

# MISOGYNY, ANDROGYNY, AND SEXUAL HARASSMENT: SEX DISCRIMINATION IN A GENDER-DECONSTRUCTED WORLD

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## I. AN INTRODUCTION

Do you know who has a problem with sexual harassment? Miss Buxley. Readers familiar with the Beetle Bailey comic strip may remember that prior to his mandatory sensitivity training, her boss, General Halftrack, was forever making sexual overtures toward her.<sup>1</sup> Even after sensitivity training, it seems clear that General Halftrack still views Miss Buxley as a sexualized object of desire, though he is now more subtle in his expression of that sentiment. What is intriguing about Miss Buxley's situation from a sexual harassment standpoint is that she is not the only female employee working in General Halftrack's office. The other woman in the office wears the regular army uniform, and she fits in neatly with the regular male employees. She is competent, she is one of the gang, and she is never harassed by General Halftrack. The presence of this second, distinctly unfeminized woman (in comparison to Miss Buxley) illustrates what many

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<sup>1</sup> Kathleen Parker, Editorial, *The PC Patrol Nabs Beetle Bailey: Humorless Feminists Dourly Cleanse Sexism from a Cartoon General*, CHARLESTON GAZETTE & DAILY MAIL, July 15, 1997, at 4A, available at 1997 WLNR 622369. The article notes:

Feminists—rather than stop reading the strip and devote their energies to something useful, such as helping women take themselves less seriously—insisted [the strip's creator] Walker see the light. Walker said Gen. Halftrack's enlightenment is reflective of his own. "I grew up reading *Esquire* magazine where the boss was always chasing the secretary," said Walker, 73. "That's not acceptable any more." . . . Walker said he began toning down Miss Buxley's Loni Anderson looks when the feminists first starting pounding their breasts. No more short skirts, plunging necklines or well-defined cleavage. These days, Miss Buxley wears a high neck and longer skirt. Walker only draws the outline of her body. And, Miss Buxley no longer paints her nails during office hours, but types efficiently and files alphabetically—just like real secretaries everywhere. Blond, buxom office workers can relax now. Hear this: You're not dumb.

have suspected all along: General Halftrack does not have a problem with *women* employees—there is just something inherently sexualized about Miss Buxley. Consequently, when General Halftrack harasses Miss Buxley, he is not doing it “because of sex”; he is doing it because of Miss Buxley. Moreover, since she seems to invite sexual attention with her self-presentation, what is wrong with that?

Over the last few years, both feminists and queer theorists have been asking that very question: what is wrong about sexual harassment?<sup>2</sup> During the period leading up to and following the Supreme Court’s decision in the same-sex sexual harassment case of *Oncale v. Sundowner Offshore Services, Inc.*,<sup>3</sup> feminists and queer theorists have become increasingly interested in the theoretical underpinnings of sexual harassment doctrine. The debate has centered primarily on the “why” question of sexual harassment, that is, why are the interactions that legal doctrine defines as “sexual harassment” wrong or harmful?<sup>4</sup> More importantly, the “why” debate asks, why should we consider sexually harassing conduct to be a form of discrimination because of sex? What does it mean to discriminate because of sex? What does “sex” even mean nowadays?<sup>5</sup>

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<sup>2</sup> Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 691 (1997).

<sup>3</sup> 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

<sup>4</sup> See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1217–20 (1998); Franke, *supra* note 2, at 691; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1720 (1998); see also Franke, *supra* note 2 (examining the link between sexual harassment and sex discrimination); Ann Juliano & Stewart Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 577–89 (2001) (analyzing trends in the circumstances that contribute to successful sexual harassment claims). See generally Ann Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) (suggesting that sexual harassment law should affirm the American legal tradition of respect); Toni Lester, *Protecting the Gender Nonconformist from the Gender Police—Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court’s Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89 (1999) (arguing that courts’ failure to recognize the sexual harassment of gays disserves the aim of sex discrimination law to attack misogyny); Anthony Varona & Jeffery Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employer Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67 (2000) (examining the current prospects for relying on the sexual discrimination prohibition to combat sexual orientation discrimination in the workplace).

<sup>5</sup> See, e.g., 3 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 27.4 (2005), noting:

The legal doctrine of sexual harassment arises from Title VII. Congress barred discrimination “against any individual with respect to . . . terms, conditions, or privileges of employment, because of (an individual’s) sex.” Ever since, courts have had to decide what those three unexplicated letters “s-e-x” mean. Does the law’s use of the term “sex” mean simply a person’s physical status (i.e., male or female—defined genitally, chromosomally, or otherwise)? Does “sex” also include gender roles (i.e., expectations and stereotypes about appropriate behavior)? Does it include sexual orientation? Sexual conduct? Demands for sexual conduct? Sexual language and innuendo? Courts have managed to spin out of that little word a tangle of interpretations that arbitrarily include some (i.e., physical status, gender

The debate has been largely fueled by two separate, yet related, conceptual evolutions in feminist, queer, and mainstream cultural thought concerning gender and sex equality. The first conceptual evolution involved a scholastic movement away from conclusions that are premised on the idea that sex is inherently subordinating to women.<sup>6</sup> This conceptual movement, which I will refer to as the sexual subordination critique, calls into question the theoretical underpinnings of the *injury* inflicted by sexual harassment.<sup>7</sup> Under the sexual subordination model, the injury of sexual harassment was the experience of being sexually objectified. Objectification itself was understood within the model to be something that women uniquely experienced as a force of hierarchy and oppression. There were two casts of characters in this paradigm: the sexual objects who were all women and the sexual subjects who were all men. Sexualizing women was one of the ways, and in some particularly robust versions of the paradigm, the primary way, in which the dominant male paradigm kept women subordinated. Thus, the injury of sexual harassment was obvious because the injury and the prohibited act were one and the same. The rejection of the male-subject/female-object model of human sexuality, however, left something of a hole in the conceptual framework of sexual harassment.<sup>8</sup> If we reject the premise that sexualization itself inherently or uniquely oppresses women, it ceases to be obvious what is injurious about being sexualized at work. Absent the sexual subordination model, what makes *sexual* behaviors—as compared to other types of irritating or unwelcome social behaviors—a tool of discrimination?<sup>9</sup>

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identity, stereotyping), and inexplicably exclude others (sexual orientation).

<sup>6</sup> This construction of women's sexuality, particularly as it intersects with issues of gender equality, is frequently attributed to Catharine MacKinnon. See, e.g., CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 178–82 (1979) [hereinafter *SEXUAL HARASSMENT OF WORKING WOMEN*]; CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 117–20 (1989).

<sup>7</sup> The doctrine's historical origins have been widely attributed to the success of the sexual subordination school of thought. This model, considered to be premised on understandings of women's sexual subordination by men, is also frequently called the sexual desire-dominance paradigm of sexual harassment. See Abrams, *The New Jurisprudence of Sexual Harassment*, *supra* note 4, at 1217. Cf. Shultz, *Reconceptualizing Sexual Harassment*, *supra* note 4, at 1687 (explaining that most sexual harassment is motivated by a desire to maintain jobs “as bastions of masculine competence and authority”).

<sup>8</sup> See Ian Halley, *Queer Theory by Men*, 11 *DUKE J. GENDER L. & POL'Y* 7, 8 (2004); see also Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE* 80, 82–87 (Wendy Brown & Janet Halley eds., 2002) (presenting criticism of the male-subject, female-object model of human sexuality and its impact on sexual harassment doctrine and theory). For a description of the sexual subordination theory, see Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *SIGNS* 515, 533 (1982).

<sup>9</sup> See, e.g., Shultz, *Reconceptualizing Sexual Harassment*, *supra* note 4, at 1689 (contending that the focus on *sexual* conduct in sexual harassment doctrine has obscured the recognition by courts of other sorts of conduct that constitutes sex discrimination); see also Vicki Shultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2074–87 (2003) (arguing that attempts to police sexual behavior in the workplace have the effect of falsely “essentializing” sexuality, when in reality sexuality cannot, and should not, be controlled by proscribing

The second major thought evolution that has complicated discussion of sexual harassment law was the movement away from conclusions premised on the idea that gender itself—outside of social context and constructs—forms a relevant category about which anything meaningful may be said.<sup>10</sup> This gender essentialism critique alleges in its most radical form that gender is never a relevant category, but is instead entirely socially constructed. Thus, this second deconstructionist wave asks: if sexual harassment is a form of discrimination, who is the relevant class? Who is being distinguished? Who should be protected? Within this model, sexual harassment doctrine takes a wrong turn in attempting to flesh out situations in which sex (or, more precisely, gender) is the distinguishing characteristic of the offender, victim, or class of victims. The model poses challenging questions concerning what it actually means to discriminate because of sex, arguing instead that “gender protectionist” measures reinforce oppressive and socially constructed gender norms.<sup>11</sup> This point is particularly illuminated in the context of same-sex discrimination.<sup>12</sup>

In this way, both feminist theory and queer theory gender and sexuality deconstruction have introduced a panoply of challenges to traditional understandings of sexual harassment as a form of sex discrimination. Where these two conceptual frameworks collide with sexual harassment doctrine, the doctrine, as currently constituted, appears to fare badly. In a post-modern light, the doctrine seems essentialist. It seems predicated on antiquated and even moralized notions of women and sexuality. It seems to perpetuate a victimization mythology. It seems to be overinclusive and underinclusive and, at all times, slightly repressive. It suddenly fails to make theoretical sense.

Why then, does the sexual harassment doctrine seem to work? Why is it that, despite anti-essentialist arguments to the contrary, the sexual harassment doctrine seems to address and inhibit a real-world injury that appears to disproportionately disadvantage women?<sup>13</sup> One potential answer is that social reality continues to reflect false social constructs despite the

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ing a set of formalistically sexual behaviors).

<sup>10</sup> There is a universe of literature, crossing numerous disciplines, which articulates this gender essentialism critique. See, e.g., JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 3–44 (1990). Moreover, while both of these critiques are types of anti-essentialist arguments—that is, the critique of sexual subordination is, in part, a subset of the larger critique that nothing meaningful can be said about women as a category—each operates independently within the sexual harassment debate. For example, as outlined above, the sexual subordination critique primarily questions the injury aspect of sexual harassment, while the gender essential critique challenges the concept of women as a potential “class” of victims. See *supra* note 7 and accompanying text.

<sup>11</sup> See discussion *supra* note 4 and accompanying text.

<sup>12</sup> While much of this debate occurred in the period immediately preceding the Supreme Court’s decision in *Oncale v. Sundowner Offshore Servs., Inc.*, the opinion also highlights these theoretical problems. 523 U.S. 75, 80 (1998).

<sup>13</sup> See generally Juliano & Schwab, *supra* note 4 (surveying sexual harassment claims and finding that the vast majority of sexual harassment plaintiffs are women).

fact that these constructs have already been theoretically unraveled, which to some extent is undeniable. This Article, however, offers a second answer. The primary argument of this Article suggests that feminist and queer gender and sexuality deconstruction evolved—and more importantly *intersected*—in such a way as to present an androcentric-assimilation model of female liberation, while failing to address (and in fact reinforcing) the animus at the root of the dominant paradigm's picture of feminized-female-as-commodity. In the sexual harassment context, I contend that this enduring animus, coupled with historically based categorical inequities in background entitlements, is in fact what lies at the heart of the wrong of sexual harassment. Deconstructionist scholarship has largely overlooked this injury, in part because the relevant class has been disappeared by the discourse itself. In fact, the class question has been largely abandoned (anyone can harass, anyone can be harassed, there are no categorical distinctions), and the focus has instead shifted to the "injury question" alone. This development obfuscated both inquiries, leaving jurists and scholars scrambling to reconcile the doctrine of sexual harassment to meet the needs of an increasingly unidentifiable category of victims.

Therefore, the agenda of this Article is twofold. First and foremost, the project at hand is theoretical: to right the theoretical underpinnings of sexual harassment as a form of gender discrimination from a post-feminist/queer theory gender deconstruction perspective. Second, assuming we accept that sexual harassment is a form of discrimination cognizable under Title VII, the Article considers differing jurisprudential standards for enforcing sexual harassment prohibitions that are both theoretically sound and pragmatically possible.

This argument is offered in the following format: Part II of this Article presents a theoretical discussion of how both feminist and queer gender deconstruction theories have informed our understanding of what it means to discriminate because of sex and posits that these deconstructions have intersected in a manner that supports an androcentric gender ideal while aggravating existing misogynistic ideas about feminized women. As a result, feminine-identified women are still comparatively devalued in traditionally sexist ways, including but not limited to having their sexual attractiveness assessed as a central aspect of their overall value in the workplace. Part III revisits the injury question by asking from a sex-neutral perspective what is harmful about involuntary sexualization in the workplace. Part IV examines the evolving doctrine of sexual harassment as it awkwardly clashes with the class question in an effort to define what discrimination "because of sex" means within the context of same-sex sexual harassment, considering along the way various jurisprudential attempts to resolve these inconsistencies. Finally, Part V offers a conclusion and an examination of what the doctrine of sexual harassment could potentially offer.

## II. "BECAUSE OF SEX": A PROBLEM OF OTHERNESS

As a starting place, it is perhaps helpful to acknowledge that gender deconstruction is in some ways a cohesive conceptual whole, the meta-project of which has been to disaggregate birth-sex designation from what were falsely perceived to be attendant characteristics. This goal has been ably pursued from many directions by many thinkers. However, the two schools of thought which have most contributed to the current state of deconstructed gender are feminist theory and queer theory. Each of these schools has pursued independent projects of gender deconstruction and arrived at independent conclusions.<sup>14</sup> These discourses have informed one another in important ways, such that only at their intersection can a comprehensive understanding of modern gender deconstruction be found. For example, though many feminists have long embraced the notion that sex is not an essential category, it was ultimately queer theory's heterosexism critique that drove home in deconstructionist discourse—and ultimately in modern cultural thought—the powerful and important idea that we may conclude nothing based *solely* on the birth-sex of an individual. Feminist thought was presented then with the challenge of reconciling feminism with the notion that nothing meaningful may be said about *all* women.<sup>15</sup> Queer theory likewise added a unique perspective to the feminist project of disaggregating gendered expectations from birth-sex. The queer paradigm revealed that many women's gendered identities, volitional gendered expressions, and even experiences of sexuality are, in meaningful ways, closely aligned with those evidenced by the dominant (masculine heterosexual) paradigm.<sup>16</sup> For those women for whom full membership in the dominant paradigm, with all of its boons and benefits, is precluded only by their birth-sex, it seems clearer that birth-sex designation is a distinction without a difference.<sup>17</sup> In this way, disaggregating birth-sex from quali-

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<sup>14</sup> This Article uses the term "gender" or "sexuality" deconstruction as if it is a monolithic school of thought with no meaningful internal distinctions, which, of course, it is not. Because an entire paper or book could be dedicated to the project of deciding whether there is meaning to the term "gender deconstruction" and what exactly it might be, I want to be clear that this Article uses the term in the lowest common denominator sense. The term "gender deconstruction" merely refers to the idea that notions of gender are not pre-social, but are instead social constructs.

<sup>15</sup> I am not considering claims that external forces have created culturally universal "women" characteristics or experiences that, while not innate, constitute a body of truths from which conclusions may be drawn that apply to all (or in some versions, at least most) women in that culture. There are different questions to be asked where the claimed difference is a socialized difference, and where socialization has fostered meaningful, though devalued, difference, the movement to undermine or alter the unilateral structure of the socialization has greater currency. However, this Article is trying to isolate contra-social differences—for example, differences that appear despite social pressure to the contrary.

<sup>16</sup> This Article particularly chooses to discuss these three qualities (gendered identity, gendered expression, and experience of sexuality) to the exclusion of other possible manifestations of preferences which are less significant for the framework of this argument.

<sup>17</sup> It is worth noting that if no particular cost was attached to expressing gendered iden-

fication for membership in the dominant paradigm makes sense from a queer perspective.<sup>18</sup> Thus, feminist gender deconstruction, as informed by—and in some ways formed by—queer theory, has operated to disaggregate birth-sex from substantive or essential qualities, and it has provided an important analytic piece for understanding gender and gender discrimination: “women” and “men” are not the relevant categories.

However, at their intersection, (particularly postmodern) feminist and queer theory gender deconstruction sought to do more than just separate birth-sex from a particular gendered identity, expression, or experience of sexuality. Rather, they sought to dismantle the binary aspect of ideas such as “gendered expression” or “gendered identity” and replace it with the idea that, although we have been socialized to express gender along binary lines, in fact each individual possesses the full spectrum of possible qualities. Thus, binary labels over-simplify complex identity compilations while perpetuating undesirable identity hierarchies. Of course, binary systems *do* seem unduly restrictive. It *does* seem that each individual must have her own complex identity/expression/sexuality make-up. Perhaps most compelling of all in an anti-discriminatory agenda, it *does* seem that if one could dispense with identities, one could dispense with oppressive identity hierarchies. Moreover, it seems plausible that this theoretical concept could have been unpacked in a way that reflected an understanding that femininity, whatever that is, and masculinity, whatever that is, are neutral characteristics or clusters of characteristics, and various manifestations of both are equally valid and value-neutral.<sup>19</sup> Thus, in addition to merely detaching characteristics from birth-sex and then detaching characteristics from birth-sex-evoking labels, there existed a potential within this theoretical framework to go a step further and dismantle the entire gender hierarchy such that the full continuum of gendered manifestations might have been redefined as “person,” rather than “masculine” and “feminine” manifestations.

Instead, the idea that gendered expressions represent a spectrum has been unpacked in such a way that the portion of the continuum that was previously understood to be masculine—that is, encompassing any aspect of gendered identity, expression, or experience of sexuality that was previously open to men—was redefined as “person,” and everyone was invited into personhood. How this peculiar unpacking of gender anti-essentialism

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ties or experiences of sexuality that lie outside birth-sex expectations, perhaps more women would express along those lines than presently do. Certainly it is still generally the case that there is a cost attached to birth-sex dissent.

<sup>18</sup> In other words, because birth-sex is a poor indicator of substantive qualities such as gendered identity, gendered expression, and experience of sexuality, it makes more sense to let those qualities themselves be determinative rather than use birth-sex as a proxy.

<sup>19</sup> I would contend that there is no “neither”—that which is not feminine *or* masculine—in this framework. We originally operated under a binary understanding in which masculine was defined in contrast to feminine, leaving no other definitional space.

came to be the prevailing understanding of gender liberation and what this means in an anti-discrimination context is considered below.

A. *Femininity in Gender Deconstruction*<sup>20</sup>

It was clearly once the case in this culture, as it still is in many cultures, that misogyny was ostensibly organized around biological sex traits, such that “women” as a devalued category was defined by anatomy.<sup>21</sup> The system operated under the understanding that the preferred and dominant category of persons was comprised entirely of non-women, and women comprised the category of the less valuable “other.” Enforcement of and justification for this animus structure required answers to two important questions: (1) how do I know who the other is?; and (2) what is it about the other that makes her less? In the case of women, the answer to the first question was relatively straightforward. “Women” as a relevant category was defined by genitalia. Understanding who was a woman and who was a non-woman was simple.

The answer to the second—and infinitely more important question to an animus analysis—was also more straightforward than perhaps our visceral or socialized sense might predict. At first blush, the answer to what made women less valuable might seem to include a veritable web of interlacing characteristics ranging from physical to metaphysical.<sup>22</sup> Upon deeper scrutiny, however, the answer converges at a pivotal point, and, as it always turns out, is subsumed by the definition itself: she is less because she is *other*, meaning in this instance that she is not male.<sup>23</sup> Moreover, in this binary system, I know that she is not male by subtracting the quality

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<sup>20</sup> This Section is meant to provide merely an overview of thought evolution in this area, not a comprehensive or historical account of women’s experience or feminist movements.

<sup>21</sup> See, e.g., SIGMUND FREUD, *Femininity*, in NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 112, 113 (James Starchy ed. and trans., 1974) (“To those of you who are women, this will not apply—you yourselves are the problem.”).

<sup>22</sup> See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 69–70, 159–63, 166–69 (Harvard Univ. Press 1993) (discussing examples of “characteristic”-type differences between women and non-women); see also ADRIENNE RICH, OF WOMAN BORN 64–73, 186–217 (W. W. Norton 1995) (discussing more metaphysical differences). This Article does not attempt here to pass upon the question of whether women share essential characteristics, but only to define otherness in a dominant/subordinate binary paradigm.

<sup>23</sup> See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 218–21. MacKinnon articulates the problem of defining the “other” where the dominant paradigm controls the process of defining:

Concealed is the substantive way in which man has become the measure of all things. Under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to his measure. Under the difference rubric, women are measured according to their lack of correspondence from man, their womanhood judged by their distance from this measure.

of maleness from him and finding both deficits and remainders.<sup>24</sup> Thus, the animus directed at the category “women” can be most simply described as an animus based on the parallel traits of both lacking aspects of maleness and exhibiting or possessing non-maleness. In this way misogyny in the pre-gender deconstruction world was, mostly simply, a form of devaluing the other *because of* its otherness and because of those qualities that differentiate it from the dominant masculine paradigm.<sup>25</sup> In this framework, women were assigned a lesser status on the basis of their birth-sex and for the most part, they could not escape this status.<sup>26</sup> A set of restrictions, some formalized and some less formalized, were placed on individuals defined as “women.”<sup>27</sup>

Eventually, this system became sufficiently offensive to egalitarian sensibilities that efforts were made to remove the formalized restrictions placed on the category of “women.”<sup>28</sup> In particular, efforts were made to dismantle legal constructs that segregated women. The project was one of inclusion, or, as Catharine MacKinnon describes it, “liberalism applied to women” because “women deserve what men have.”<sup>29</sup> The goal was to remove barriers to full personhood—personhood being something that men alone enjoyed—including barriers to education and to legal, political, and fiscal autonomy. Through this breakdown of facial restrictions on women, a form of gender integration was achieved.<sup>30</sup> Women, who were previously confined to a specified portion of the behavior and expression continuum, were now able to “immigrate” into areas previously peopled exclusively by men. While the barrier-removing measures did nothing to directly address the source of animus itself (that is, the devaluing of other as other), there was perhaps a sense that proximity through integration would dissipate the source of animus as false stereotypes were empirically dispelled.

However, animus against women survived the physical immigration project, and even as many formal barriers to full inclusion dissipated, and both laws and access became increasingly “gender-blind,” non-women as a category continued to enjoy a markedly preferred status.<sup>31</sup> In this way, though women were permitted to inhabit the physical domain of person-

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<sup>24</sup> *Id.* Cf. EVE SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 157–60 (1990) (discussing sameness and difference with respect to homosexuality).

<sup>25</sup> MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 6, at 218.

<sup>26</sup> This was true unless of course they “passed” as men, as some did. See Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 31 (1995).

<sup>27</sup> See generally BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* (2d ed. 1996) (providing coverage of developments in gender-related law).

<sup>28</sup> *Id.*; see also Tracy E. Higgins, *Democracy and Feminism*, 110 *HARV. L. REV.* 1657, 1657 (1997) (proposing that feminist legal theory has emphasized the importance of constraints on women’s choices to the detriment of competing concerns).

<sup>29</sup> MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 6, at 220.

<sup>30</sup> *Id.* at 221.

<sup>31</sup> *Id.* at 222.

hood, their second-class status persisted. As a result, those interested in dissolving women's lesser status came to believe that the less formal restrictions placed on women were in many ways as real an obstacle to inclusion in personhood as facially disparate formal restrictions.<sup>32</sup> These less formal restrictions came to be understood as the now infamous—from both a queer and feminist perspective—"gender roles."

Two important ideas emerged concerning gender roles. The first was that gender roles acted as an innately oppressive force by limiting individuals of both genders to a prescribed conduct.<sup>33</sup> This was a particularly important idea from a queer perspective, where a constituency was in part defined by, and certainly ostracized for, gender non-conformity.<sup>34</sup> It was also an important idea from a feminist perspective, where the problem of gendered hierarchies was of primary concern. The oppressive force of gender roles was particularly onerous for women because women's roles defined women subordinately and relegated them to permanently subordinate positions.<sup>35</sup> Consequently, in some ways the focus on gender roles was not a departure from gender-blind liberalism, but rather a conceptual extension of it. The second important idea was that gender roles were not, as was often advanced, premised on truth-based ideas of the unique and distinct natures of women and non-women, but instead were premised on false and oppressive stereotypes about women.

### 1. *Disappearing Femininity Within the Feminist Paradigm*

The emergence of the idea that gender roles were particularly premised on false stereotypes about women proved to be a significant fork in the theoretical road. In a queer theorist gender deconstruction model, femininity and masculinity would seem to be social constructs in tension—a story of false alternatives in which masculinity and femininity are antonyms. The queer gender deconstruction project's goal is to reveal that neither masculinity nor femininity describes something innate or something that corresponds to sex.<sup>36</sup> Thus, within the queer theory model, there would seem to be no hierarchy with respect to which false concept is *more* false.<sup>37</sup>

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<sup>32</sup> *Id.* Of course the representation that feminists were (or are) of one mind, and that they generally addressed affirmative obstacles to equality before attacking gender roles, is a narrative device. In fact, those working toward women's equality and/or against women's subordination have simultaneously adopted many strategies at many times throughout history.

<sup>33</sup> See William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equity*, 74 *IND. L.J.* 1085, 1110 (1999).

<sup>34</sup> *Id.* at 1109–11.

<sup>35</sup> See Abrams, *The New Jurisprudence of Sexual Harassment*, *supra* note 4, at 1208–09 n.206 (analyzing the manner in which feminine stereotypes contribute to the hierarchical valuation of masculine over feminine norms).

<sup>36</sup> See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 100–01 (Robert Hurley trans., Vintage Books 1990) (1978); BUTLER, *supra* note 10, at 40.

<sup>37</sup> But see Sandra Lee Bartky, *Foucault, Femininity, and the Modernization of Patriar-*

However, from a feminist perspective, an implicit assumption of greater falseness is attached to the concept of femininity. Society, feminists argue, had constructed particularly and oppressively false notions about women as a mechanism of social control, and these notions perpetuated a cycle of subordination, justifying and defining women's roles in the social structure.<sup>38</sup>

Interestingly, it was not thought to be the case, although this conclusion is a necessary logical corollary, that society had constructed equally erroneous notions about men. Perhaps not surprisingly, the dominant paradigm fared well in this critical assessment, lending support to MacKinnon's idea that the dominant masculine paradigm was the ultimate point of reference. Though many thinkers articulated concern about masculinity as a social construct, there was no real parity on the issue in terms of prevailing feminist theory.<sup>39</sup> Feminist gender deconstructionists were originally and principally concerned with deconstructing those socially constructed differences that justified the exclusion of women from the category of personhood *because* they were creating an obstacle to personhood. Men already enjoyed personhood, so the deconstruction of notions of masculinity was less necessary to achieving egalitarian aims. In this way, the deconstruction project was really still "liberalism applied to women" aimed at revealing the false separateness of women but reconstituted to understand inequality in the context of social norms and expectations.<sup>40</sup> What women were separate from was personhood, a construct in which men in their masculine role already resided. The primary problems of masculinity lay in its exclusivity, which cordoned off women not only from the status of masculinity, but also from the set of qualities, benefits, and entitlements embodied in masculinity. As a result, feminist gender deconstruction trod relatively lightly on the category itself, and masculinity, to the extent it was

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*chal Power*, in *FEMINISM & FOUCAULT: REFLECTIONS ON RESISTANCE* 61, 64 (Irene Diamond & Lee Quinby eds., 1990). Bartky argues:

The woman who checks her makeup half a dozen times a day to see if her foundation has caked or her mascara has run, who worries that the wind or the rain may spoil her hairdo, who looks frequently to see if her stockings have bagged at the ankle or who, feeling fat, monitors everything she eats, has become, just as surely as the inmate of the Panopticon, a self-policing subject, a self committed to a relentless self-surveillance. This self-surveillance is a form of obedience to patriarchy.

*Id.*; JANA SAWICKI, *DISCIPLINING FOUCAULT: FEMINISM, POWER, AND THE BODY* 59 (1991) (arguing that male domination may not stem from patriarchy, but rather from numerous "power relations at the microlevel of society").

<sup>38</sup> See, e.g., MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 6, at 100–02.

<sup>39</sup> Cf. DAVID BUCHBINDER, *MASCULINITIES AND IDENTITIES* 1 (1994) (arguing that a "plurality of masculinity" has emerged, inducing scholars to declare that "masculinity is in crisis"); DAVID GILMORE, *MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITIES* 12–14 (1990) (explaining that masculinity has a different meaning in different societies).

<sup>40</sup> MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 6, at 117.

reconstructed at all, was redefined to include a few additions which were at best only marginally un-masculine, such as “sensitivity,” “expressiveness,” and “nurturing”—a reconstituting that seems primarily motivated by a sense that men had been suffering their deprivation.<sup>41</sup> For the most part, however, and perhaps even by no particular design, masculinity retained many if not all of the qualities that were consistent with masculine identity and behavior prior to deconstruction.

Femininity, on the other hand, was deconstructed entirely. Women had been assigned a subordinate social role that was ostensibly premised on understandings of femininity. Further, femininity as a concept was intertwined with a morass of false and oppressive stereotypes.<sup>42</sup> From a theoretical perspective, femininity was a mess; parsing out what, if anything, could be defined as a pre-social quality of lacking maleness and possessing non-maleness was problematic at best. Perhaps most importantly from a pragmatic perspective, notions of femininity served as a rope to which the millstone of women’s subordinate social role and attendant prescribed behaviors were attached. As Catharine MacKinnon described the problem, “[d]ominance either seems or is justified or unjustified. Difference *is*.”<sup>43</sup>

This problem of difference seemed to have at least two potential solutions. One solution might have been to contend that femininity was irrationally devalued in that femininity represented a discernable difference, but the difference only had hierarchical significance insofar as society responded differently to it. Moreover, this hypothetical argument might proceed, the difference that was represented in femininity did not define the category of “women” or even correlate to it (i.e., not all women are feminine, and not all men are non-feminine), nor was that difference mutually exclusive to the category and qualities of personhood. Finally, this argument might conclude that while the quality of femininity was value-neutral—indeed qualitatively neutral—it had been erroneously equated with inferiority. In this framework, two ideas needed to be dismantled: (1) the idea

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<sup>41</sup> See, e.g., Nancy Levitt, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1073 (1996) (noting how fathers are precluded socially from assuming nurturing roles). MacKinnon understands this lack of parity to be an extension of the social control principle. She notes, for example, that the recasting of masculinity to include concepts such as “nurturing” has had the effect of getting for men what few privileges women previously held—for example, per se preference in child custody. From MacKinnon’s perspective, this is a one-way ratchet that is entirely consistent with the male-superiority/female-inferiority model. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 222.

<sup>42</sup> Margaret Davies & Nan Seuffert, *Knowledge, Identity, and the Politics of Law*, 11 HASTINGS WOMEN’S L.J. 259, 284 (2000) (noting that the female has traditionally been seen as irrational, passive, dependent, and emotional). Femininity was likewise entangled with notions of responsibility and conduct. For example, the association of an activity such as meal production with femininity is most likely attributable to a false stereotype premised on rigid birth-sex role assignment. See MARJORIE DEVAULT, FEEDING THE FAMILY: THE SOCIAL ORGANIZATION OF CARING AS GENDERED WORK 11, 95–120 (1991) (noting that by feeding their families, women perpetuate social norms about what constitutes proper women’s work).

<sup>43</sup> MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 220.

that all women and only women were feminine, and (2) the idea that femininity was a quality of inherent inferiority. However, while the latter concern was frequently addressed in feminist discourse, the former concern was only partially addressed in queer theory, and there primarily by implication.<sup>44</sup> Consequently, a debate flourished regarding whether there were qualities essential to womanhood, but *not* whether there was an essential pre-social quality to femininity disaggregated from birth-sex.<sup>45</sup>

A second possible solution to the problem of feminine inferiority was to dismantle the idea that femininity was women's natural state through theoretical extrapolation. Starting from the observation that many, if not most, notions of femininity seemed suspiciously like socially constructed mechanisms of subordination, deconstructing the "difference" seemed to be a reasonable project, particularly compared to the deconstruction project necessitated by the conclusion that *all* of the "difference" was a product of social construct. As MacKinnon observed:

[C]onsidering gender a matter of sameness and difference covers up the reality of gender as a system of social hierarchy, as an inequality. Differences are inequality's post hoc excuse . . . its damage that is pointed to as the justification for doing the damage after the damage has been done, the distinctions that perception is socially organized to notice because inequality gives them consequences for social power.<sup>46</sup>

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<sup>44</sup> The great feminist essentialism wars have produced a spectrum of possible womanhood essentialisms ranging from pre-social "woman" qualities, to socially formed experiential qualities, to socially constructed but yet superior qualities, to biologically essential traits, to traits resulting from biologically essential qualities. See Davies & Seuffert, *supra* note 42, at 279–81; CATHARINE MACKINNON, FEMINISM UNMODIFIED 55 (1987). See generally Gilligan, *supra* note 22 (discussing women's failure to fit a model of human development as a flaw in the model rather than their development); Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605 (2001) (offering a perspective on the reemergence of care, including the feminist conversation about care as an undervalued social practice central to many women's lives); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (examining the "human being" constructed by feminist theory and, alternatively, masculine jurisprudence).

<sup>45</sup> Interestingly, it would seem that the womanhood essentialism debate was one of the primary theoretical turns that effectively obscured the question of pre-social femininity. Because the emphasis was directed only toward the category of women, rather than the queer framing of masculinity and femininity in contest, the womanhood essentialism debate diverted the pre-social/social question from attribute and toward birth-sex. Once the question was centered on the birth-sex category, essentialism was difficult to square with the reality of queer women without defining queer women out of the woman category altogether. See, e.g., Gail Mason, *(Out)Laws: Acts of Proscription in the Sexual Order*, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 66, 68–80 (Margaret Thornton ed., 1995). Consequently, most feminists have moved away from pre-social essentialist positions and have instead gathered in either anti-essentialist or socially constructed essentialism quarters. Davies & Seuffert, *supra* note 42, at 277–78. Discussion about the role of essentialism within femininity has fallen between the cracks of both queer and feminist theory.

<sup>46</sup> MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 218.

This idea was empirically supported by the observation that many women experienced forced feminization as a social imposition. If femininity was not natural to all women, then femininity could not be women's *natural* state. Accordingly, the idea that femininity was the creature of socialization implies that, if it were not for this socialization, women would not be feminine. Deconstructing the socialization then could potentially resolve the problem of women's subordinate role in the social hierarchy by distinguishing womanhood from femininity.

Moreover, because femininity, as a discernable difference, was among MacKinnon's stigmatizing "hooks," deconstructing femininity represented the path of least resistance toward escaping subordination for several reasons. First, because femininity was "more false" as to women than the dominant masculine paradigm was to men, and because femininity was concurrently defined by its distinction from the masculine point of reference, the idea that femininity was false *in se* could be advanced without disturbing existing notions of personhood.<sup>47</sup> Also, deconstructing femininity provided an avenue by which women could escape their status designation in a manner that did not require the gargantuan undertaking of dismantling the relative valuations of the dominant masculine paradigm and the subordinate feminine paradigm.<sup>48</sup> Masculine could remain superior to feminine, and femininity could simply be abandoned. Additionally, the revelation that there was no "real" difference between men and women provided a relatively palatable reason for those in the dominant paradigm to relinquish that privilege, which is based on there being actual membership in the subordinate category. Deconstruction of "difference" facilitated the transition from relative privilege, since, as a point of first principles, the reason to devalue the other is based on the fact of his otherness. The final manner in which the femininity deconstruction approach represented the path of least resistance had to do with women's own relative valuation of things feminine. Rather than forcing women to confront our internalized misogyny, this approach offered permission to embrace it and encouraged women to do so since, from this point of view, femininity as an identity and as an expression *is* inferior. Therefore, women could achieve a change in their status without challenging hierarchical notions about masculine superiority in which we, too, had a substantial investment.

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<sup>47</sup> This was in part because the dominant feminist gender deconstruction theory did not operate under a model of personhood in which half the picture of person was feminine. The dominant model was one in which personhood was a category that was wholly separate from femininity, and consequently the identification of femininity was an inherent obstacle to claiming personhood.

<sup>48</sup> Certainly there were advocates for this approach. *Cf.* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (discussing women's inequality as resulting from devaluation because it differs from the male norm, offering an "equality as acceptance" model to revalue women's behavior).

In addition to being the path of least resistance, deconstructing femininity was appealing from another practical perspective because it provided an unambiguous avenue of exodus from women's gender roles. Women could defect. Movement away from identifications of femininity was tantamount to movement away from the devalued status. The opening of this avenue of exodus introduced an aspect of meaningful self-determination with respect to relative valuation that was previously unavailable to women. Women could *do* something about their status problem, and in fact, they should do something about it because the deconstruction emphasized two essential points about femininity. First, attributes which had been traditionally deemed "feminine" were not innate to women, were primarily socially imposed, and could—and most importantly, in the interest of full empowerment, *should*—be "unlearned." Second, women possessed innately (and could therefore access any of) the attributes that had been traditionally deemed "masculine." In this understanding, what was most ostensibly different about women was, by all accounts, innately less valuable—but the redeeming news was that it was also not inherent to women. Armed with these ideas, women were able to throw off the shackles of oppressive gender role conformity and express non-feminine attributes, which themselves partially transitioned from "masculine" attributes into "androgynous" attributes that people possessed in varying degrees.

Another pragmatic benefit of femininity deconstruction was felt by women for whom forced feminine identification was an identity imposition and for whom a non-feminine identity seemed more natural. To these individuals, the imposition of a feminized gender role was oppressive, not only because the role was subordinate, but also because the role itself was inconsistent with their sense of self-expression and gender identity. Femininity deconstruction appeared to have a pareto optimal result. Not only were these individuals relieved of an identity imposition, but the androgynous identity, which, all things being equal, they would opt to express anyway, became the preferred identity.

However, while the deconstruction of femininity may have yielded specific positive results for some women, it also had the effect of aggravating notions that a feminine identity or expression was inherently less valuable than a non-feminine identity or expression. This happened on four levels. First, because the deconstruction advanced the idea that femininity, when present in women, was not real or natural, women who exhibited femininity did so as either a conscious or subconscious bid for societal approval. In either construct, they were, on some level, faking it.<sup>49</sup> To be

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<sup>49</sup> The concept of femininity as a social construct was largely pioneered in the classic and influential text, SIMONE DE BEAUVOIR, *THE SECOND SEX* (H. M. Parshley ed. & trans., Alfred A. Knopf, Inc. 1993) (1949).

feminine, then, was to be submitting to a false consciousness and thereby denying one's true self.<sup>50</sup>

Second, the deconstruction revealed that femininity was created by the dominant paradigm to render women attractive and useful and, as such, served as a mechanism by which to subordinate women.<sup>51</sup> Femininity thus functioned as a reinforcement of women's subordinate status as object and pleaser.<sup>52</sup> Consequently, post-gender deconstruction, when a woman expresses femininity, she concurrently expresses self-subordination and the desire to be an object and pleaser.

Third, because the deconstruction understood that a claim to personhood qualities, like intelligence and competence, was achieved by migrating from woman status (which is characterized by femininity) to person status, to be feminine was to be, by definition, not smart, not competent, and not otherwise in possession of personhood qualities. This implication of the gender deconstruction landscape has the most tangible impact in terms of understanding sexual harassment as a continuing feminist problem.

Finally, the fourth (and arguably the most subtle) way in which the deconstruction operated to invalidate female femininity was by simply erasing it as a possible pre-social identity. This erasure meant that any perceived expression of female femininity could only be understood as contrived rather than essential—in all events a *choice*. Consider how our egalitarian anti-discrimination sensibilities shift as we move along the continuum of characteristics. We start with immutable traits like race, which we would generally insulate from discriminatory measures because punishing individuals for being born one way or another is obviously unfair. But when we reach volitional behavior like bigamy, our liberal idealism softens to give way to the competing value of social organization and hierarchy. The theoretical distinction between what we *are* and what we *do*—even where the distinction becomes tautological (is being gay something one does or is?)—has serious implications in the antidiscrimination context. As a society, we have tolerated restrictions on “doing” (anti-same-sex sodomy laws) in a way we would not tolerate similar restrictions on “being” (rounding up and interning known homosexuals). We seem to find discrimination based on behaviors more palatable than discrimination based on qualities, even where the behaviors are associated with or connected to

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<sup>50</sup> See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 109–11 (arguing that femaleness and femininity are social constructs).

<sup>51</sup> See Bartky, *supra* note 37, at 71 (explaining that “the ideal body of femininity—and hence the feminine body-subject—is constructed . . . a body on which an inferior status has been inscribed”).

<sup>52</sup> See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 110 (arguing that femininity is the quality of being sexually attractive and available to men); see also MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 6, at 178 (arguing that femininity is learned and defined through submission to male sexual advances).

the immutable qualities themselves.<sup>53</sup> This tendency suggests, I think, that we find a discriminatory model which leaves an avenue of escape by good (conforming) behavior less objectionable than a model that precludes such escape, and it is within this framework that we should consider the implications of denying the possibility that female femininity can be a quality of *being* rather than doing or acting.

With these four levels in mind, consider, for example, the following account of femininity:

By performing gender in a hyperbolic, stylized way, drag queens don't simply imitate femininity, they reveal how *women imitate femininity* as well, and what hard work it is. Through parody, drag can expose the seeming naturalness and effortlessness of gender itself; it doesn't imitate an original, but reveals that there is no original, only layers of performance. Drag says, "If you think my pretending to be a woman is hard, think what an effort it must be for a woman to do."<sup>54</sup>

This naturalness question is an important one. As an intuitive starting point, is it not at least somewhat suspect that, upon dismantling gendered social constructs, the androcentric model, which was already dominant, turned out to be the only "natural," non-socially constructed identity, expression, and experience of sexuality?

To illustrate this point, I would ask the reader to engage with me in a thought experiment: imagine for a moment that an individual's pre-social identity did not fall within that portion of the continuum which had previously been available to men and is now, under the gender deconstruction model, available to all. Is it possible for an individual to express a natural femininity?

Now imagine that the individual is a little boy. Most of us can accept a *Ma Vie en Rose* picture of natural femininity: a little boy, despite strong social disincentive, persists in a self-presentation that models femininity.<sup>55</sup> What is painful and poignant in the story is that, because of birth-sex bias, the boy is not permitted to present the identity that feels natural to him. It does not occur to us that he is faking this feminized self-presentation. It does not seem possible that he is vying for social approval. Although we are post-deconstruction thinkers, we are nonetheless likely to conclude, without

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<sup>53</sup> For an engaging consideration of the significance of discrimination/regulation that is directed at behaviors that are connected to an immutable quality in the context of race, see Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 38, 38–79.

<sup>54</sup> Sarah Chinn, *Gender Performativity*, in *LESBIAN AND GAY STUDIES: A CRITICAL INTRODUCTION* 294, 300–01 (Sally Munt & Andy Medhurst eds., 1997) (emphasis added).

<sup>55</sup> This is a reference to the film *MA VIE EN ROSE* [*MY LIFE IN PINK*] (Sony Pictures 1997) in which the main character, seven-year-old Ludovic, describes and presents himself as a feminine girl, despite castigation by his family and community.

much difficulty, that the boy is presenting a “real” pre-social, or at least contra-social, sense of self, perhaps even the ever-sacrosanct immutable quality.<sup>56</sup> Because we believe that the boy is who he presents himself to be, the squelching of his individuality theoretically matters to us. His choice is not contrived; it is a manifestation of his true self, and as such, it warrants our respect and arouses our anti-discrimination instincts. As post-deconstruction thinkers, we seem able to identify “natural” expressions of femininity where they appear in men, again primarily because manifestations of femininity in men are *contra*-social.

Thus, despite the per se invalidity of sex as a meaningful category in the deconstructionist framework, the rules with respect to the unnaturalness and social conformity aspect of femininity apply exclusively to women. Ironically, we find that femininity only naturally occurs in men or boys.<sup>57</sup> It turns out that the only completely socially constructed and therefore false gendered identity is that of a woman who expresses femininity. She does not exist, she acts, and as such, she is the great outlier, having chosen to persist in an identity expression that is, post-gender deconstruction, the only wrong choice.

So completely, in fact, have we internalized this androcentric bias that we think nothing of the fact that our present understanding of “androgyny” defines that area of the spectrum that has always been available to men and has only recently become open to women. For example, as a result of the androcentric-assimilation model of gender deconstruction, it is completely acceptable for a woman to cross-dress in the ordinary course of her daily life. In fact, there is no longer a concept of female cross-dressing. Women fundamentally can now dress androgynously as “people” always have—the difference is that the concept of “people” used to be limited to men. It is not acceptable, however, for a man to cross-dress in the ordinary course of his daily life. It is not acceptable for a man to don a dress and makeup and show up for his job as corporate counsel for a Fortune 500 company. This type of male feminine expression is, as a general rule, limited to performance. Male feminine expression is “hyperbolic” and

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<sup>56</sup> See, e.g., Patience W. Crozier, Book Note, *Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth*, 21 B.C. THIRD WORLD L.J. 123, 126 (2001) (reviewing CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* (2000)) (asserting that Sommers ignores evidence that, for example, a person born biologically male can identify and present as female).

<sup>57</sup> A possible explanation for this logically irreconcilable understanding of male and female femininity may be that male femininity appears at a unique juncture in feminist and queer theories. On the one hand, from a feminist perspective, the fear that femininity is a tool of female group subordination has little relevance when applied to a male. In fact, by lending an aspect of male privilege to a traditionally subordinated and feminized identity, male femininity would seem to help bridge the otherness and subordination gaps. On the other hand, from a queer theory perspective, male femininity would seem to embrace an aspect of gender role non-conformity, which is valued for its own sake in the queer paradigm. Consequently, in the deconstruction paradigm, male femininity is valid.

unnatural, while androcentric expression in women is considered natural, respectable, and professional.

This understanding of androcentric expression as normal for either gender is likewise illustrated in social understandings of children's identities and expressions. In the dominant paradigm, a little girl who is a "tom-boy" and expresses non-feminine traits is acceptable.<sup>58</sup> However, there is no benign analogue for little boys. Consider Cynthia Kern's observation:

I think in a really broad societal sense, it is much more offensive to young boys to see another boy who is feminine or who is experimenting with a transgender identity. Several of my clients do not identify as transgendered but they wear women's clothing a lot, they are experimenting with female names and more feminine identities. And I think that is far scarier and more offensive to a young boy than a young girl who wears pants and is more butch.<sup>59</sup>

Courts, too, appear to have internalized this social double standard. In simple sex discrimination cases, courts have consistently been more open to simple sex discrimination claims in which the plaintiff claims to have been a victim of forced feminization rather than those in which the plaintiff claims forced masculinization. In other words, courts have been sympathetic to the claim that an individual should be allowed to express non-femininity even where that expression is contrary to gendered expectations, but the claim that an individual, particularly a man, should be allowed to express femininity has not been sympathetically received.<sup>60</sup>

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<sup>58</sup> See, e.g., VERN L. BULLOUGH & BONNIE BULLOUGH, *CROSS DRESSING, SEX, AND GENDER* 330 (1993).

<sup>59</sup> Symposium, *Client-Centered Advocacy on Behalf of At-Risk LGBT Youth*, 26 N.Y.U. REV. L. & SOC. CHANGE 221, 240 (2001); see also BULLOUGH & BULLOUGH, *supra* note 58.

<sup>60</sup> Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding sex discrimination where a woman produced evidence that her career progression was adversely affected by her employer's expectation that she behave femininely), with *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992) (rejecting appellant's Title VII claim of forced masculinization on the basis that discrimination was based on his homosexuality, not his effeminate presentation). In *Dillon*, the court rejected Dillon's contention that he was the victim of the same sort of sex stereotyping that was recognized as discriminatory in *Price Waterhouse v. Hopkins*. The court concluded instead that Dillon was harassed because he was perceived to be homosexual, rather than because he was perceived to be effeminate. An interesting discussion of the judiciary's reluctance to recognize forced masculinization claims under Title VII appears in Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 780 (2002). Yoshino attributes this double standard to the Catch-22 identified by Hopkins's expert witness, psychologist Susan Fiske. Hopkins's double bind, as identified by Fiske, was the inability to be in her gender role and good at her job. Yoshino believes that it is only because of the doubleness of her bind (if, as a woman, Hopkins failed to act aggressively, she would not be promoted, but acting aggressively was likewise unacceptable) that Hopkins received relief. Dillon, in contrast, was presumably free to "butch it up" and therefore had an avenue available to him by which he could secure the job-related benefits otherwise withheld from him. While I think this is an interesting read of the disparate treatment by courts of enforced gendered expressions, I believe that the disparity actually results from a larger and more pervasive

Mary Anne Case touched on this double standard in 1995, making a compelling case for the proposition that the dominant androcentric model of gender role oppression is an inherently insufficient framework within which to address the problem of the devaluation of women.<sup>61</sup> She noted that while the traditional hierarchy which preferred men to women remained intact, a new sub-hierarchy was also emerging, one within which masculine-expressing women are preferred to feminine-expressing women.<sup>62</sup> She asserted that any hierarchy in which androcentricism is the norm will necessarily disfavor women, and consequently, for women to be valued on equal terms with men, femininity must first be valued in both women and men.<sup>63</sup>

Case's prediction of an emerging intra-sex hierarchy seems increasingly likely in a system that continues to disaggregate birth-sex from relative valuation but has not even begun to address the "otherness" problem associated with non-masculinity. The dominant paradigm acceptance of gender non-conformity continues to be a one-way ratchet. Society respects the manifestation of androcentric characteristics in either men or women, but it has yet to evidence a corollary respect for feminine expression in either women or men. Under this regime, feminine stereotypes, which were previously thought to be oppressive, are reified because feminine identity is understood as the expression of an autonomous choice to embrace those qualities that have yet to be disaggregated from feminine expression. These qualities themselves, however we might define them, have yet to be reconsidered and so remain devalued. Thus continues the downward spiral. At the end of the deconstruction, femininity's subordinate place in the social hierarchy, the very same "otherness" problem that egalitarian-minded feminists initially smote the sounding furrows to solve, remains largely unchanged. Instead, feminist gender deconstruction has settled for an out: an assimilation model of female liberation that made androgynous expression available to women. And the smart women got out while the getting was good.

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understanding that feminine equals less, and consequently enforced feminization is necessarily relegation to a lesser status, whereas entry into the dominant paradigm via masculinization is entry into a privileged status, which can only be deemed to be an expansion of options and liberties, rather than a diminishing effect. Masculinization is the opposite of dehumanizing. However, even under Yoshino's reading, femininity lacks inherent value while androcentricism is the norm. In Yoshino's view courts recognize that a set of androcentric norms apply to everyone in the workplace and that Hopkins was disadvantaged as compared to Dillon in that bias regarding her sex prohibited her from assimilating to those norms. Dillon on the other hand was free to assimilate. In this way, the "Catch-22" analysis of the disparate treatment of gendered expression identifies the key to gender equality as the freedom to assimilate to the dominant paradigm.

<sup>61</sup> See Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, *supra* note 53, at 35.

<sup>62</sup> *Id.* at 31.

<sup>63</sup> See *id.* at 33.

## 2. *Disappearing Femininity Within the Queer Theory Paradigm*

Here enters queer theory. In some ways, queer theory picks up the gender deconstruction project where feminist deconstruction left off. However, the ostensible point of reference for queer theorists would seem to be far less particularly geared toward abandoning femininity in favor of an androcentric model. After all, the existence of femininity does not disadvantage queer constituencies, as it arguably does women by distinguishing us as “other.” Or does it?

First, it is helpful to consider the ways in which gender deconstruction operates differently in the queer paradigm than in the feminist paradigm. In terms of gender deconstruction, queer theory begins with the premise that all gendered constructs are oppressive.<sup>64</sup> Gender is understood here to represent both antonym contrast and dominant paradigm difference.<sup>65</sup> The definitions of masculinity and femininity are symbiotic. We only know what femininity is because it is *other* than masculine—a definition that, as I hope is thoroughly suggested in Part II.A of this discussion, seems difficult to discount. However, if gender represents difference, queer theory answers the question “different from what” differently than MacKinnon answers it. While MacKinnon understands the point of reference to be the dominant masculine paradigm, the queer point of reference is the dominant heterosexual paradigm. In that framework, gender represents an elaborate social expectation, which includes sexuality expectations, that is absurdly married to one particular sex to the exclusion of the other.

Thus, the dominant heterosexual paradigm understands gender as a set of contrasts: masculinity means not feminine and goes with male only insofar as femininity means not masculine and goes with female. Dissent from this expectation distinguishes the dissenter from normal—he is distinguishable from the dominant heterosexual paradigm and is both defined and regulated by that difference. The queer project then is not only to disaggregate gendered expectation from birth-sex (à la feminism), but also to dismantle the binary system of gendered expectation altogether. Thus, the queer perspective begins from an understanding of dual social norms: a norm of masculinity and a norm of heterosexuality. But, from the queer perspective, the norm of heterosexuality eclipses in meaningful ways the norm of masculinity.

Herein lies the problem for women. By focusing on the heterosexual norm, queer theory fails to account for the animus that is directed toward those who dissent from the masculine norm. Deconstructing gender becomes a project aimed at dismantling the stigmatizing “difference” of gender non-conformity, not redeeming deviation from the masculine norm. Queer theory then would erase gendered categories: there are no more bi-

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<sup>64</sup> See, e.g., SEDGWICK, *supra* note 24.

<sup>65</sup> *Id.*

nary distinctions, and consequently the full range of gendered identities and expressions are available to all, irrespective of birth-sex. However, because the category feminine was not relatively redeemed prior to its abandonment, femininity remains disfavored. As a result, while difference from the heterosexual norm becomes obscured, the existing dominant ideal of masculinity remains intact, and masculinity or femininity choices are recast in assimilation or exclusion from the sole remaining paradigm.<sup>66</sup> Androcentricism is permitted to remain ideal because gendered equality was never the priority of queer theory gender deconstruction; binary gendered concepts are themselves the target of the deconstruction. But in failing to account for the fact that not only were our gendered constructs falsely binary—they were (importantly from a feminist perspective) hierarchically ordered—queer theory gender deconstruction simply allowed the existing dominant gendered paradigm (consisting of an andro-ideal) to subsume the already devalued subordinate paradigm of femininity. Androgyny was idealized and femininity left, again, to fend for itself amid residual misogynistic stereotypes. In this way femininity suffered in the queer theory paradigm, but largely by omission from the queer theory egalitarian project. But I would go further. I would argue that queer theory's version of gender deconstruction made its own unique contribution to both the construction and preeminence of the androcentric-assimilation model of female liberation.

It makes intuitive sense that gender deconstruction should be of particular import in the queer paradigm.<sup>67</sup> The idea that gendered birth-sex expectations are oppressive and socially constructed has obvious implica-

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<sup>66</sup> Christopher Kendall provides a compelling description of the assimilation-exclusion problem in the queer male community. He questions:

And what of those who do fit in, who find the validation in assimilation through masculine mimicry? What of those who become what our community and its models of masculine behavior say they should be? Will they alone ensure gay male liberation? I think not. Mimicry only ensures that those who cannot or who choose not to conform—and who, as a result, continue to threaten heterosexual male privilege—become the victims of greater physical and emotional abuse and discrimination. . . . In turn, this reinforces the idea that gay men can either fail to conform to male standards and be the feminized other that society has always told them they are . . . or they can copy them.

Kendall concludes:

By encouraging gay men to “change status,” in order to become exactly what society says men should be, and by constructing an entire community identity around this model of behavior, gay men have done little more than create a liberation strategy based on assimilation and, more significantly, upon the invisibility that results from assimilation.

Christopher N. Kendall, *Gay Male Pornography After Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality*, 12 WIS. WOMEN'S L.J. 21, 56 (1997).

<sup>67</sup> See generally SEDGWICK, *supra* note 24; Varona & Monks, *supra* note 4; Lester, *supra* note 4.

tions for queer individuals.<sup>68</sup> Also, unlike the dominant (non-queer) paradigm, in the queer paradigm, gender roles operate as an oppressive force against both genders. Consequently, one might think that the queer theory gender deconstruction paradigm would have adopted a model that disaggregated femininity from birth-sex, but which equally valued both feminine and non-feminine expression in either men or women. However, it is interesting to consider the extent to which a non-hierarchical approach, which would seem to flow so naturally from the queer paradigm, has not been realized, at least anecdotally, in the queer community.<sup>69</sup> What appears to have happened instead is that the queer paradigm has adopted a model of androcentric-ideal that is surprisingly more entrenched and more misogynist in the most traditional sense of misogyny (i.e., attributing subordinating stereotypes to feminine qualities and expressions) than anything found in non-queer culture.<sup>70</sup> This seemingly bizarre result could potentially be explained in a few ways.<sup>71</sup>

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<sup>68</sup> See Lester, *supra* note 4.

<sup>69</sup> Cf. SHEILA JEFFREY, *LESBIAN HERESY: A FEMINIST PERSPECTIVE OF THE SEXUAL REVOLUTION* (1993) (considering the extent to which the lesbian community has incorporated male iconography into their sexual practices).

<sup>70</sup> For example, on the surface level, an emphasis on a hyper-masculine appearance is much more prevalent in the queer male community than in the heterosexual community. “Muscle boys” occupy a prime place within the queer community desirability hierarchy, while online ads ubiquitously requesting “no queens” suggest that non-gender conforming men do not share a commensurate position. Indeed, much of the male queer community engages in the project of actively distancing itself from effeminate stereotypes while encouraging, patronizing, and, at a minimum, apparently appreciating exaggerated femininity—replete with traditionally misogynistic notions about sexually manipulative, plotting, feminine-wiles-wielding Madonna-like iconography—in women.

More surprising still, is the lack of tolerance for femininity in the female queer community. See Liz Stanley, *Male Needs: The Problems of Working with Gay Men*, in *ON THE PROBLEM OF MEN: TWO FEMINIST CONFERENCES* 190 (Scarlet Friedman & Elizabeth Sarah eds., 1982), *quoted in* TIM EDWARDS, *EROTICS AND POLITICS: GAY MALE SEXUALITY, MASCULINITY AND FEMINISM* 43 (1994). Stanley remarks:

Once upon a time I experienced my relationships with gay men as a paradigm of what liberated relationships between women and men might be like. Now I find it difficult to think of gay men without a groan, without thinking that in some respects they are more sexist, and certainly more phallogentric, than many heterosexual men.

See generally Kendall, *supra* note 66; SEYMOUR KLEINBERG, *THE NEW MASCULINITY OF GAY MEN, AND BEYOND*, in *BEYOND PATRIARCHY: ESSAYS BY MEN ON PLEASURE, POWER AND CHANGE* 120 (Michael Kaufman ed., 1987) (exploring manliness as the only real virtue recognized in the homosexual community). It is also the case in the queer paradigm that male femininity is devalued with respect to male non-femininity, though male femininity may be more valued in the queer paradigm than it is in the dominant paradigm.

<sup>71</sup> A common account that is offered to explain the dominance of the androcentric model in the queer community is simply that the queer paradigm failed to construct a community unified across sex lines. Instead the community, like its mainstream counterpart, was divided by dissimilar interests into male and female constituencies. Consequently, because queer men, by virtue of being men, enjoy more real-world power than queer women, queer men have constructed the queer paradigm from an androcentric perspective. This account is augmented by an understanding that certain queer activist movements that have been essentially rooted in queer male perspectives have likewise served to define the queer

a. *The Stake in Male Privilege*

One possible explanation involves what many have observed as the increased stake that a subordinated group has in retaining or accessing relative privilege.<sup>72</sup> In the queer context, queer men may have an increased stake in retaining male privilege because they are otherwise subordinated in the dominant paradigm. Similarly, queer-identified women may have an increased stake—as compared to non-queer-identified women—in accessing male privilege because they, too, are otherwise particularly subordinated in the dominant paradigm.<sup>73</sup> As a result of this increased need to retain or access male privilege, dissociation from and devaluing of femininity becomes more important in the queer paradigm than in the non-queer paradigm.

Additionally, our understanding of the queer stake in male privilege may be refined by a consideration of the specific interests of unique constituencies within the queer community as compared to the non-queer community. For example, there is a constituency of women in the queer community for whom feminine identification is a profound imposition and rejection of femininity is an important assertion of autonomy as well as an avenue for accessing privilege.<sup>74</sup> This constituency then has a specific interest not only in maintaining the superiority of non-feminine expression because non-feminine expression is consistent with its members' particular sense of self, but also they have an interest in rejecting and devaluing female femininity as a mechanism of social oppression.

Also, within the queer community there is a male constituency for whom non-feminine expression may be consistent with its members' sense of self, and the stereotype of a feminine gay man is a false social imposition as well as an obstacle to power. This constituency then has a specific interest in rejecting and devaluing femininity, both as an assertion of auto-

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constituency and queer paradigm in dominant culture. Cf. Christine Littleton, *Double or Nothing: Lesbian as a Category*, 7 UCLA WOMEN'S L.J. 1, 7–13 (1996) (describing lesbians' political disappearance in the queer paradigm). However, while I think it is possible that factors such as the dissimilarity of men's and women's interests, and the reality of male privilege with respect to real-world power have had an influence on the development of the androcentric model in the queer paradigm, I do not think this account adequately explains the community's double standard approach to the quality of femininity in queer people. It is particularly inadequate, I think, for explaining relative valuations of femininity in the lesbian community.

<sup>72</sup> Cf. Michael P. Jacobs, *Do Gay Men Have a Stake in Male Privilege?*, in HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 165, 178 (Amy Gluckman & Betsy Reed eds., 1997) (arguing that “gay activism should neither be conflated with, nor attempt to substitute for, a strong political movement that confronts women's subordination in all its forms”). Also consider as an analogue Devon Carbado's argument that black men may have an increased stake in male heterosexual privilege in *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76 (2000).

<sup>73</sup> See sources cited *supra* note 72.

<sup>74</sup> There is of course a constituency of women in the non-queer paradigm for whom this is likewise true.

mous self-definition, and also as a mechanism of dissociating the concepts of femininity and queer maleness. It was of this constituency in the queer community that Marilyn Frye observed:

They know, even if not articulately, that their classification with women is based on misunderstanding. Like most other men who for one reason or another get a taste of what it's like to be a woman in a woman-hating culture, they are inclined to protest, not the injustice of anyone ever being treated so shabbily, but the injustice of their being treated so when they are not women. . . . What results is not alliance with women but strategies designed to demonstrate publicly gay men's identification with men, as over and against women.<sup>75</sup>

A third group to be considered is the male constituency in the queer community for whom a feminine identification is a reflection of a sense of self.<sup>76</sup> This group has an interest in advancing an understanding of femininity that does not negate male privilege.<sup>77</sup> This group then has a stake in promoting a concept of femininity as an aspect of maleness, and—so as not to be inconsistent with male privilege—as distinctly disaggregated from femaleness. The femininity-expressing man is accepted in this paradigm despite expressing femininity because at the end of the day he is still able to lay claim to manhood. Male privilege serves to mitigate male femininity, but only insofar as it can be dissociated from femaleness.<sup>78</sup>

However, to achieve this end, it is necessary to embrace a value that validates the idea of feminine expression but does not run afoul of male privilege. The value that best suits this purpose is the value of gender non-conformity. The manner in which valuing gender non-conformity has in many ways eliminated a need in the queer community to examine the animus directed at femininity per se and the degree to which this value has disappeared female femininity within the queer theory paradigm is considered below.

*b. The Stake in Gender Non-Conformity*

As discussed above, while I think that the increased stake in male privilege is likely a large part of the reason that the queer paradigm has adopted an androcentric model, I do not think it entirely accounts for the community's disdain and disrespect for female femininity in particular. The community's stake in gender non-conformity, I believe, forms the other half

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<sup>75</sup> MARILYN FRYE, *THE POLITICS OF REALITY* 138–39 (1983).

<sup>76</sup> Kendall, *supra* note 66.

<sup>77</sup> See Jacobs, *supra* note 72.

<sup>78</sup> *Id.*

of the picture. The queer community has a substantial cross-constituency interest in valuing gender non-conformity for its own sake. To some extent, everyone in the queer community is, to one degree or another, venturing outside the behavior historically assigned to her gender. Meanwhile, in the dominant heterosexual paradigm, gender non-conformity is manifestly devalued and often extremely dangerous. Consequently, much of the queer community is unified in profound ways around a common experience of subordination and harassment, which is rooted in gender non-conformity. Valuing this common experience of oppression is extremely important in the queer paradigm, as is defying this pressure to conform.

The value of embracing gender non-conformity picks up where the value of embracing male privilege leaves off. Two things then are respected: androcentricism and gender non-conformity. An andro-expressing male in this paradigm, though he does not share in the common experience of gender non-conformity, is accepted and respected because he embodies an andro-ideal and reinforces queer male access to male privilege. A female who andro-expresses in this framework is accepted and respected because she shares in the common experience of gender non-conformity and because she emulates an andro-ideal, thereby reinforcing queer female access to male privilege. The male who femininely expresses in this model receives respect and acceptance because he too shares in the common experience of gender non-conformity, and because, despite his devalued feminine expression, he is still a man.

However, the feminine expressing woman is a complete outlier here. She neither shares in the common experience of gender non-conformity, nor does she embody or emulate an andro-ideal. Moreover, her gender conformity is problematic, not only because it marks her as an outsider from the subordination perspective, but also because it marks her as a sell-out. Here, the "naturalness" critique of femininity reenters, and the feminine expressing woman is castigated for two reasons. First, she is particularly devalued in the queer female community for being purposefully or ignorantly self-subordinating. Also, she is perceived as being contrived and artificial for all the reasons revealed by gender deconstruction in the heterosexual paradigm. Her gender non-conformity is seen as a bid for heterosexual social approval, or an attempt to escape queer-based animus. In a more extreme version, she is thought to be "passing" as straight in a bid for heterosexual privilege, or she is, in many versions, not *really* homosexual because actual homosexuality is somehow bundled with expressions of gender non-conformity in women although this is not so for men. In fact, none of these critiques appear applicable to gender-conforming queer men.

Perhaps most significantly, the gender-conforming queer woman is thought to be in receipt of dominant masculine heterosexual paradigm privilege in remuneration for her conformity. The exact nature of this privilege is ill-defined, as it must be when considered in light of what feminine

women do actually get in the dominant masculine heterosexual paradigm. Nevertheless, it is perceived that a feminine woman, by residing within a conventional gender expression role, has received a benefit from mainstream culture that has been denied to the gender non-conformists of the queer community, and this access to privilege (whatever it may be) makes her a poser, a sell-out, and most significantly here, well outside the relevant paradigm.

*B. The Last Paradigm Standing: Androgyny or Otherness*

So if gender deconstruction is a tale of two discourses, female femininity has been erased from the place where they intersect. Of course, this preference for an androcentric paradigm and the resulting devaluation of female femininity may not be a significant problem if gender deconstruction is descriptively right, that is, if female femininity is in fact a social construct. If that is the case, then the model as unpacked should have a liberating effect for previously feminized women, and gender differentiated entitlements and restrictions should continue to diminish as the birth-sex disaggregation project continues to succeed. In other words, it would not be a problem that the underlying animus against women *as other* had not been resolved had the subordinate paradigm in fact disappeared instead of merely being disappeared by the discourse. And maybe that is the case. Maybe, as the smoke clears, it will become apparent that an androcentric-assimilation model accurately reflects the true spectrum of human gendered identity, and the only problem with the deconstruction is that its liberating potential has not yet been universally accessed.

However, I would offer another perspective: that femininity deconstruction is descriptively flawed, and that in fact there is an aspect of femininity that, rather than being a social construct, is as natural a form of identity and expression as is androcentric expression.<sup>79</sup> It is this core aspect of femininity, rather than the *mélange* of attributes and stereotypes associated with femininity, which is the primary source of the perception of otherness.<sup>80</sup> I also contend that this quality is devalued wherever it is perceived

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<sup>79</sup> Of course, I may be wrong about the “naturalness” claim. It may be the case that only men and boys experience and express an innate femininity, and that femininity-expressing women are enacting a conscious or subconscious bid for social approval to the peril of their natural androgyny. However, even from this perspective, it is still a feminist problem that gender deconstruction has failed to address the underlying animus directed at the otherness of women. This is so not only because, as discussed above, women persist in feminine expression, but also because even were cultural disapproval able to squelch all volitional manifestations of female-femininity, identity hierarchies that disadvantage women would endure because this culture engages in sophisticated mechanisms of gender coding.

<sup>80</sup> It is important to be clear that I am not mounting a cultural feminist argument of female or even femininity essentialism. I do not believe femininity is an essential female trait, that all women have a core femininity, or that femininity is more natural in women than in men. Nor am I, for example, making an argument that people who express femininity spin webs whilst people who do not express femininity build hierarchies. *See, e.g.*, Gilli-

and especially devalued in women. Moreover, I argue that regardless of whether one embraces the naturalness claim, it is certainly the case that both gendered expression and gender coding persist, and gender deconstruction has failed to adequately account for or dismantle these recalcitrant gendered manifestations. Consequently, because the underlying animus against women-as-other (bringing as it does all the historical baggage of women as less and as a commodity) has yet to be addressed, and because gender expression and gender coding exist, identity hierarchies, which closely parallel pre-deconstruction hierarchies, are ubiquitous and—although they are increasingly disaggregated from birth-sex—continue to disproportionately disfavor women.

### C. *Femininity as a Commodity*

But what does any of this have to do with sexual harassment as a tool of gender discrimination? Both the relevance and the moral of this backstory is simply that everything old is new again: if femininity has not been revalued, if the model of female liberation is one of androcentric-assimilation, then it should not surprise us to find that General Halftrack continues to understand feminine-expressing Miss Buxley to be a sexual object. More importantly, he continues to understand her to be *different* than other employees because she is (in his mind) fundamentally and materially different from *people*, his point of reference being, of course, *him*. In sexualizing her, he reminds her and himself that she is other, and other is less. And although his actual workplace skirt-chasing may have changed (by force of law, let us remember), the workplace power dynamic and his own investment in it has not. He need not be threatened by competence that issues from a dissimilar source because he will always be able to say or do something that reminds them both where they stand. We should not

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gan, *supra* note 22, at 32. In this piece, which is frequently hailed as a foundational work of cultural feminism, Gilligan presented two eleven-year-olds, Amy and Jake, with moral dilemmas and concluded that Jake approached the problems with an abstract perspective, while Amy focused on the particulars of the interpersonal relationships. Gilligan concluded that Amy spoke “in a different voice,” and that voice roughly represents a feminized approach to cognition and ethics. In this view, what is feminine and what is socialized to be feminine are often indistinguishable. See Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 10–20 (1990) (maintaining that the unresolvable causal problem is an incoherent inquiry because the phenomenon of gender differences and power/treatment differences are interrelated and interactive); West, *Jurisprudence and Gender*, *supra* note 44, at 13–28. For an introduction to ideas of cultural feminism, see JOSEPHINE DONOVAN, FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM 31–68 (1985); Abrams, *The Second Coming of Care*, *supra* note 44, at 1607–14. See generally Susan Moller Okin, *Reason and Feelings in Thinking About Justice*, in FEMINISM & POLITICAL THEORY 15 (1990) (focusing on how the assumptions of Rawls and Kant about the division of labor between the sexes have a fundamental effect upon their accounts of moral subjects and the development of moral thinking).

be surprised to find that Miss Buxley is still other and less because isn't that where we left her when we sailed for other shores?

What is perhaps marginally surprising, however, is that as feminist and queer theorists, we do not seem to care about this dynamic anymore. We are not sure that it is a problem at all: Miss Buxley is a volitional, autonomous being expressing the universal code for a sexual object, and more power to her for making use of her commodity. Or we are not sure that Miss Buxley is not herself the initiator, navigating the whole scene. Even if Miss Buxley would, all things being equal, prefer General Halftrack to back off, her resistance to General Halftrack's sexualization of her is itself a sort of false consciousness—a learned response laden in shame and sex-negativity and inexorably tied to MacKinnonite theories of female sexual subordination. In this last scenario, Miss Buxley has become dissociated from what would otherwise be her own erotic involvement in the sexually charged workplace. The unifying theme in all of these scenarios is that if there is a problem with General Halftrack sexualizing his secretary at work (and let us be introspective enough to be sure we are not simply being repressed or sex-negative about the whole matter), the alpha and omega of the problem is Miss Buxley, that little vixen. The old is indeed new again.

Now before arguments concerning the pros and cons of “sexy dressing” begin rushing to the reader's mind, let me be clear: this is not an article about female sexual subordination.<sup>81</sup> It is not an article about sexual subordination from a feminist perspective, a post-modern perspective, a sex-positive perspective, or a queer theory perspective. I am not advancing a position about what Miss Buxley's subjective experience of being sexualized is or should be, in part because *that* ground, certainly, is well-trod. More significantly, it is immaterial here because sexual harassment law is not and should not be designed to keep women separated from sex. I do not pretend to know how women, or anyone, should subjectively experience sexualization when they are on the subway, at the gym, at the grocery store, and so forth. Therefore, I will confine my observations to another point: Miss Buxley is at *work*. Notwithstanding the parade of horrors presently en vogue portending the expansive reach of sexual harassment prohibitions and their paranormal propensity to inhibit basic human sexuality, I would point out that sexual harassment law is about the intersection of three factors: (1) *sexualization*, which, depending on context, may be subjectively experienced positively, negatively, or indifferently; that is (2) *unwelcome*; and (3) *in the work place*.<sup>82</sup> Whether involuntary sexualization at work is subjectively experienced as a problem or not is highly individual-

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<sup>81</sup> Cf. DUNCAN KENNEDY, *SEXY DRESSING, ETC.* 126–213 (1993) (linking sexy dressing, sexual abuse, and the eroticization of domination). For a treatment of sexual subordination, see MACKINNON, *FEMINISM UNMODIFIED* *supra* note 44, at 55.

<sup>82</sup> See, e.g., Shultz, *supra* note 4, at 1716–20, 1729–32; Halley, *Sexuality Harassment*, *supra* note 8.

ized, and so of course it is not always experienced as an injury. Nonetheless, I posit that where involuntary sexualization at work is experienced as an injury, it is an injury that disproportionately affects non-androcentrically assimilated women, that is, women like Miss Buxley.

As a starting point, it is important to distinguish this injury from the injury identified by Katherine Franke in her assessment of what is wrong with sexual harassment.<sup>83</sup> Franke contends that what is injurious about sexual harassment is that it functions as “a mechanism by which an orthodoxy regarding masculinity and femininity is enforced.”<sup>84</sup> Women are subordinated by sexual harassment by being feminized.<sup>85</sup> To Franke, what is wrong with sexual harassment is that it “perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men.”<sup>86</sup> Thus, in this paradigm, Miss Buxley is not inherently feminine, but instead, feminized by General Halftrack. Moreover, this feminization has the effect of reducing “women’s identity to that of sex object while figuring men’s identity as that of a sex subject.”<sup>87</sup> Franke notes that this ideology also includes a “hierarchy in which women are regarded as inferior to men, and *femininity is regarded as inferior to masculinity*,”<sup>88</sup> but her solution to that lesser status problem is to work against the forced feminization—which is necessarily the objectification—of women. Thus, Franke’s conceptualization of sexual harassment embraces a worldview in which feminization is inherently degrading because society values the feminine less, and to be feminine is to be an object. Consequently, women need to be allowed to escape femininity and assimilate into the larger paradigm of personhood. So again the options appear: either cease being the other, or be subordinated. Franke views the potential good of sexual harassment prohibitions as a mechanism to inhibit this involuntary feminization.

However, the injury I am attempting to isolate is not predicated on a view that feminization is inherently subordinating, first, because I do not believe that femininity is a subordinate quality, but, more importantly, because I think we should aspire to greater egalitarian goals than merely ensuring unobstructed access to androcentric-assimilation. The premise from which I begin (for the purpose of this analysis) is that femininity itself is value-neutral; it is merely a way of being or expressing, like the lauded androgyny. The problem is that femininity is, and has always been, equated with inferiority, one manifestation of which is sexual objectivity. Consequently, women coded as feminine are also coded as objects—as a particular manifestation of the inherent inferiority. The problem then from a

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<sup>83</sup> Franke, *supra* note 2, at 693.

<sup>84</sup> *Id.* at 760.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 696.

<sup>87</sup> *Id.* at 760.

<sup>88</sup> *Id.* at 762 (emphasis added).

sexual harassment standpoint is that femininity has yet to be disaggregated from women's historical status as sexual commodities.

The historical context of this coding is hardly new or controversial. Feminists have long contended that patriarchy presents a sex-for-subsistence barter to women.<sup>89</sup> Historically, women had few, if any, options outside of this exchange.<sup>90</sup> Because of birth-sex bias, women's non-sexual abilities were not permitted to be presented as commodities alongside men's abilities. Consequently, women were forced to trade on their suitability as romantic partners as their sole commodity. Not surprisingly, under this system, women's relative value was related to their sexual attractiveness. This perception that women had nothing to offer except to the extent that they could please a member of the dominant paradigm was, of course, a manifestation of misogyny.

There are two aspects of the barter that were problematic from a feminist perspective. First, the coercion created by the absence of meaningful choices was a problem, in part because the ability to decide what happens to one's body is arguably an essential element of autonomy. Coercion was also a problem from a bargaining perspective; while it may be the case that sexual attractiveness was not her best commodity, a woman was precluded from choosing to market one commodity over another. A second problem with the barter was the fact that women were only able to access power indirectly. Men were able to access real-world power (i.e., money, knowledge, status) directly. Women, however, were only able to access real-world power by way of an intermediary. A woman required a patron to exchange her commodity for real-world power, and the presence of that intermediary represented a significant transaction cost.

Feminist efforts have, of course, changed the landscape of this barter by dismantling many of the formal restrictions that limited women's ability to bargain with non-sexual commodities. Also, as discussed above in Part II.A.1, gender deconstruction has provided assimilation as an avenue for women to escape the informal restriction of being identified as solely a sexual commodity. Now, to the degree that a woman can andro-present, she has the opportunity to "be taken seriously" and have her personhood abilities valued. If a woman successfully escapes feminine identification, she can enjoy a degree of commodity agency that begins to approach the kind of agency that men enjoy. She may choose to commodify her attractiveness, or she may decline to do so and instead present another commodity. While she may still have her attractiveness commodified against her will, she is shrouded in a sufficient acceptance of personhood that it is not a foregone conclusion.

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<sup>89</sup> Cf. CICELY HAMILTON, MARRIAGE AS A TRADE (1981) (arguing that women were brought up to look for success only in the marriage market, and this severely damaged their intellectual development).

<sup>90</sup> *Id.* at 35.

However, also as discussed above in Part II.A.1, gender deconstruction did not dismantle the misogynist conclusions that were coupled with the “otherness” understanding of femininity that is manifested by non-androcentric-assimilation presentation. Amidst the misogynist notions bundled with feminine identification is the notion that the value of a feminine-identified woman, a class that was previously understood to include all women, is uniquely related to her sexual attractiveness. Female femininity then creates a presumption that the feminine-identified woman is to some degree still a sexual commodity in a way that androcentric presentation negates.

What is particularly interesting about the current structure of these ideas is that, because there is another option available to women and because feminine identity has not been uncoupled with notions of commodification, now a female feminine presentation routinely is interpreted as evidence of a *desire* to use sexual attractiveness as a commodity. This conclusion is obviously circular and results from the fact that femininity was never disaggregated from this notion. However, as gender deconstruction has provided an “out” from this dilemma, a feminine-identified woman is presumed to be opting “in.”

Similarly, because gender deconstruction rejects the possibility that feminine identity is a pre-social identity, feminine identification is understood as an expression of one’s autonomous choice to be sexualized. In this way, gender deconstruction ironically has operated to assign commodification roles to various gendered identities. Women then inhabit a continuum on which Madonna and Janet Reno serve as stereotypical poles. Madonna represents the self-actualized choice to embrace a sexualized self-presentation that is pleasing to the dominant masculine heterosexual paradigm, and in so doing she makes the choice to commodify her sexual attractiveness. At the other end of the spectrum, Janet Reno represents the desire to embrace the natural human androcentric state while maximizing the unique avenue it provides for direct access to power. In this framework, both Madonna and Janet Reno have valid mechanisms for accessing power. Moreover, possibly both of these women are able to express identities that feel natural to them, while bartering those commodities that—all things being equal—they would choose to barter.

However, this is clearly not the case for all women. In a framework in which feminine identification creates a presumption that the quality one prefers to commodify is sexual attractiveness, a feminine-identified woman who would prefer to commodify her non-sexual abilities instead of her attractiveness faces the androcentric-assimilation dilemma. Further, the likelihood that she will be perceived as available for sexual commodification has been aggravated by the post-deconstruction notion that her self-presentation communicates a desire to be sexualized. Moreover, assimilation may not even provide an adequate remedy to this problem. As suggested above, attempts at assimilation may not effectively obscure the

quality of otherness that is now unabashedly equated with a desire to use attractiveness as a commodity. This adds, I think, an interesting wrinkle to the “choice” aspect of feminine commodification; if being valued for one’s attractiveness is on some level inescapable, how much of a choice is it to try to make the best of this condition?<sup>91</sup>

But even assuming that the failure to assimilate to an andro-norm renders one likely to be read as available for commodification, or more strongly, makes one a unique sexual commodity, what is wrong with that? If, as the sexuality deconstruction discussed below suggests, there is nothing inherently subordinating to women about being sexualized, why should we care if a subset of women are sexually commodified? To the extent non-andro-genized women uniquely possess a commodity that is valued by the dominant masculine paradigm, are they not better off because of it?

### III. BECAUSE IT IS *SEXUAL*: INJURY REVISITED

In the first Part of this Article, I considered whether sexual harassment is a feminist concern, that is, whether it has anything in particular to do with women. My first step was to answer the class question. Now, assuming arguendo that I am permitted to project upon the reader a provisional acceptance of the premise that sexual harassment might represent a persisting incarnation of “otherness” and gender hierarchy, where does that leave us on the injury question? The queer or feminist deconstructionist may well ask, even if a particular gendered identity is more likely to be sexually objectified at work, what is wrong with that? Whereas above, skepticism was directed at the gendered distinction claim of sexual harassment doctrine, here skepticism is aimed at the injury claim of sexual harassment doctrine. Here, post-gender deconstructionist sex-positive thinkers, having banished the possibility of “sex” and “wrong” meeting in the same situation, may wonder if Miss Buxley should just lighten up and learn to take a compliment. Here enters a sexual subordination critique of sexual harassment law.

This criticism is twofold. The first part of the critique calls into question the validity of, or at a minimum, the universality of, Catharine MacKinnon’s sexual subordination model of sexual harassment. The model of sexual harassment injury offered by MacKinnon in her influential work, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, is a model in which sexual power relationships between men and women are largely solidified along birth-sex lines.<sup>92</sup> In this model, sex is understood as a mechanism by which women are subordinated by men, and what results

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<sup>91</sup> See Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 391–404 (1985) (questioning the relationship between consent and autonomy).

<sup>92</sup> MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 6, at 156–58; see also MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 44, at 40.

is an essentially gendered dominant-subordinate dyad based largely on notions of who is acting and who is being acted upon.<sup>93</sup> However, some deconstructionists, particularly queer-identified deconstructionists, may well find this model too shrouded in heterosexist “missionary position” presumptions to be predictive of real-world sexual power dynamics. Moreover, feminists too have moved away from the male-dominance/female-as-sexual-subordinate model of sexual harassment injury that seemed inexorably tied to theories of sexual coercion in a patriarchy and predicated on the notion that women are inevitably victims when sexuality is afoot.<sup>94</sup> Thus, from both an anti-essentialist and a pro-empowerment perspective, the perceived entrenchment of women’s subordination within the sexual-subordination model seems unacceptable. Consequently, being sexualized is not viewed as inherently subordinating to women, and so, what is injurious about sexually harassing behavior cannot be that it sexualizes women. Being sexualized then is not an injury in its own right.

The second part of the critique advances Gayle Rubin’s idea that our cultural instinct to construct barriers and regulations around aspects of sexual expression is the result of a cultural norm of sex negativity.<sup>95</sup> This part of the critique understands the prohibition on sexual harassment in the workplace as predicated on ideas about “bad sexual expression,” that is, sexual expression that is not redeemed by furthering the ends of acceptable pursuits, such as “marriage, reproduction, and love.”<sup>96</sup> Moreover, Martha Nussbaum applies this concept to specific instances of female sexual commodification and concludes that most condemnation of female sexual commodification is premised on false beliefs about “the evil character of female sexuality, the rapacious character of male sexuality, the essentially marital and reproductive character of ‘good’ women and ‘good sex.’”<sup>97</sup> Sexual harassment prohibitions seek to corral bad masculine sexual expression because it is “unredeemed” and consequently per se “guilty” sexual expression. Thus, at this level of the critique, sexual harassment doctrine errs in villifying sexual expression without perceiving that sexual expression of all sorts has inherent value and can be specifically empowering to women.<sup>98</sup>

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<sup>93</sup> See, e.g., MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 114.

<sup>94</sup> See, e.g., Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306 n.11 (1995). See generally Juliano & Schwab, *supra* note 4; Abrams, *The New Jurisprudence of Sexual Harassment*, *supra* note 4; Schultz, *supra* note 4; Bernstein, *supra* note 4; Franke, *supra* note 2.

<sup>95</sup> Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 278–80 (Carol Vance ed., 1984).

<sup>96</sup> *Id.* at 280–82.

<sup>97</sup> Martha C. Nussbaum, “Whether from Reason or Prejudice”: Taking Money for Bodily Services, 27 J. LEGAL STUD. 693, 723 (1998).

<sup>98</sup> Abrams, *The New Jurisprudence of Sexual Harassment*, *supra* note 4, at 330.

However, the analysis offered here is agnostic on the questions of whether MacKinnon's picture of sexual power dynamics is descriptively correct or whether Rubin and Nussbaum are accurate in their assessments of the sex negativity problem in our culture. This Article assumes no position on the "sex wars" question regarding whether sex is empowering to women because the injury identified here is not a "sex" injury.<sup>99</sup> Instead, there are two "sex-neutral" injuries that follow from involuntary sexualization in the workplace.<sup>100</sup> The first is best described as a transactional model of injury in which feminine-identified women are more likely to be commodified and are also, as women, less likely to have background entitlements of real-world power due to historical inequities. In a nutshell, the transaction goes like this: women who are (or are coded) feminine are uniquely valued for their sexual attractiveness, a tradeable commodity, by those who are disproportionately in power (straight men). The transaction is, at its root, power for sexual desirability, indeed the oldest trade in the book.<sup>101</sup> Sexual harassment law seeks to prohibit that transaction. The feminist model behind it has ascribed to the belief that as long as women continue to occupy a space in our culture as unique sexual commodities and straight men have disproportionate background entitlements, the transaction will result such that women (particularly unassimilated women) will continue to be relegated to accepting sexual attractiveness as a proxy for actual power, instead of just having actual power.

A fundamental problem with involuntary sexualization in the workplace, however, does not implicate commodities, bargaining power, or one's particular desire to capitalize on the sexual situation of women in a larger social structure, but rather is still a problem of otherness. Sexualizing an individual (or the class of individuals of which a particular worker is a member) describes the other as other. More specifically, involuntary sexualization is a means of first identifying and then ostracizing and disempowering otherness.<sup>102</sup> Interestingly, this still prevalent power dynamic is

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<sup>99</sup> See, e.g., MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 6, at 117 (describing sex discrimination as protecting only against injury based solely on one's sex outside any social context); MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 6, at 233 (addressing the argument that the "sameness" view of sex discrimination ignores that unequal treatment is often socially based, and therefore does not constitute a solely sex-based injury).

<sup>100</sup> The injuries following from involuntary sexualization are perhaps self-evident even in a post-modern light, and they have certainly been ably explained by a myriad of scholars. My point is simply that because feminist and queer theory deconstruction has failed to disaggregate the negative baggage attendant to the "otherness" of women and has instead embraced an assimilation model of female liberation, the problems that have always been attendant to this particular construal of female femininity "otherness" largely remain.

<sup>101</sup> It is important to be clear that while I describe the model as though it were applicable only to situations of quid pro quo harassment, the general commodification of women in the workplace produces a similar set of injuries.

<sup>102</sup> Sexual harassment is the "unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another." MACKINNON,

easier to see from a “sex-neutral” perspective in the context of intra-sex sexual harassment. Is not this phenomenon of identifying, ostracizing, and disempowering otherness the operative dynamic in same-sex sexual harassment suits in which there appears to be no sexual desire?

For example, in *Oncale*, which is considered in more detail in Part IV, are not Oncale’s coworkers sexualizing him as a means of rendering him less volitional, less respected, less autonomous, and less alpha than themselves? Consider the Fifth Circuit’s description of the facts:

Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale’s neck, on one occasion, and on Oncale’s arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale’s anus while Pippen restrained Oncale as he was showering on Sundowner premises.<sup>103</sup>

In the scenario described by the court, Oncale is the subject of involuntary sexualization that serves to disempower and subordinate him. He is restrained and threatened with sexual violence. Here, though, Oncale’s disempowerment comes not from the subordinate status of men in sex or all things sexual, but rather from the involuntary sexualization to which he is subject and which renders him, the other, as less.<sup>104</sup>

If either gender can be the subject of involuntary sexualization, and if it is disempowering and injurious to either gender, how is involuntary sexualization a form of gender discrimination? How is it a feminist problem? The pre- and post-gender deconstruction answers are the same: because it happens more to women, and women still have fewer background entitlements. There is also an additional element to this answer: involuntary sexualization has a different meaning when it happens to women, par-

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SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 6, at 1. Such sexual harassment “reinforces and expresses women’s traditional and inferior role in the labor force.” *Id.* at 4.

<sup>103</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118–19 (5th Cir. 1996), *rev’d*, 523 U.S. 75 (1998).

<sup>104</sup> But what of the “otherness” of Oncale? Why was he targeted? Of course lacking omniscient access to Oncale’s harassers’ psyches, we know little about the nature of the “otherness” of Oncale from the perspective of his harassers. Did his coworkers perceive him to be gay? Was the quality for which his harassers targeted him a feminine quality? Consider, too, the experience of Medina Rene, an openly gay man who complained of same-sex sexual harassment because his male coworkers whistled at him, called him “sweetheart,” and “touch[ed] [his] body like [one] would a woman.” *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9th Cir. 2002); *see also* discussion *infra* Part IV.B. What is the otherness of Rene? Is it that he is gay? Certainly that animus was present in his workplace, and Rene did charge that the unwelcome behavior was motivated by homosexual bias. How much of the actual harassing behavior can be untangled from the view that his coworkers understood Rene’s otherness to be connected to the fact that he was “womanlike,” that he possessed a quality of non-maleness that they viewed as subordinate? It is unclear how much of this class of harassment is an attempt to target through sexualized domination the unredeemed quality of femininity.

ticularly within the heterosexual paradigm, which is still the dominant paradigm in most workplaces. Desire or power may be the underlying motive of involuntary sexualization, whether a man or a woman is the target. However, excepting those situations in which involuntary male sexualization is in some way about responding to a perceived quality of femininity about the man, when a man is involuntarily sexualized at work, it is not about identifying him within a historically contextual otherness. Involuntary sexualization of a woman is uniquely imbued with the message that at the end of the day, however smart and competent she may appear to be, she is still “just a girl.”

This dynamic identifies sexual harassment—or more accurately, the involuntary sexualization of (predominately) women by (predominately) men in the workplace—as a tool of oppression wielded disproportionately against women. It is still a priori a feminist problem, both from a commodification perspective and an “other as other” perspective. Therefore, what is wrong with sexual harassment is that even in our post-modern-gender-sexuality-queer-theory-deconstructive world, by sexualizing women at work when sexuality is not a job-relevant quality, it is an exercise in defining women as less.

Having considered the theoretical foundation for understanding involuntary sexualization at work as both a form of gender discrimination and a (non-sex negative) injury, the next step in understanding the doctrine of sexual harassment is to consider how the doctrine navigates the labyrinth of Title VII post-gender deconstruction and how, in an ideal legal landscape, it should.

#### IV. DECONSTRUCTIVE THEORY MEETS SEXUAL HARASSMENT LAW: *ONCALE AND BEYOND*

Predictably, as notions of gender and sexuality have evolved over the last few decades, legal theories concerning what it means to discriminate “because of sex” under Title VII have experienced a similar evolution. This evolution began with the recognition that gender roles represented a form of simple sex discrimination. For example, one of the early gender-deconstructive rulings of the Supreme Court appeared in 1989 in *Price Waterhouse v. Hopkins*.<sup>105</sup> In *Price Waterhouse*, the plaintiff was denied partnership at the well-known accounting firm in part, she alleged, because she failed to adhere to traditional notions of femininity. In reviewing her claim, the Supreme Court noted that Hopkins had been advised by the partnership that she could improve her chances of making partner in the future by striving to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jew-

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<sup>105</sup> 490 U.S. 228 (1989).

elry.”<sup>106</sup> The Court found the firm’s treatment of Hopkins’s candidacy to be a form of evidence of discrimination based on sex because Hopkins was subject to a separate set of behavioral criteria as a result of her gender.<sup>107</sup>

In *Price Waterhouse*, the Court took a significant deconstructive step. While, like other successful gender discrimination plaintiffs, Hopkins produced evidence that her employer considered her gender to be a factor relevant in an employment decision, her claim introduced a subtle distinction from previous claims: Price Waterhouse did not consider the fact that Hopkins *was* a woman to be relevant; it considered the fact that Hopkins did not *act like a woman* to be relevant. Thus, Hopkins did not demonstrate that Price Waterhouse discriminated against women, but rather that it discriminated against women *like her*. As a result, *Price Waterhouse* opened the door for a claim of discrimination for intra-gender difference. Thus, *Price Waterhouse* established Title VII redress not only for discrimination that resulted from gender nonconformity, but also for discrimination premised on disfavor in comparison to other women (or men).

Within this framework followed intra-gendered claims. Indeed, the next major step down the gender-deconstructive path of Title VII doctrine was the effort by courts to adjudicate claims in which the plaintiff presented evidence of animus against men (or women) “like them” who failed in one way or another to meet social expectations attendant to their gender. In this stage of Title VII development, courts struggled to define the parameters of gender roles and norms and what it meant, post-*Price Waterhouse*, to discriminate because of sex within the structure of simple sex discrimination.

Title VII gender-deconstructive thought then progressed to sexual harassment doctrine. From one perspective, *Oncale* was the first occasion in which gender deconstruction was incorporated into this doctrine. In a way, the result in *Oncale* is a simple matter of applying the principle articulated in *Price Waterhouse*—that prohibited gender discrimination may include claims of disadvantageous treatment as compared to members of one’s own gender—to the narrow subset of sexual harassment, sex discrimination claims. In *Oncale*, not every man on the rig was subjected to sexu-

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<sup>106</sup> *Id.* at 235. The Court referred to several similar comments that supported Hopkins’s claim of gender discrimination, noting that:

There were clear signs . . . that some of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language.” Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.”

*Id.* (citations omitted).

<sup>107</sup> *Id.* at 251, 256.

alizing behavior. The offensive conduct was not then prompted solely because of Oncale's gender, but rather was in some way about Oncale. Though the Court does not make this explicit, it was likely about "men like Oncale," just as Hopkins's discrimination was about women like Hopkins or just as Miss Buxley's harassment is about women like Miss Buxley. There was a specific quality that set Oncale apart for intra-sex distinction, and that quality, while possibly also arousing desire in the harasser, on some level activated a strong desire to punish otherness. It is a similar kind of otherness animus and the same kind of injury perpetrated against Hopkins and Miss Buxley.

Before we look closer at the deconstructive<sup>108</sup> model within *Oncale*, it is perhaps helpful here to take a moment to consider the place of sexual harassment prohibitions within the wider context of sex discrimination law. As an initial matter, in the interest of theory-doctrine reconciliation, there are two characteristics of sexual harassment that importantly set it apart from simple sex discrimination. First, sexual harassment is a subset of sex discrimination. Imagining a Venn diagram, all of sexual harassment law sits within the circle of sex discrimination. It follows then that sexual harassment law prohibits a narrow and particular type of sex discrimination. In fact, sexual harassment doctrine addresses a relatively modest set of human behaviors, prohibiting only "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>109</sup> This point, albeit obvious, must be identified because the doctrine has so often been criticized as overinclusive and/or underinclusive that it seems we have ceased to recognize that nonsexualizing sex discrimination is also separately cognizable under Title VII.

Second, and more essentially, sexual harassment as a form of gender discrimination is not only subject to deconstructive interpretation, but is *itself* a sort of deconstructive interpretation of gender discrimination. Absent a social-contextual understanding of women's historical place as a sexual commodity within a larger patriarchic power structure, it is not obvious how "verbal or physical conduct of a sexual nature" forms a type of gender discrimination, particularly as compared to nonsexual but perhaps abusive verbal or physical conduct.<sup>110</sup> To address then the overinclusion critique, we must consider the origins of gender discrimination and sexual harassment. What was thought to be wrong about the *sexual* as-

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<sup>108</sup> "Deconstructive" here and throughout is used to mean "dismantle." See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). The phrase "under deconstruction" is used throughout this Article to mean ideas that challenge the traditional notion of binary gendered constructs.

<sup>109</sup> Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting the Equal Employment Opportunity Commission's (EEOC) Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1995)).

<sup>110</sup> *Id.* at 65-66 (adopting the EEOC's interpretation of sexual harassment as a form of sex discrimination and determining that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment").

pect of sexual harassment in 1977 when the D.C. Circuit explained in *Barnes v. Costle* that “to say . . . [the plaintiff] was victimized in her employment simply because she declined the invitation [for sexual activity] is to ignore the asserted fact that she was invited only because she was a woman”?<sup>111</sup> Implicit in, and logically essential to, the court’s analysis in *Barnes* is the understanding that the sexual nature of the rebuffed invitation played a part in the discriminatory effect of the overture. Not all adverse employment actions are actionable because not all adverse employment actions are discriminatory. Thus, the picture of the sexual subordination of women in a patriarchy forms the backbone of injury analysis in this early body of sexual harassment jurisprudence and agency regulation, even though it is obfuscated by a surface, gender-blind focus on the “because of sex” class question.<sup>112</sup> Feminist sexual-subordination scholarship, authored by thinkers like MacKinnon, plainly forms a cornerstone of sexual harassment-as-discrimination jurisprudence. While gender-deconstruction has moved away from the sexual-subordination paradigm of understanding men’s and women’s relative relationships to sex, the fact remains that, like much of anti-discrimination law, sexual harassment law as a form of gender discrimination only makes theoretical sense when we acknowledge that the problem it seeks to address exists only because the “other”—here, women—is situated outside the dominant paradigm. It only makes sense within its social and historical context.

The understanding that sexual harassment doctrine is itself a deconstructive interpretation of sex discrimination is a crucial piece of the analytic puzzle. This understanding unlocks the door to another stealth player in the game: the statutory language requires equal application to both genders. It does not prohibit discrimination against women; it prohibits discrimination because of sex.<sup>113</sup> In simple sex discrimination, equal application is not that difficult to understand. Within the modern gender-deconstructive model of simple sex discrimination, equal application issues remain easily resolved because deconstructed gender oppressions have analogues: Hopkins complained of female gender roles, but happily for sex symmetry, male plaintiffs have also identified gender role oppressions. However, when examined in the contemporary model, premised on an understanding that a subordinate group is differently situated with respect to sexualizing conduct, equal application to both genders can confuse the doctrine’s theoretical foundation. As a result of equal application, the doctrine, which

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<sup>111</sup> 561 F.2d 983, 990 (D.C. Cir. 1977) (holding that where the plaintiff would not have been solicited for sexual activity if she had not been a woman, the retaliation she sustained upon rebuffing the invitation was “because of sex” within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994)).

<sup>112</sup> In 1980, the EEOC issued its “Guidelines on Discrimination Because of Sex,” which prohibited as actionable discrimination both quid pro quo sexual harassment and hostile work place harassment. 29 C.F.R. § 1604.11 (1999).

<sup>113</sup> Title VII protections apply equally to men and women. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

is, at its core, about leveling the playing field for the subordinated paradigm (women, or particularly non-assimilated women like Miss Buxley), will be necessarily overinclusive in practice. Members of the dominant (male) paradigm will be protected in a necessary bow to the statutory language.<sup>114</sup>

Nevertheless, the fact that the statutory language requires an application of sexual harassment protections to a class of individuals not particularly or primarily disadvantaged by the conduct does not render the entire doctrine flawed. Justice Scalia offered a nod to the “class” question in *Oncale*, when he observed that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned about when it enacted Title VII.”<sup>115</sup> Nevertheless, Scalia relied on the standard iteration that statutes may be fairly read to reach the natural analogues of the primary evil when resolving the issue of sexual harassment protections for men.<sup>116</sup> But this gender parity point must not be subsumed by the project of parsing out of the larger theoretical issues in sexual harassment doctrine. The doctrine, as Justice Scalia correctly observes, may (and indeed, must) expand to protect a class of individuals who are not members of the subordinate paradigm, and therefore do not, as a group, require an anti-discrimination statute to level the playing field. The playing field (here, the workplace) was level already for men at the time that sexual harassment protections were recognized as a form of gender discrimination by the EEOC. In applying those protections to male plaintiffs, we allow the members of the dominant paradigm to reap the benefit of sexual harassment protection when faced with like conduct. We must do this, and we should do this, but when we do, we blur the link between the prohibited behavior of unwelcome sexual advances and the *discriminatory effect* of the behavior, which disproportionately disadvantages women. Nevertheless, we do not need the nexus between behavior and discriminatory effect to be implicated in every case.<sup>117</sup>

It is enough that Congress determined (with the help of the EEOC) that individual instances of sexual harassment, when considered in the aggregate, have the effect of disadvantaging “women as women” in the work-

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<sup>114</sup> Ideally, sexual harassment would be prohibited without reference to “because of sex.” Ideally discrimination based on sexual orientation would be prohibited without reference to “because of sex.” However, I would argue that rather than dismantle the protections we have codified because they are overinclusive and underinclusive, we should seek codification of additional and better laws.

<sup>115</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

<sup>116</sup> *Id.*

<sup>117</sup> We know from *Oncale* that men may experience the *same kind of injury* that women experience from involuntary sexualization: domination and devaluing of otherness. What they do not experience is the *discriminatory injury*: sexualization in the workplace does not disproportionately affect them as a class of individuals. While sexual harassment by men or women is sometimes only about sexual desire, not about devaluing otherness or domination, the existence of involuntary sexualization in the workplace still has a systemic discriminatory effect on women.

place. Applying this effect-aggregate model, Congress concluded that sexual harassment in the workplace is a form of gender discrimination and prohibited it.

Furthermore, like effect-aggregation in Commerce Clause jurisprudence, courts have permitted this effect-aggregation model but limited its application to instances in which there is a demonstrated nexus to gender in each individual case. Sexual harassment as a pervasive set of behaviors is discriminatory in effect, but an instance of sexual harassment is *actionable* only where there exists a sufficient nexus to gender. In order to retain the necessary link to the statutory authority “because of sex,” gender must be among the factors that prompted the prohibited conduct, although gender need not be the sole motivating factor in the decision to engage in the prohibited conduct.

Due to the nature of sexual harassment, the nexus to gender almost invariably exists. Pre-*Oncale*, the nexus was so apparent to the courts that it was inferred. In cases of male-female harassment, courts implicitly employed the “desire paradigm,” which assumed understanding the requisite nexus to gender. As Justice Scalia explained:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.<sup>118</sup>

However, what Justice Scalia is really describing here is not the connection to discrimination itself, that is, disparate treatment between genders, or even disparate treatment of members of the same gender based on a gendered quality. Instead, Justice Scalia identifies that pre-*Oncale*, the requisite nexus to gender was inferred in the inter-sex context because courts assumed that, had the plaintiff been of the opposite gender, the plaintiff would not have been harassed. In this way, gender was understood to be one of the factors that motivated the prohibited conduct, although certainly not the sole factor.

After *Oncale*, sexually harassing conduct is still prohibited, but courts are rethinking the nexus to gender assumption. Because *Oncale* reached the Supreme Court on a motion for summary judgment, the Court did not determine whether *Oncale* himself was sexually harassed. As a result, the Court did not have occasion to rule upon an argument that but for his gender, *Oncale* would not have been harassed.

However, Justice Scalia did make clear that the but-for nexus to gender provided by the desire paradigm is not the only means by which a plain-

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<sup>118</sup> *Oncale*, 523 U.S. at 80.

tiff can demonstrate a nexus to gender. Indeed, many roads lead to gender, as Justice Scalia outlines:

Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted “discrimination . . . because of . . . sex.”<sup>119</sup>

In Scalia’s analysis, the desire paradigm’s but-for-my-gender inference survives *Oncale*, and indeed *Oncale* adopts the same imperfect inference in same-sex harassment. However, the *Oncale* Court also acknowledges that other conceptual paths may also provide the requisite nexus to gender.

An implied nexus to gender is, and has always been, required in actionable sexual harassment claims. The *conduct* itself gives rise to the nexus of gender inference, not solely in the desire sense, as plaintiffs certainly were not required to demonstrate the harasser’s desire for them, but in the sense that there exists a gendered aspect to being selected for sexual harassment. Gender is a factor in selecting the harassed, whether the harasser harasses because he is hostile to women in the workplace, because he desires a woman, because he uses all tools available to exercise power over others, because he wants to be one of the guys, or because he seeks to deflect attention from his own nonconforming qualities. For example, in the same-sex sexual harassment context, the harassed is frequently selected, not because he is a man, but because he is “a man like that.” In these cases, the nexus to gender is overt: as in *Price Waterhouse*, the harassed is selected, at least in part, based on unmet gendered expectations.<sup>120</sup> Thus, just as in the inter-sex harassment context, in intra-sex sexual harassment, gender is a factor in selecting the harassed, regardless of the specific sexual desires of the harasser.

The relevant question, after *Oncale*, is to what degree plaintiffs will now be required to demonstrate the gender nexus that was implied pre-*Oncale*. Prior to *Oncale*, courts did not require plaintiffs to provide evidence that the harasser desired them. As in other anti-discrimination contexts, a

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<sup>119</sup> *Oncale*, 523 U.S. at 80.

<sup>120</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

fact-finder cannot look into the defendant's psyche and parse out his invariably complex feelings about gender with respect to the plaintiff. Pre-*Oncale* courts understood that they must look to external indications. In pre-*Oncale* sexual harassment jurisprudence, the external indication was the harassing conduct itself. Sexual harassment can be distinguished from other forms of discriminatory conduct because sexual harassment implicates gender sufficiently so as to tether the prohibited behavior to the statutory foundation for the prohibition. As the Seventh Circuit noted in *Doe v. City of Belleville*:

Sexual harassment cases differ [from discrimination alleged in other frameworks] because the discriminatory nature of the charged conduct speaks for itself. The main issue in sexual harassment cases is not whether the employer harassed the employee on the basis of her gender, but whether the claimed harassment affected the terms, conditions, or privileges of the plaintiff's employment, as Title VII uses those words.<sup>121</sup>

Sexual harassment is a different discriminatory model because it necessarily embodies a contextual understanding of gender equality. It is not sex discrimination *because* the harasser desires and therefore only harasses one gender. It is sex discrimination because involuntary sexualization and involuntary sexual commodification in the workplace disproportionately disadvantage women in a way that we as a polity have chosen to disallow. In order to discover whether intra-sex sexually harassing behavior embodies an adequate nexus to gender, we need to ask if it is sexual harassment, following the model established in the EEOC's Guidelines on Discrimination Because of Sex that prohibit sexual harassment under Title VII.<sup>122</sup>

The circuits have split on the question of what constitutes an adequate nexus to gender after *Oncale*. Two dominant schools have emerged from the split. The first model, the "desire paradigm," has been advanced in the Fifth Circuit. The second model, the "conduct paradigm," has been advanced in the Ninth Circuit. A consideration of each approach follows.

#### *A. Because of Sex: The Fifth Circuit's Desire Paradigm*

The Fifth Circuit entered the current same-sex sexual harassment doctrinal debate with *Oncale*. The Supreme Court remanded the decision with the instruction that the Fifth Circuit erred in affirming the district court's conclusion that *Oncale* could not, as a matter of law, present a case of sexual

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<sup>121</sup> 119 F.3d 563, 576 (7th Cir. 1997) (quoting *Cline v. Gen. Elec. Credit Auto Lease, Inc.*, 748 F. Supp. 650, 654 (N.D. Ill. 1990)).

<sup>122</sup> 29 C.F.R. § 1604.11 (1999).

harassment where he did not allege quid pro quo harassment at the hands of his male coworkers.<sup>123</sup> The case was subsequently settled by the parties, so the question of whether Oncale was sexually harassed never received judicial resolution.

The next same-sex sexual harassment case to reach the Fifth Circuit was *La Day v. Catalyst Technology, Inc.*<sup>124</sup> In *La Day*, the male plaintiff, La Day, alleged that his male supervisor, Craft, had remarked that he was jealous of La Day's girlfriend and that Craft "approached him from behind while he was bending down and fondled his anus . . . describ[ing] the contact as similar to 'foreplay with a woman.'"<sup>125</sup> La Day further alleged that he reported this conduct to a supervisor and that Craft retaliated by spitting on him. Finally, La Day alleged that he refused to report to a job assignment where Craft was the supervisor and that he was terminated as a result. La Day filed suit alleging sexual harassment.

Specifically, La Day proffered a same-sex desire paradigm claim. He alleged that he had evidence that his harasser was homosexual. In reviewing La Day's claim, the Fifth Circuit articulated a non-exhaustive framework for presenting evidence of a harasser's homosexual interest in the harassed that is centered on the idea of a "sexual advance." First, the court isolates instances in which a *genuine* sexual advance is issued in the context of workplace harassment, such that the harasser intends or wishes to consummate the overture:

It is not possible for us to specify all the possible ways in which a plaintiff might prove that an alleged harasser acted out of homosexual interest in him. Nonetheless, there are two types of evidence that are likely to be especially "credible" proof that the harasser may be a homosexual.

The first is evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him for reasons unrelated to sexual interest.<sup>126</sup>

Unfortunately, here, the court falls into a tautology because the problem of distinguishing contexts in which the harasser intended sexual contact from those in which he did not intend sexual contact is the very problem with which the court began. Specifically, how do we know when the harasser acts out of sexual interest? How do we read the subjective intent of the harasser? When does a sexual comment translate into a bona fide offer? Within this framework, we now need only to determine what constitutes a genuinely homosexual sexual advance.

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<sup>123</sup> *Oncale*, 523 U.S. at 79.

<sup>124</sup> 302 F.3d 474 (5th Cir. 2002).

<sup>125</sup> *Id.* at 476.

<sup>126</sup> *Id.* at 480.

The court goes on to consider the evidentiary value of genuine sexual advances toward other same-sex employees:

The second is proof that the alleged harasser made same-sex sexual advances to others, especially to other employees. This approach conforms with the admonition that “the critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>127</sup>

Unfortunately, from an evidentiary standpoint, this second suggestion is also troubling. Aside from embodying the same tautological problem identified above, it is not clear that evidence that a harasser harassed multiple employees of the same sex creates a greater likelihood that the plaintiff was exposed to “disadvantageous terms of employment to which members of the other sex are not exposed.”<sup>128</sup> How do multiple incidents of same-sex harassment support the inference (more so than an isolated incident) that opposite-sex individuals were not harassed? Does serial same-sex harassment suggest the harasser is *more* gay than a single-incident harasser? Even imagining that the serial harasser harasses *every* employee of the same sex, how do multiple harassments make it more likely that the harassment was motivated by sexual interest instead of reasons unrelated to sexual interest? What are the unidentified premises within the court’s reasoning about how sexuality—or perhaps more specifically, homosexuality—works?<sup>129</sup>

Furthermore, an obvious problem with the Fifth Circuit’s focus on the desire motivation of the harasser is that it is not a manageable judicial standard. Requiring plaintiffs to demonstrate the sexual proclivities of their harassers, aside from being both intrusive and offensive, is neither a practical nor a logical approach to identifying gender-based motivation. Such a standard is on par with requiring a plaintiff who alleges race-based disparate treatment to demonstrate that the defendant is a racist generally as a threshold to allowing evidence that demonstrates that the defendant was motivated by race in the particular instance in question. Also, even if a plaintiff was able to provide such evidence, what relevant inference would it logically support? A person may be a racist generally, yet not act from a racial motivation in a particular instance. A person may be heterosexual

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<sup>127</sup> *Id.* (quoting *Oncale*, 523 U.S. at 80).

<sup>128</sup> *Id.*

<sup>129</sup> Moreover, imagine applying this gender nexus standard in the context of male-female harassment. Imagine requiring an inter-sex plaintiff to demonstrate that the harasser was sexually interested in her by demonstrating that the harasser had made sexual advances to other women in the past. What if he had not made previous advances, or what if evidence of those advances was unavailable to the plaintiff? An evidentiary framework that turns on demonstrating the sexual inclinations or orientations of defendants is deeply problematic in the context of workplace discrimination.

generally, but still act out of intra-sex desire in a particular instance. A person may be generally oriented toward intra-sex desire and not, obviously, act out of desire in every instance he encounters an individual of his own gender. Is this really an area that the judiciary is prepared to navigate?<sup>130</sup>

Further, in emphasizing its genuine sexual advance evidentiary theory, the *La Day* court highlights the potentially paradoxical result of a motivation-based evidentiary standard. The court notes that “[a] harasser may well make sexually demeaning remarks and putdowns to the plaintiff for sex-neutral reasons,” which in the motivation-based framework would not be actionable, but it suggests that the advantage of focusing on the genuine sexual advance criteria is that a harasser is “far less likely to make sexual advances without regard to sex.”<sup>131</sup> So, even assuming that the court is able to separate out the genuine sexual advance from the advance made for sex-neutral reasons, the result will be that same-sex, sexually derogatory putdowns in the workplace, no matter how unwelcome and pervasive, will not be actionable under this standard unless the harasser also happens to have a concurrent genuine sexual interest in the harassed.

Also, and on a more critical level, the *La Day* motivation-based evidentiary approach to sexual harassment doctrine—in addition to being judicially unmanageable and threatening absurd results—is a poor fit theoretically with the doctrine as a form of gender-discrimination. The Fifth Circuit’s “criterion-triggers-act therefore act-is-because-of-criterion” syllogistic approach would logically succeed if we were seeking with our anti-discrimination model to identify and eradicate animus-based behaviors. But we are not doing that in sexual harassment law. Instead, we are seeking to identify and eradicate behaviors that have a discriminatory *effect* in the aggregate, and there is nothing in Title VII that precludes such an approach.<sup>132</sup> The gender nexus requirement inferred by courts in the inter-

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<sup>130</sup> Where this approach has been attempted, imaginative judicial forays into the private desires of harassers have unfortunately followed. In *Shepherd v. Slater Steels Corp.*, the Seventh Circuit encountered the difficulty of assessing the sexual interest of a male harasser who had made sexual advances to the male plaintiff but had also “flashed” a female employee. 168 F.3d 998, 1009–11 (7th Cir. 1999). In considering these intricacies of human sexuality, the court reasoned, “Although we readily acknowledge that the fact finder could infer from such evidence that Jemison’s harassment was bisexual and therefore beyond the reach of Title VII, the evidence is not so strong as to make that conclusion inevitable.” *Id.* at 1011. Presumably, if the desire-motivation approach to same-sex sexual harassment continues to be judicially imposed, we will soon see a standard for determining when a putative harasser is “inevitably” bisexual and thereby “beyond the reach of Title VII.” *Id.*

<sup>131</sup> *La Day*, 302 F.3d at 480.

<sup>132</sup> Moreover, while the framework set up in *Oncale* for understanding intra-sex sexual harassment as discrimination identifies a motivation-based approach to sexual harassment analysis as one of the paths to supporting a sexual harassment claim, the Court makes clear that motivation is not the only means by which to meet the “because of sex” requirement. *Oncale*, 523 U.S. at 81 (“*Whatever evidentiary route* the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’” (emphasis added)). There is nothing in *Oncale* that precludes a continuation of the pre-*Oncale*

sex context and articulated by the *Oncale* Court's statutory reading of "because of sex" is a factor that serves only to tie the sexual harassment prohibition to its statutory authority. The gender nexus does not itself independently support an inference of discriminatory motivation.

Moreover, in the interest of internal consistency, it is important to remember that adopting a motivational approach to sexual harassment law signals a significant doctrinal departure from pre-*Oncale* sexual harassment jurisprudence. Prior to *Oncale*, courts did not require plaintiffs to demonstrate with credible evidence that an improper criterion—here, their gender—motivated the harasser to act out of either animus or desire. It was sufficient to demonstrate sexually harassing conduct, that is, severe or pervasive unwelcome conduct of a sexual nature. It is not clear why the introduction of same-sex sexual conduct should require additional indicia of discriminatory intent, where a gender nexus has heretofore been inferred by the conduct itself in inter-sex contexts. Since its doctrinal inception, harassing conduct has been construed as "because of sex" in the sexual harassment context when gender was *among* the factors that contributed to the selection of the harassed. There is simply no principled reason to apply a different evidentiary standard for finding that conduct was "because of sex" in the context of intra-sex harassment.

Finally, and most importantly, the *La Day* motivation-based standard bears little logical relationship to the purpose of "because of sex" analysis, that is, to ensure a sufficient gender nexus exists in sexual harassment claims. Focusing on the motivation of the same-sex harasser only diverts attention from the conduct itself, which heretofore has held the key to understanding the gendered nature of the exchange. The Fifth Circuit's standard privileges the ultimately unknowable subjective intent of the harasser, regardless of the quite knowable content of his behavior. For example, in the hypothetical presented by the court, a same-sex harasser may use gender-specific derogatory language to communicate a proposal of sexual activity, and where the harasser has no subjective intent or otherwise demonstrable genuine sexual interest in the harassed, the claim is not actionable. Such a framework does not elucidate in any meaningful way instances in which the harasser's conduct was motivated in part by gender.

Fortunately, a second school of *Oncale* interpretation has developed concurrently in the Ninth Circuit. A consideration of that approach follows.

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conduct-based approach to sexual harassment as has been advanced by the Ninth Circuit. See *Reissner v. Rochester Gas & Elec. Corp.*, No. 02-CV-6353-CJS, 2004 WL 941645 (W.D.N.Y. Apr. 22, 2004) ("In the case of same-sex harassment, such as is alleged here, a plaintiff has three evidentiary avenues available to prove a prima facie case of same-sex harassment.").

*B. Because It Is Sexual: The Ninth Circuit's Conduct Paradigm*

The Ninth Circuit addressed the question of same-sex sexual harassment after *Oncale* in *Rene v. MGM Grand Hotel, Inc.*<sup>133</sup> In *MGM Grand*, the plaintiff, Rene, was an openly gay man who alleged that his male co-workers engaged in conduct that included “blowing kisses at Rene, calling him ‘sweetheart’ and ‘muneca’ (Spanish for ‘doll’), telling crude jokes and giving sexually oriented ‘joke’ gifts, and forcing Rene to look at pictures of naked men having sex.”<sup>134</sup> Rene also alleged that his coworkers grabbed his crotch and touched his anus.<sup>135</sup> Unlike La Day, Rene did not allege that his harassers were homosexual. In fact, he alleged that they were not homosexual, but they were harassing with conduct of a sexual nature because Rene himself was homosexual.

In analyzing Rene’s claim of sexual harassment, the Ninth Circuit noted at the outset that Rene’s sexual orientation was irrelevant to his claim of sexual harassment. The court stated:

We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of a woman. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim.<sup>136</sup>

The court then turned to the conduct itself, just as it would have done in a case of inter-sex harassment. In analyzing the claim before it, the court considered whether the conduct complained of was sexual in nature, unwelcome, and sufficiently severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.<sup>137</sup> On the facts before it, the court found that:

It is clear that Rene has alleged physical conduct that was so severe and pervasive as to constitute an objectively abusive working environment. It is equally clear that the conduct was “of a sexual nature.” Rene’s tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus.<sup>138</sup>

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<sup>133</sup> 305 F.3d 1061, 1061 (9th Cir. 2002).

<sup>134</sup> *Id.* at 1064.

<sup>135</sup> *Id.* at 1065.

<sup>136</sup> *Id.* at 1066.

<sup>137</sup> *Id.* at 1065 (citing *Ellison v. Brady*, 924 F.2d 872, 875–76 (9th Cir. 2001)).

<sup>138</sup> *Id.*

Thus, the court found that the sexual nature of the conduct, when considered together with the severity of the behavior and the fact that it was unwelcome, made it sexual harassment. The court made clear that Rene's gender, the gender of his harassers, and the motivation of his harassers were not material at this stage of the analysis.

Next, after concluding that the alleged conduct stated a prima facie case of harassment, the court addressed the question of whether the claim had an adequate nexus to gender in light of *Oncale's* "because of sex" analysis. To do this, the court noted that the *Oncale* Court left open another, more manageable evidentiary path to finding gender-based discrimination in the same-sex sexual harassment context: "Oncale did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men*."<sup>139</sup> The court concluded that if Rene was treated differently than other male employees, a nexus to gender was found that was sufficient to tie the claim to Title VII (not to independently support an inference of particular discriminatory intent). In doing this, the court embraced the deconstructive model of same-sex sexual harassment that was introduced by *Oncale*. As is discussed at length above, in the first instance, *Oncale* applied the *Hopkins* rule of gender discrimination, that discrimination against "women like her" claims are actionable within the subset of sex discrimination known as sexual harassment. Thus, the Ninth Circuit recognized that even without knowing if Rene was singled out because of desire, dominance, or homosexual animus, the fact that he was singled out for sexually themed abuse is sufficient to support the inference that the conduct was motivated by a desire to treat "men like Rene" differently than the other male employees. Rene was disadvantaged as compared to other men, and in so finding, the Ninth Circuit found a sufficient nexus to gender for the claim to be statutorily supported and to proceed.

Of course, in many ways, the Ninth Circuit in *MGM Grand* was simply continuing to apply the doctrine of sexual harassment in a conduct-based framework. In inter-sex sexual harassment, the conduct gives rise to the gender nexus inference, and in *MGM Grand*, the court extended that rationale to intra-sex harassment. The Ninth Circuit found determinative the fact that Rene in particular was selected for harassment, and from that fact, the court inferred that he was selected for a gendered reason, much the way that courts have been inferring (without requiring specific evidentiary support) that inter-sex plaintiffs are selected for a gendered reason.<sup>140</sup> In

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<sup>139</sup> *Id.* at 1067.

<sup>140</sup> In Rene's case, the gender nexus inference is probably more overt than in many same-sex sexual harassment suits because Rene alleged that he was singled out because he was gay, implying that Rene's harassers chose to discriminate against "men like him." Ultimately, the court held that Rene's sexual orientation was immaterial to his sexual harassment claim and that the validity of the claim would turn on the degree to which the alleged conduct satisfied the "sexual" standard for sexual harassment. In this way, the Ninth Circuit declined to engage in motivation-based speculation about the gendered na-

so doing, the court declined to inquire into the set of reasons that Rene was selected for harassment, opting instead to consider only the facts on record with respect to the conduct alleged by Rene. Ultimately, the Ninth Circuit makes the simple point that it does not matter why Rene's alleged harassers chose to harass him; the only relevant question is whether they did so in a sexual manner.

Most important from a feminist perspective is the fact that the Ninth Circuit in *MGM Grand* demonstrated that it is not impossible to construct a theoretically sound yet judicially manageable standard for determining when same-sex harassing conduct bears a sufficient nexus to gender so that it may be an actionable form of gender discrimination. The Ninth Circuit recognized that, just as in other anti-discrimination contexts, gender need not be the only causal factor in selecting the harassed; it need only be one of the factors material to the decision to harass. The court further recognized that the question of whether sexual harassment itself is an actionable form of gender discrimination was answered long ago by the EEOC. In each individual case, the court is charged only with making sure the conduct meets the standard and that the claim does not otherwise fall outside the statutory language "because of sex." Toward that end, it is appropriate for courts to consider whether gender was among the factors that influenced the decision to subject an employee to disadvantageous treatment. The Ninth Circuit found that inquiry easy to resolve; it concluded, again, that sexual conduct itself implies a gender nexus.

Doctrinally, the post-*Oncale* circuit split suggests that the judiciary is still contemplating the role that the gender nexus will play after *Oncale*. In struggling to internalize rapidly evolving theories of gender and sexuality deconstruction, the judiciary may well make a theoretical and pragmatic mistake by defining same-sex sexual harassment differently than inter-sex harassment. However, whether courts adopt the Fifth Circuit's desire paradigm and require evidence of a gender nexus in same-sex situations, or whether they adopt the Ninth Circuit's conduct paradigm and infer the gender nexus in same-sex contexts, the basic components of a sexual harassment claim should remain uncomplicated: (1) sexually harassing conduct, in which (2) gender played a role in the decision to harass.

## V. CONCLUSION

Sexual harassment doctrine has had a long strange trip from its early days as a deconstructive understanding of gender inequality, through the maze of competing feminist projects, down the rabbit hole of gender deconstruction, only to now meet its beginning again with the doctrinal stylings of Justice Scalia. The doctrine has been described as essentialist, pro-

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ture of the conduct and thereby constructed a judicially manageable standard that is also supported by the text of Title VII.

tectionist, repressed, and binary. It has been criticized as overinclusive, underinclusive, too successful, and too impotent. Today, sexual harassment is a target for liberal-leaning thinkers of various perspectives, for feminist and queer theorists alike. In a culture where women earn seventy-five cents on the dollar,<sup>141</sup> *sexual harassment law* is a target.

Therefore, we need to be careful and critical as we continue to refine its terms. In light of our post-gender deconstructive landscape, it is important to remain clear about what sexual harassment law is, why we have it, and how sexual behavior continues to be used as a tool for gender discrimination. Sexual harassment law inhibits involuntary sexualization at work, and it inhibits the potential of sexual attractiveness as a workplace commodity, in a culture where the commodification of sexual attractiveness at work still disproportionately disadvantages women, and all of this it does, not through an oppressive penal code, but through a private cause of action in which injury is assessed by a jury of peers.

Finally, to those who would warn of the encroaching behemoth of a workplace awash in sanitized civility, I would suggest that excessive civility is not the current emergency; we simply are not there yet. Our gender-based commodification, autonomy, and even liberty concerns have not yet been put to rest. I, for one, will welcome the day when civility is the crisis of the moment.

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<sup>141</sup> Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *FORDHAM L. REV.* 2007, 2021 (2001).