . . . Recognizing that law does not result from a single action, but from various interacting activities, leads to deriving intention from a series of acts, emphasizing context and plans. To ascertain a group's intent may require asking: "Of what type of plan would this action be a reasonable first step?" This inquiry avoids ascribing a subjective motive to a group, yet remains consistent with both the common usage of "intent" as applied to groups and the sense that group activity is goal-oriented. By focusing on a group's plan, as revealed by its context, action, and words, this inquiry enables us to determine group legislative intent.

\textsuperscript{341} HR Rep No 88-914 (1963), reprinted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 2026 (GPO 1968).
\textsuperscript{342} Susan Silberman Blasi, The Adjudication of Same-Sex Sexual Harassment Claims under Title VII, 12 Lab Law 291, 297–98 (1996); see also Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L J 1281, 1283–84 (1991) ("[S]ex discrimination in private employment was forbidden under federal law only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination. Sex was added as a prohibited ground of discrimination when this attempted reductio ad absurdum failed and the law passed anyway."). But see Robert Bird, More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 Wm & Mary J Women & L 137, 138 (1997) ("Congress added sex as a result of subtle po-
only prohibited discrimination because of race, color, national origin and religion. Yet, some opposed the transformative mission of the legislation as to those forms of discrimination. For example, Representative George Meader published separate remarks in the House Judiciary Committee Report stating:

The title . . . will have far-reaching consequences on both management and labor; contains onerous provisions for recordkeeping, inspection, and reporting; and constitutes an important but ill-devised limitation upon the area of discretion and decisionmaking of both American businesses and American workers.\(^\text{345}\)

The Minority Report from the House Judiciary Committee stated, "The depth, the revolutionary meaning of this act, is almost beyond description. It cannot be circumscribed, it cannot be said that it goes this far and no farther."\(^\text{344}\) Opponents of the bill added the word "sex" as a strategy for derailing the legislation.\(^\text{345}\) Congress, they thought, could not pass such an extensive measure that included among its prohibitions discrimination because of sex. Rather than detract from the transformative intent of Title VII, opponents' strategy for defeating the measure is a testament to the far-reaching nature of the statute as a whole. To the opponents' surprise, Congress passed the legislation, extending the transformative purpose to eliminate discrimination based on sex.

The legislative history of subsequent amendments makes clear that the revolutionary aims of the statute included the prohibition of sex discrimination. The report on the Pregnancy Discrimination Act from the Senate Committee on Human Resources states: "Congress passed Title VII in 1964 to eliminate discrimination in employment on the basis of race, sex, color, national origin, and religion."\(^\text{346}\) In amending that law in 1972, Congress noted that "discrimination against women . . . is to be accorded the same degree of social concern given to any type of unlawful

\(^{343}\) See note 342 and accompanying text.

Thus, the legislative history of Title VII indicates a congressional intent to transform the workplace through, among other things, the elimination of sex discrimination.

2. Purposive Analysis.

The purpose of Title VII is to transform the workplace to create equality. The severe or pervasive standard as a doctrinal cloaking of proven discrimination is contrary to the statute's original purpose. The Court in *Faragher v City of Boca Raton* explained that the severe and pervasive standards "for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, these standards will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."

Since, as the Court explained, Title VII is not a general civility code, it does not require employers to insure that their managers and supervisors say "good morning" upon arriving to work. It does not mandate "please" or "thank you" or chewing with closed mouths. Title VII does, however, prohibit discrimination, which includes harassment. Many "jokes" are not discriminatory, but when someone discriminates and calls it a joke, the fact that he calls what he has done a joke does nothing to cure the harm. In outlining the parameters of sexual harassment, MacKinnon explained:

"Trivialization of sexual harassment has been a major means through which its invisibility has been enforced. Humor, which may reflect unconscious hostility, has been a major form of that trivialization. As Eleanor Zuckerman has noted, "Although it has become less acceptable openly to express prejudices against women, nevertheless, these feelings remain under the surface, often taking the form of humor, which makes the issue seem trivial and unimportant.""

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347 HR Rep No 238, 92d Cong, 2d Sess 5 (June 2, 1971), reprinted in 1972 USCCAN 2137, 2141.
348 118 S Ct 2275 (1998).
349 Id at 2283–84 (citations and internal quotation marks omitted).
The label "joke" is simply an effort to legitimate the assertion of dominance, to mystify and normalize oppression so that discrimination remains merely a question of civility.

In *Sink v Knox County Hospital*, a co-worker of the plaintiff suggested that she give him an early birthday present by spending the night in a hotel with him. Plaintiff did not believe that the co-worker's request was genuine but warned him that she did not appreciate the comment. Another co-worker who was present told her "not to take it personally because it was only a joke." The first co-worker also asked plaintiff whether she was sleeping with her boyfriend and whether she knew how to masturbate. Plaintiff's co-worker also made various attacks on her competence. In granting summary judgment for defendant, the court concluded that the explicitly sexual conduct of plaintiff's co-workers did "not rise to the necessary level of severity or pervasiveness."

The question should not be whether the harassment was severe. The question should simply be whether what happened was harassment because of sex — that is, due to some fantasy of sexual desire (explicit or not), biological difference, sexuality or gender identity. That is a question to be determined by the fact-finder. If what happened was discrimination because of sex, then the employer has violated the statute. The Supreme Court, by the severe or pervasive standard, is not only failing to pursue the purpose of the statute, but is unnecessarily complicating the analysis. The question should be simple: did the employer harass based on sex? If so, the employer discriminated against the employee and thus violated the statute. The element of degree, in the liability stage, is an unnecessary and counterproductive layer of complexity to a straightforward statute.

Consider the Court's own example from *Oncale v Sundowner Offshore Services, Inc*:

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351 900 F Supp 1065 (S D Ind 1995).
352 Id at 1069.
353 Id.
354 Id.
355 *Sink*, 900 F Supp at 1069.
356 Id at 1070. See also Schultz, 107 Yale L J at 1732 (cited in note 29) (describing "non-sexual" harassment as attacks on women's competence).
357 *Sink*, 900 F Supp at 1075. See also *Long v Eastfield College*, 88 F3d 300 (5th Cir 1996) (holding offensive joke concerning condoms was insufficient to establish hostile work environment claim).
358 See text accompanying notes 172–73, explaining that sexual harassment is sex discrimination.
In same-sex (as in all) harassment cases, that inquiry [regarding the objective severity of harassment] requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field — even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.\(^{360}\)

Is the distinction here that one smack on the butt is severe or pervasive while the other is not, as the Court suggests? Or is the distinction that a random smack, which is not individually directed and which is one of fifty or so arbitrarily administered smacks, is not discrimination (and probably not unwelcomed), while an individual and directed smack of a secretary in an office is discrimination (and probably unwelcomed)? Imagine that the coach administered the smack on the butt to only one player, the same player, sporadically or every time he entered the field. Imagine that the coach administered the smack despite the football player's objection. The Court acknowledges that "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."\(^{561}\) Nevertheless, the purpose of the statute is realized not by asking whether the discrimination or harassment was severe; rather the question is whether the conduct (mild or severe) was harassment because of sex.

The Court in\(^{1}\) Oncale reasoned that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."\(^{562}\) As the Court noted elsewhere, "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."\(^{563}\) By this analysis, the Court stated explicitly its intention to maintain the status quo. The fact that the action in question is commonplace, the fact that it describes an

\(^{360}\) Id at 81.
\(^{561}\) Id at 81–82.
\(^{562}\) Id at 81.
\(^{563}\) Faragher, 118 S Ct at 2283 (citation and internal quotation marks omitted).
interaction between people that is "normal," does not mean it is not a violation of the statute. Inequality is commonplace. It is normal for racial minorities to experience discrimination. It is normal for women to experience discrimination. The central problem that the severe or pervasive framework fails to address is the possibility that normal behavior, when non-consensual, is not only discriminatory, but a key impediment to equality in the workplace. Title VII is transformative; it is designed to rectify the way that people commonly interact. The statute does not aim to create a workplace where harassment is not severe or pervasive, a workplace that is bearable or tolerable. Rather, the statute aims to eliminate discrimination because of sex in the workplace.

3. Textual Analysis.
Nothing in the language of Title VII explicitly prohibits sexual harassment.

However, accepting the Court's definition of sexual harassment as sex discrimination, nothing in the language of the statute permits harassment that is not severe or pervasive. The statute provides, in pertinent part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

An employer who is covered by the Act may be excused from these prohibitions with regard to hiring where the individual's religion, sex, or national origin constitutes a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of that particular business or enterprise. In other words, an employer may discriminate in hiring only where such discrimination amounts to a bona fide occupational qualification. Absent a BFOQ, the statute provides for the elimination of sex discrimination with regard to the failure or refusal to hire or discharge, or other discrimination with respect to compensation, terms, conditions, or privileges of employment.

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364 See Franke, 49 Stan L Rev at 702 (cited in note 29).
In *Oncale, Ellerth,* and *Faragher,* the Court relies primarily on its previous decisions in *Meritor* and *Harris* for the proposition that harassment must be severe or pervasive to be actionable. This proposition contradicts the plain language of the statute. The statute states that it is an unlawful employment practice “otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.” The words “to discriminate” are unconditional. The statute does not say that it is unlawful “to discriminate severely.” It does not say that it is unlawful “to discriminate pervasively” or “unreasonably.” Nothing in the statute as amended can sustain the queries in *Harris* regarding whether the discrimination is frequent or physical (as opposed to merely offensive) or whether the discrimination unreasonably interferes with performance (as opposed to reasonably interfering). The statute gives the very simple mandate that no sex discrimination is reasonable.

Sexual harassment pertains to the statute’s prohibition of discrimination with respect to the “terms, conditions or privileges” of employment. This provision is in the same section as the statute’s prohibition of discrimination in hiring and discharge. Since the passage of the 1991 Amendment, courts make no distinction, for purposes of liability supported by direct evidence, in hiring and discharge cases between an employer who discriminates a little versus one who really discriminates. Even in sexual harassment cases, courts do not pause to examine the severity or pervasiveness of the discrimination where the harassment involves a tangible job consequence. The Supreme Court distinguishes between sexual harassment cases involving a tangible job consequence and those lacking a tangible job consequence. Both are cognizable under Title VII, but the latter requires sexual harassment that is severe or pervasive. Sexual harassment cases resulting in adverse tangible job consequences are a hybrid of the discharge and terms or conditions provisions. In sexual harassment cases in the absence of a tangible job consequence — pure terms, conditions, or privileges cases — the Court requires plain-

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198] “SEVERE OR PERVERSIVE” AS MALE FANTASY 261

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See notes 180-95 and accompanying text.
See notes 252-331 and accompanying text.
*Ellerth,* 118 S Ct at 2264-65.
Id at 2265.
tiffs to prove that the harassment they experienced was severe or pervasive. In other words, in pure terms or conditions cases, the Court requires a higher degree of discrimination, explicitly permitting some discrimination because of sex. This interpretation produces an inconsistency that departs from the language of the statute.

III. THE COURT'S ANALYSIS OF EMPLOYER LIABILITY AND THE AFFIRMATIVE DEFENSE CONFLICT WITH THE SEVERE OR PERVERSIVE STANDARD

Despite its reaffirmation of the severe or pervasive standard, the Court during the 1998 Term reached several important conclusions regarding sexual harassment law that will further the goal of workplace equality. The Court held, among other things, that same-sex sexual harassment is cognizable under the statute and that employers may be liable for sexual harassment by supervisors. The progressiveness of these decisions, especially the decision regarding employer liability, stands in contrast to the affirmation of the severe or pervasive standard, which in turn conflicts with the affirmative defense conditioning employer’s liability.

A. The Vicarious Liability and Affirmative Defense Frameworks

The central holding of both Ellerth and Faragher is that employers may be liable for sexual harassment committed by a supervisor in certain circumstances. Applying principles from the Restatement(Second) of Agency, the Court concluded that an employer would be vicariously liable for the actions of its supervisors where there is a tangible job consequence, or in the absence of a tangible job consequence, where the sexual harassment is severe or pervasive, and the employer is unable to prove the affirmative defense. The affirmative defense created by the Court “comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm other-

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378 Faragher, 118 S Ct at 2278–79; Ellerth, 118 S Ct at 2270.
379 Faragher, 118 S Ct at 2292–93.
The Court noted that proof that the employer had promulgated an anti-harassment policy with complaint procedures would be sufficient, but not necessary, to satisfy the first element of the defense. And proof that an employee failed to take advantage of the existing complaint procedures would normally be sufficient, but not necessary, to satisfy the second element.

B. Employer Liability

The Court’s recognition of employer liability for sexual harassment by supervisors is significant. This result will further the goal of creating equality in the workplace. The reasoning of the Court in reaching this goal, however, distances employers from the sexual harassment that occurs in the workplace in the absence of a tangible job consequence, rationalizing a framework that requires sexual harassment in such instances to be severe or pervasive.

1. Supervisory Employees.

When there is a tangible job consequence, the employer’s role in the sexual harassment is clear, but when there is no tangible job consequence, courts view the harm as less real and employers as being removed from the employment practice.

The Court implicitly characterizes employers as merely indirect participants in acts of discrimination by supervisors where there is no tangible job consequence. This assumption is illustrated by the Court’s characterization of the issue in Ellerth: “The question presented on certiorari is whether [plaintiff] can state a claim of quid pro quo harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for [the supervisor’s] alleged misconduct, rather than liability limited to its own negligence.” From this perspective, the supervisor is the party that acts while the employer is passive.

Courts’ proximity analysis using the severe or pervasive standard arises in the context of distancing the employer from

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380 Ellerth, 118 S Ct at 2270.
381 Id.
382 Id.
383 See Faragher, 118 S Ct at 2284–85.
384 Ellerth, 118 S Ct at 2265. The issue presented in the petition for certiorari was “Whether a claim of quid pro quo sexual harassment may be stated under Title VII . . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?” Id (alteration in original).
the harassment. When the employer's involvement has been removed from the sexual harassment — when there is no tangible job consequence — the plaintiff must prove that the sexual harassment was severe or pervasive and the employer has an opportunity to establish an affirmative defense.

The Court is able to presume distant employer responsibility only by ignoring the simplest interpretation of the statute. According to the statute, agents of the employer are the employer. The statute defines employer as "a person engaged in an industry affecting commerce . . . and any agent of such a person." It then proscribes discriminatory conduct by employers, which incorporates conduct of the employers' agents by definition. The question, then, is who is an agent, not whether an employer should be liable for the actions of its agent. Supervisors, empowered by the employer, are agents. Supervisors must therefore be read into the definition of employer in order to avoid rendering superfluous the language of the statute. If the supervisor acts, according to the statute, the employer has acted. There is no need to assess the liability vicariously.

The Court circumvents the clear language and intent of the statute by substituting new standards for employer liability rather than simply giving content to the word "agent." Consider an alternate statute that separately defined "agent" and separately proscribed the agent's actions. In applying that statute, it would be appropriate for the Court to consider the issue of vicarious liability. It should not, however, have done so given the statute in its current form.

2. Non-Supervisory Employees.

The Court's decision regarding employer liability for supervisors may have implications for claims regarding employer liability for the actions of non-supervisors. In such cases, courts may further distance employer fault from sexual harassment.

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365 42 USC § 2000e(b) (1994).
366 A simple indication of the Court's error in this regard is its conclusion that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." Ellerth, 118 S Ct at 2269 (emphasis added). This is contrary to the language of the statute which provides that the actions of an agent are the actions of the employer. If supervisors and managers are removed from this connection to the employer, then the inclusion of "agent" in the definition of employer is superfluous because it adds nothing to what the common law already provides.
367 The statute, for example, defines employment agencies separately. See 42 USC § 2000e(c) (1994).
368 See Restatement (Second) of Agency § 219(1) (1958).
Tangible job consequences (hiring, discharge, promotion) are generally implemented by employees having some supervisory authority. As a result, employers will generally not be liable for sexual harassment by a non-supervisor that involves a tangible job consequence. However, because non-supervisory employees engage in sexual harassment where there is no tangible job consequence, the Court may have felt compelled to reaffirm the severe or pervasive limitation on employer liability in the absence of a tangible job consequence and create an affirmative defense not provided in the statute.

Although the issue of employer liability for sexual harassment by non-supervisory employees was not before the Court during the 1998 term, the Restatement sections discussed by the Court could arguably apply to such harassment. The Restatement (Second) of Agency § 219(2), discussed by the Court, provides as follows:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Both subsections (b) and (d), the subsections that the Court considered in evaluating employer liability due to the actions of a supervisor, could be applied to impose employer liability for the conduct of non-supervisory employees. The Court evinced considerable skepticism that the second component of subsection (d), the aided in the agency relation standard that applies to supervisors, would apply to non-supervisors. Nevertheless, subsection

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389 See Ellerth, 118 S Ct at 2267, quoting Restatement (Second) of Agency § 219(2).
390 See id at 2267.
391 The Court noted that "neither the EEOC nor any court of appeals to have considered the issue" had applied the agency relation standard to non-supervisors. Id at 2268.
(b) and the first component of subsection (d) arguably should apply to the conduct of non-supervisors.

Under subsection (b), an employer should be liable for sexual harassment by a non-supervisor that is attributable to the employer's own negligence. Nothing in this Restatement section or the Court's discussion of it limits its application to the actions of supervisors.\(^\text{392}\) This is especially true in light of the Court's observation that under this provision an employer can be liable for conduct outside the scope of the employee's employment if the employer knew or should have known about the conduct and failed to stop it.\(^\text{393}\) The Court did not resolve the issue of employer liability for a supervisor's conduct under this subsection of the Restatement because "[n]egligence sets a minimum standard for employer liability under Title VII" and the plaintiff sought a more stringent standard.\(^\text{394}\) Nevertheless, employers, at a minimum, should be liable for sexual harassment by a non-supervisor that occurs because an employer has turned a blind eye to harassment among co-workers.

In addition to subsection (b), the first component of subsection (d) should provide a limited basis for employer liability for sexual harassment by non-supervisory co-workers. Under the first component of subsection (d), an employer is liable when an employee uses apparent authority.\(^\text{395}\) The apparent authority standard is different from the agency relation standard in that the latter involves actual authority.\(^\text{396}\) The Court opined that an employer could be liable for sexual harassment by a non-supervisory co-worker in the unusual case where there is a reasonable false impression that the co-worker was a supervisor, when he in fact was not.\(^\text{397}\)

The Court did not discuss subsection (c).\(^\text{398}\) Nevertheless, an argument could be made that employers have a nondelegable duty to provide a workplace free from harassment.\(^\text{399}\) Under this

\(^{392}\) See id at 2267.
\(^{393}\) Ellerth, 118 S Ct at 2267.
\(^{394}\) Id.
\(^{395}\) Id.
\(^{396}\) Id at 2267–68.
\(^{397}\) Ellerth, 118 S Ct at 2267–68.
\(^{398}\) Id at 2267 (“There is no contention . . . that a nondelegable duty is involved”).
theory, employers could be liable for sexual harassment by non-supervisors.

With the door opened to arguments for employer liability for sexual harassment by non-supervisory co-workers, it is less surprising that the Court felt compelled, contrary to the language and intent of the statute, to limit the scope of that liability by reaffirming the severe or pervasive standard and creating an affirmative defense. The limitation of the affirmative defense, however, should apply to circumstances not specified by the statute — employer liability for the actions of non-supervisory co-workers — rather than employer liability for the actions of supervisors.

C. The Affirmative Defense

Under the affirmative defense established by the Court in Ellerth and Faragher, an employer must exercise reasonable care to prevent and correct sexually harassing behavior. In Faragher, the Court noted that the primary purpose of Title VII "is not to provide redress but to avoid harm." The Court used this observation to explain the first element of the affirmative defense. The Court reasoned that because employers' development of sexual harassment policies and procedures will prevent sexual harassment, employers should be given an incentive to develop such procedures:

It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

By allowing employers to avoid liability by adopting policies and procedures, the Court creates a tremendous disincentive for employers to go beyond procedures and create actual equality in the


Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293. See also notes 378–82 and accompanying text.

Faragher, 118 S Ct at 2292.

Id.
workplace. Title VII and the threat of liability provide an incentive to employers not only to create sexual harassment policies and procedures, but also to take affirmative steps to educate employees and monitor the workplace, thus preventing discriminatory behavior. However, the first element of the affirmative defense permits employers to abdicate responsibility for the actual harms of sexual harassment as long as they have taken the perfunctory step of establishing an official policy that includes a visible enforcement mechanism.

If the aim of Title VII is to avoid harm, then the Court should recant that aspect of sexual harassment law that acquiesces to certain forms of sexual harassment. The severe or pervasive standard and the employer incentive concept are at odds with each other. The severe or pervasive standard, rather than preventing or discouraging instances of sexual harassment, enables sexual harassment. The severe or pervasive standard creates a gray area of permissible discrimination. Employees (potential harassers and potential victims) are informed by repeated Supreme Court proclamations that some sexual harassment, mild or sporadic sexual harassment, is permissible. Potential harassers are then on notice that some sexually harassing behavior is condoned. Potential victims are on notice that under certain circumstances, when they experience sexual harassment, they will have no recourse.

The availability of an affirmative defense in the absence of a tangible job consequence is a redundancy that exaggerates the severe or pervasive requirement. Under the current standard, if a plaintiff proves a hostile work environment, then he or she has proven harassment so objectively severe or pervasive that it alters the terms or conditions of employment. Since plaintiff has proven this degree of harassment, allowing an affirmative defense for employers, based on lack of knowledge or the existence of a policy and procedures, is unreasonable and contrary to the statute. The employer in *Ellerth*, for example, was given the opportunity to establish an affirmative defense despite plaintiff's proof that she suffered severe or pervasive sexual harassment by a supervisor.  

The severe or pervasive standard also conflicts with the first element of the affirmative defense because it impedes effective

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43 *Ellerth*, 118 S Ct at 2271. The defendant in *Faragher*, however, failed to take even the minimal precaution of establishing a visible anti-harassment policy and procedure for its many “far-flung” departments. *Faragher*, 118 S Ct at 2293.
sexual harassment policies. Under the severe or pervasive standard, employers are obligated to avoid some of the harms of sexual harassment, but not all. Employers, as a result, lack guidance as to what is and is not permissible. The murkiness of the severe or pervasive standard frustrates clear and consistent application of company policies and is at cross purposes with the statute's aim.

A plaintiff's failure to take advantage of existing complaint procedures is sufficient to show that he or she did not reasonably pursue preventive or corrective opportunities or avoid harm.\(^4\) The second element of the defense imposes on victims of sexual harassment "a coordinate duty to avoid or mitigate harm."\(^5\) According to the Court, an employer is not liable when a plaintiff unreasonably fails to use available preventive measures to avoid the harm:

If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.\(^4\)

This element of the affirmative defense ignores the reality that reporting sexual harassment may have serious consequences for the victim.\(^4\) Whether or not there is an official anti-harassment policy, common workplace environments often make reporting sexual harassment equivalent to a letter of resignation. Victims of sexual harassment are often afraid of reprisal from supervisors or co-workers.\(^4\) It is no coincidence that none of the plaintiffs in

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\(^4\) Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
\(^5\) Faragher, 118 S Ct at 2292. The Court's affirmative defense transplants mitigation as a factor affecting remedy to a factor affecting both liability and remedy. The affirmative defense that the Court creates does not limit the defense to the contemporaneous acts of the victim. Employers are freed from responsibility for particular instances of discrimination by the subsequent conduct of the plaintiff. How can a plaintiff avoid what has already happened? Once an employee has suffered discrimination, the relevant action is complete. The employer's liability is determinable. The plaintiff's subsequent acts are irrelevant to the question of liability, though they arguably may have some bearing on damages.
\(^4\) Id.
\(^4\) See, for example, notes 410–11 and accompanying text.
\(^4\) See Patricia Davis, Woman Deputy is Accused of Sex Harassment of 2 Men, Wash Post C1 (Nov 19, 1992) (reporting that the Women's Legal Defense Fund finds that sexual harassment is "significantly underreported" primarily due to fear of retaliation); Karen De Witt, The Thomas Nomination: The Evolving Concept of Sexual Harassment, NY Times A28 (Oct 13, 1991) (reporting that a United States Merit Systems Protection Board survey shows that 42 percent of female workers experienced sexual harassment but only 5 percent of those women reported the harassment); Deb Riechmann, Men and Women Debate
Meritor, Harris, Faragher, or Ellerth made official reports of the harassment. Many victims of sexual harassment are unwilling to risk ostracism as well as loss of job, goodwill, training, and potential for advancement by reporting the harassment. For example, the plaintiff in *Morrison v Carleton Woolen Mills, Inc* testified that after reporting sexual harassment,

[M]ost of the people with whom she had worked for years would no longer speak to her . . . ostensibly because discouraged by management from doing so. The few that did were reprimanded by their supervisors afterward. Morrison felt that some of her co-workers would no longer cooperate with her, thereby making her job much more difficult, and that one of her new supervisors . . . would occasionally assign her excessive work. [This supervisor], according to Morrison, would also follow her around and look for flaws in her work, and would often blame her for mistakes that were not of her own doing.

Requiring victims of workplace harassment to be superheroes is not equality. Instead of avoiding the harms of sexual harassment, the second element of the affirmative defense treats employers, rather than employees, as potential victims, absolving them of the responsibility to act affirmatively to end sex discrimination.

Given the possibility of retaliation, the severe or pervasive standard also conflicts with the second element of the affirmative defense because of the possibility that the harassment may be viewed as mild or sporadic. On one hand, plaintiffs must report instances of sexual harassment in order to avoid a determination that they were complicit or unreasonable. On the other hand, they risk retaliation and not being taken seriously because others may view the action as merely a joke or flirtation. Thus, having come forward, receiving no redress from the employer,
and lacking redress in the courts, the employee, for her courage, must live with the possibility of reprimal or decreased goodwill.\(^{414}\)

The combination of the severe and pervasive requirement and the second element of the affirmative defense can only silence victims of sexual harassment.

The exchange between the judges on the panel in *Long v Eastfield College*\(^{415}\) illustrates the dilemma faced by plaintiffs. The majority held that plaintiff's complaint about a sexual joke did not allege sufficiently severe or pervasive harassment to survive the defendant's motion for summary judgment.\(^{416}\) Nevertheless, for purposes of her retaliation claim, the majority held that plaintiff had presented evidence sufficient to survive summary judgment that she reasonably believed that her supervisor's conduct violated Title VII.\(^{417}\) Dissenting in part, Judge DeMoss argued that the plaintiff's "reasonable belief" was insufficient to satisfy the statutory requirement that retaliation claims be based on opposition to an unlawful employment practice. According to Judge DeMoss:

> The statutory text is clear and unambiguous: "because he has opposed any practice made an unlawful employment practice by this chapter." The statute says "made." It does not say "because he has opposed any practice which he reasonably thinks or believes is an unlawful employment practice."\(^{418}\)

Fortunately for the plaintiff, Judge DeMoss's opinion was a dissenting opinion, but that outcome is by no means assured in future cases. Plaintiffs face a dilemma created by the opinions in the Supreme Court's 1998 Term. The sexual harassment victim may choose to report sexual harassment in order to preempt an affirmative defense that she failed to act reasonably, thus taking the chance that the sexual harassment will not be viewed as sufficiently severe or pervasive. In such a case, plaintiff will have no redress in court for the sexual harassment that she or he experienced and may also face difficulty proving that his or her belief that the conduct was sexual harassment was reasonable for pur-

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\(^{415}\) 88 F3d 300 (5th Cir 1996).

\(^{416}\) Id at 309. Long was one of two plaintiffs alleging sexual harassment and retaliation.

\(^{417}\) Id at 308–09.

\(^{418}\) Id at 310 (DeMoss concurring in part and dissenting in part).
poses of a retaliation claim. Alternatively, she can continue to suffer the sexual harassment in silence.

Under the second element of the affirmative defense, when there is proof of sexual harassment by a supervisor that is severe or pervasive, employers can escape liability for the sexual harassment by blaming the victim — proving that the plaintiff acted unreasonably so as to lift responsibility for proven unwelcome severe or pervasive sexual harassment from the employer.

Not being blamed for the violence done to us has been a continual struggle for women. Even when a plaintiff has proven severe or pervasive sexual harassment, the Supreme Court and the employer still look to shift the blame. The claim is often that "she wanted it." "Was she wearing, after all?" "Why didn't she leave?" "Did she even fight/protest/report?" The issue of blaming the victim is an issue of believing the victim. As MacKinnon notes, "women report rapes when we feel we will be believed. The rapes that have been reported, as they have been reported, are the kinds of rapes women think will be believed when we report them." Examining a plaintiff's use of an employer's existing policy for the purpose of determining liability constitutes doctrinal doubt of individuals as victims of sexual harassment.

IV. TRANSFORMING WORK

Is a world without sex inequality a world without fun? If we take all unwelcome impositions of the fantasy of sex out of the workplace, are we left with an environment that has less joy and is less bearable? How much more freedom would there be in the workplace if sex (fantasy) were only done to others mutually or consensually? How could we accomplish it?

To begin with, courts should cease attempting to delineate degrees of discrimination in the liability phase. Either a plaintiff satisfies her evidentiary burden of proving discrimination by a

\[419\] See notes 213–30 and accompanying text.

\[420\] See MacKinnon, A Rally against Rape, in Feminism Unmodified at 82 (cited in note 1) ("Women believe that not only will we not be believed by the police, not only will the doctors treat us in degrading ways, but when we go to court, the incident will not be seen from our point of view. It is unfortunate that these fears have, on the whole, proved accurate.").


\[422\] MacKinnon, A Rally Against Rape, in Feminism Unmodified at 81 (cited in note 1).

\[423\] See MacKinnon, Sexual Harassment of Working Women at 51 (cited in note 116) ("Noncooperative women (including women who carry resistance to the point of official complaint) are accused of trying to take away one of the few compensations for an otherwise meaningless, drab, and mechanized workplace existence, one of life's little joys.").
preponderance of the evidence or she does not. If the conduct is discriminatory, then the degree to which it affected an employee's terms and conditions of employment may be considered in the remedial phase.

The 1991 Amendment to the Civil Rights Act limits the relief available to a plaintiff that proves discrimination that is a motivating factor but not a "but for" cause:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).424

Therefore, applying the 1991 Amendment to sexual harassment, in the absence of a tangible job consequence, when a plaintiff proves by direct evidence that sexual harassment by an employer (including a supervisor) is a motivating factor affecting the terms, conditions, or privileges of employment, he or she has proven a violation of the statute, even if the sexual harassment was not severe or pervasive. Likewise, in the absence of a tangible job consequence where a plaintiff proves by direct evidence that sexual harassment by a non-supervisory employee is a motivating factor affecting the terms, conditions, or privileges of employment, an employer that knew or should have known of conditions facilitating sexual harassment should be liable if it fails to establish the affirmative defense outlined in Ellerth and Faragher, even if the sexual harassment was not severe or pervasive. In any case in which a plaintiff proves sexual harassment that is a moti-

vating factor but is not severe or pervasive, plaintiff's remedy
should be limited as provided in the statute.425

By providing a remedy but limiting it to declaratory and in-
junctive relief and attorneys' fees, the statute produces at least
two important results. First, it acknowledges and provides a basis
for stopping the harm of sexual harassment even when it mani-
manifests as normal heterosexual male behavior. Second, it alleviates
concerns that removal of the severe or pervasive standard would
cause the agency and judicial system to be overwhelmed with
new complaints.

In addition, to the extent that the Court wishes to provide
incentives to employers to prevent sexual harassment in the
workplace and to reward them for their efforts, such incentives
should function to foster, rather than retard, the transformative
intent or dynamic nature of the statute. In that regard, the em-
ployer may establish an affirmative defense to any claim of sex-
ual harassment by a supervisor if the employer can prove that it
created an equal workplace prior to the harassment. In other
words, if an employer satisfies its responsibility to create equality
in the workplace, then the employer will not be held liable for the
subsequent sexually harassing actions of its employees. I do not
attempt to outline an equal workplace here. However, examples
of factors that may be included in an employer's proof of equality
in the workplace are the diversity of the workforce at all levels,
equity in pay and responsibility, accessible complaint procedures,
proactive education and monitoring of the workplace, and inves-
tigation and redress of sexual harassment complaints. Of course,
an employer may choose not to create an equal workplace, but if
the employer does not, then there should be no defense to a plain-
tiff's proof of even mild or sporadic sexual harassment.

CONCLUSION

The enactments of the Civil Rights Acts of 1964 and 1991 are
more than symbol or gesture or empty promise. They are the plan
for accomplishing the goal of workplace equality. In this Article, I
have defined sex as fantasy and sex discrimination as the (unwel-
come) imposition of (sex) fantasy. In considering theories re-
garding the aggregation and disaggregation of sex (biological, ex-
plcit and non-explicit, gender, and sexual orientation), I have

425 See generally Susan M. Mathews, Title VII and Sexual Harassment: Beyond Dam-
ages Control, 3 Yale J L & Feminism 299 (1991) (discussing role of damages in eliminating
sexual harassment).
argued that the problem of sexual harassment law is not only how sex is defined but that as a jurisprudential matter, courts have accepted that some sex discrimination is acceptable. In particular, courts have accepted the legality of sexual harassment that is not severe or pervasive with the aim of preserving the fantasy of normal male heterosexuality, an interpretation that is contrary to the statute as amended. The Supreme Court should eliminate the severe or pervasive consideration in the liability phase of sexual harassment cases when there is no tangible job consequence and construe the statute to achieve the goal of equality.