

Multiple Masculinities: A New Vision for Same-Sex Harassment Law

Rachel L. Toker^{*}

To be a man is to care, to love, to be able to give oneself generously as husband, father, son, friend, colleague, mentor, citizen, fellow creature. To be a "big" man is to need and accept love, without counting this as a weakness; to give love, without counting the cost; to be open to new and even threatening questions and perspectives; to be loyal to the true and the good, though that may well mean coming in second, or even finishing last.¹

The following are brief accounts of workplace harassment suffered by male workers at the hands of male co-workers and/or supervisors:

Oncale was forcibly subjected to sex-related, humiliating actions . . . in the presence of the rest of the crew. Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape.²

[After a "campaign" of verbal harassment, the] verbal taunting of [plaintiff ("P")] turned physical one day when [assailant ("A1")], noting that [P] was in ill humor, told [assailant ("A2")] that his "bitch" appeared to be grumpy and urged [A2] to do something about it. [A2] . . . walked toward [P] saying, "I'm going to finally find out if you are a girl or a guy." [P] stepped

^{*} B.A., Stanford University, 1994; M.P.P., John F. Kennedy School of Government, Harvard University, 1999; J.D., Harvard Law School, 1999. This Note is dedicated to my parents. I want to thank Martha Minow, Carol Chetkovich, Kenji Yoshino, Katherine Franke, Nan Hunter, and Richard Katskee for their insightful comments and encouragement. I also want to thank the editors of the *Harvard Civil Rights-Civil Liberties Law Review*, especially Adam Szubin, Kim Thomas, and Jim Walsh, for their rare ability to halve an article without losing its meaning. Finally, I want to thank Midnight, without whom none of this would have been possible.

¹ William H. Becker, *Feminism's Personal Questions—For Men*, in *FEMINIST FRAMEWORKS* 16, 18 (Alison M. Jaggar & Paula S. Rothenberg eds., 3d ed. 1993).

² *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998). For more specific details of the harassment suffered by Joseph Oncale, see *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118–19 (5th Cir. 1996); see also Jennifer J. Ator, *Same-Sex Sexual Harassment After Oncale v. Sundowner Offshore Services, Inc.*, 6 AM. U.J. GENDER & L. 583, 588 (1998) ("[T]wo co-workers restrained him while placing one of their penises on Oncale's neck, threatened homosexual rape, and forcefully pushed a bar of soap into Oncale's anus.").

backward in an attempt to avoid [A2], but found himself trapped against a wall. [A2] proceeded to grab [P] by the testicles and, having done so, announced to the assemblage of co-workers present, "Well, I guess he's a guy." In his deposition, the plaintiff testified that . . . he came to believe that [A2] was actually willing and able to take him out to the woods and sexually assault him.³

Beginning sometime in 1989, McWilliams' coworkers, collectively known as the "lube boys," beset McWilliams with a variety of offensive conduct. They teased him, asked him about his sexual activities, and exposed themselves to him. They taunted him with remarks such as, "The only woman you could get is one who is deaf, dumb, and blind." On one occasion, a co-worker . . . placed a condom in McWilliams' food.

. . . On at least three occasions, coworkers tied McWilliams' hands together, blindfolded him, and forced him to his knees. On one of these occasions, a coworker placed his finger in McWilliams' mouth to simulate an oral sexual act. During another of these incidents, a coworker . . . and another placed a broomstick to McWilliams' anus while a third exposed his genitals to McWilliams. On yet another occasion, [the co-worker] entered the bus on which McWilliams was working and fondled him.⁴

Do these accounts sound as if they describe sexual harassment actionable under Title VII of the Civil Rights Act of 1964?⁵ Certainly the only reason they might not is because it is unclear whether these events constituted discrimination "because of . . . sex."⁶ That is, was it really the victim's *sex* that provoked these assaults? Courts have refused to bar such co-worker violence under Title VII when the violence is clearly motivated by homophobia.⁷ Yet, a person may choose to discriminate

³ *Doe v. City of Belleville*, 119 F.3d 563, 567 (7th Cir. 1997) (finding sexual harassment), *vacated and remanded*, 118 S. Ct. 1183 (1998).

⁴ *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1193 (4th Cir. 1996) (finding no sexual harassment).

⁵ 42 U.S.C. § 2000(e)(1)-(17) (1994). This Note focuses on "hostile work environment" sexual harassment claims. Such Title VII claims are normally defined by the following elements: (1) the harassment is unwelcome; (2) the harassment is objectively severe and pervasive so as to create a hostile work environment; (3) the harassment was based on, or because of, sex; and (4) the employer knew, or should have known, of the harassment and failed to take proper remedial action. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993).

⁶ 42 U.S.C. § 2000e-2(a)(1) (1994) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex . . .").

⁷ *See generally* Richard Storrow, *Same-Sex Sexual Harassment After Oncale: Defining*

against members of his own sex because of their sex for other reasons, primary among them being the fear of gender nonconformity. In Title VII's doctrinal history, courts have traditionally assumed that it is not in a person's self interest to discriminate against members of one's own sex in the workplace. However, the Supreme Court has now recognized that this assumption does not always hold true.⁸ In *Oncale v. Sundowner Offshore Services, Inc.*, the Court held that Title VII's "because of sex" prong is met in a same-sex harassment claim if a worker can demonstrate either that the violence was motivated by sexual desire, or that the violence was perpetrated against members of one sex exclusively.⁹ Are these the appropriate standards for determining when harassment of a member of one sex by a member of the same sex is "because of sex?"

A closer look at same-sex harassment—its psychological origins, when and in what circumstances it is likely to occur—makes it clear that the *Oncale* standards are sorely off-course. These standards will not protect workers from many instances of same-sex harassment in the workplace because they are based on a misunderstanding of gender and its relationship to sex.¹⁰ *Oncale* demonstrates how this misunderstanding can lead courts unwittingly to secure the gender hierarchies that Title VII can and should undermine.

This Note argues that *Oncale* sets forth not only inadequate, but also affirmatively harmful criteria for determining when same-sex sexual harassment is "because of sex." Part I introduces the terminology used throughout this Note. Part II describes the foundations of Title VII sexual harassment law and the current doctrinal tests for identifying sexual harassment. This Part also focuses on "sex flipping," the predominant judicial method for determining whether the causation prong of hostile environment sexual harassment claims is satisfied (in other words, was the harassment "because of sex?"). Part III frames the contemporary debate over Title VII's proper functions and the proposed definitions of sexual harassment. Part IV introduces an alternative theory of Title VII's purpose that the reader can use as the lens through which to examine judicial doctrine. This Part develops the concept of masculine supremacy, explaining the ways in which this supremacy is created and perpetuated in

the *Boundaries of Actionable Conduct*, 47 AM. U.L. REV. 677 (1998).

⁸ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998).

⁹ See *id.* at 1002. The Supreme Court did not foreclose additional grounds for same-sex sexual harassment.

¹⁰ The Equal Employment Opportunity Commission ("EEOC") reports that the percentage of sexual harassment charges by males has steadily increased from 1992 to 1998. See U.S. Equal Employment Opportunity Comm'n, *Sexual Harassment Charges* (last modified Jan. 14, 1999) <<http://www.eeoc.gov/stats/harass.html>>. There is also evidence that men are committing sexual violence against other men with gender-nonconforming traits. See Amicus Brief of Catherine A. MacKinnon at 9–10, *Oncale* (No. 96-568) ("Men sexually abuse those they have power over in society: first, women and children; then other men Often it is men perceived not to conform to stereotyped gender roles who are the targets of male sexual aggression." (citations omitted)).

the workplace as well as in society more generally. Part V critiques "sex flipping" as an inaccurate and harmful method of assessing violations of Title VII. Part VI offers a new theory of masculinity and explains the ways in which this theory can enable the courts to retain continuity with current doctrines while protecting gender-nonconforming men and women. This Note works from the premise that until society repairs its visions of masculinity, the law cannot understand the ways in which Title VII should appropriately apply to same-sex harassment by heterosexuals of gay and straight victims. It is this new understanding that can propel us toward dismantling the structure of masculine supremacy.¹¹

I. Terminology

This Note uses the terms "gender," "sex," and "sexuality" to denote distinct, but interrelated, aspects (and for these purposes, constructs) of the self. For purposes of this Note, "sex" is defined as the accumulation of biological characteristics that society uses to define the terms "male" and "female," including genital, hormonal, and chromosomal differences.

The differentiation of sex from gender is becoming increasingly controversial.¹² Many theorists argue that our ability to categorize by "sex" is so intimately tied to gender¹³ that sex categories are meaningless apart from notions of gender.¹⁴

"Gender" is a complex and loaded term. Because gender and its sub-categories (masculine and feminine) are used with a variety of meanings, this Note uses different terms to denote different dimensions of gender.

¹¹ For the purposes of this Note, the term "masculine supremacy" is used to mean a social structure in which notions of the "masculine" are systematically and institutionally preferred to notions of the "feminine." Those men who choose to conform to "masculinity" are then rewarded with power and preference. Men who do not conform, as well as women, are not granted such power.

¹² Retaining "sex" as a separate category is especially problematic in the context of transsexualism. For the purposes of this Note, a transsexual should be treated as a member of the sex with which he or she identifies at the time of harassment. It is beyond the scope of this Note to engage in an in-depth discussion of this provocative issue.

¹³ See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 at 39-40 (1998).

To conceptualize both sexual identity and sex discrimination in terms of biology at all is to ignore the role that gender stereotypes play in the construction of sexual difference Whatever genes, hormones, and biological evolution contribute to human social institutions is materially as well as qualitatively transformed by social practices In the end, bodies end up meaning less in the fight for equality than the roles, clothing, myths, and stereotypes that transform a vagina into a *she*

Id.

¹⁴ Some theorists go further and argue that "sex" characteristics, or those parts of the body that we use to distinguish the sexes, are also socially constructed distinctions between men and women. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 22-25 (1990).

Society's prescriptive understandings of gender are referred to as "gender ideals." Gender ideals tell individuals how to "act out their sex" and demonstrate how a "good man" or "good woman" should look, behave, and experience all aspects of life that are related, either by biology or by culture, to biological sex.¹⁵ These prescriptions also order the way in which the sexes interact in society, relationships of dominance and power, and systems of social reward and punishment. Beauty standards regulate the physical aspects of gender and often play the dual role of transmitting understandings of gender ideals and threatening those who do not conform to the gender ideals with social and sexual isolation.¹⁶

Gender ideals are complex because they are culturally specific, although aspects of an ideal may be present in gender ideals across cultures. Subcultures may develop gender ideals that differ from those of the larger society.¹⁷ What is most important to note about gender ideals, however, is that implicit in the notion of "ideal" is the fact that a community will rarely accept more than one gender ideal for each sex.¹⁸ Although people are generally incapable of attaining gender ideals, society expects and rewards the act of constantly striving to attain them.

Society teaches children how to conform to the gender ideal assigned to their sex through a process that I label "gender assignment." Gender ideals are assigned through literature, media, teachers, parents, and other civic organizations that socialize and, if necessary, coerce children to conform to their respective gender ideals.

Individuals also have "gender identities." A person's gender identity may be the nearest approximation to society's gender ideal, or it may be a whole or partial rejection of that ideal. A person's gender identity also encompasses the outward enactment of that person's understanding of his or her sex.¹⁹ If a person's gender identity substantially differs from the

¹⁵ Males must constantly strive for the ideal of masculinity. The "masculine" male is physically strong, rational, stoic but passionate, persistent, intelligent, the "head of his household," brave, assertive, agile, and an authority figure. See Ken Clatterbaugh, *Mythopoetic Foundations and New Age Patriarchy*, in *THE POLITICS OF MANHOOD: PROFEMINIST MEN RESPOND TO THE MYTHOPOETIC MEN'S MOVEMENT (AND MYTHOPOETIC LEADERS ANSWER)* 44, 47 (Michael S. Kimmel ed., 1995). Consider the verb "to emasculate": it is defined by *Webster's Dictionary* as "to deprive of strength, vigor, or spirit: weaken" or "to deprive of virility or procreative power." *MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY* 376 (10th ed. 1997). The feminine ideal, on the other hand, has historically been shaped by male fantasy, see ANNE HOLLANDER, *SEX AND SUITS* 121 (1991), and has been characterized by emotion, nurturing, self-sacrifice, and self-denigration.

¹⁶ See NAOMI WOLF, *THE BEAUTY MYTH* 10, 12 (1991).

¹⁷ A particular socioeconomic class, racial group, or local geographic community may generate gender ideals. Moreover, gender ideals can develop within workplace communities: a certain gender ideal may dictate individual behavior within the workplace, even if a different ideal is promulgated in social settings.

¹⁸ This claim is more true in the context of the masculine ideal than the feminine, due to factors discussed in more detail in Part VI.

¹⁹ Gender identities and gender ideals are both descriptive and prescriptive; a person's gender identity is a composite of attributes and a performance of what the individual thinks that his or her sex should be.

gender ideal assigned to that person's sex, he or she is a gender nonconformist. Gender nonconformity is based on the relationship of one's gender identity to the gender identities of the community members who produce gender ideals for their community and/or those who internalize those ideals. An individual can become a gender nonconformist either by adopting traits traditionally identified with a gender ideal not assigned to his or her sex, or by adopting traits not associated with any gender ideal but running counter to traits assigned to the gender ideal associated with his or her sex.²⁰ Gender nonconformity produces "gender regulation," which occurs when gender conformists attempt to pressure or coerce gender nonconformists—through social pressure or physical violence—to strive for their sex-specified gender ideal.

This Note maintains the male/female sex distinction for three reasons. The first reason is pragmatic: federal judges are called upon to interpret Title VII as a provision in a federal civil rights statute. As such, it is unconvincing that judges understand and/or will agree with the recent scholarship's argument that sex is as socially constructed as gender. Therefore, in order for Title VII to apply to gender regulation, courts must have a theory in which sex, as conventionally understood, plays a central role in the story of discrimination on the basis of gender regulation. Second, even if judges would readily accept the developing understandings of sex as a social construction, sex is an important category so long as it remains the identifier that is used to determine one's appropriate gender role. Third, even if the sex/gender distinction is obsolete, and neither the theoretical or practical arguments are persuasive, gender is the concept that emerges from the sex/gender collapse because ultimately both are determined by socially imposed meanings. Because it is the social meanings of sex and gender that must be reconstructed in sex equality law, it is necessary for society to understand the pluralization of gender ideals and the inadequacy of current methodologies for assessing same-sex sexual harassment.

Although sexuality is intimately related to sex and gender, this Note defines sexuality as a complex combination of a person's desire for, inclinations with regard to, and idealized understandings of sexual relationships. Sexual preference encompasses the consistent sexual desire for one type of person, particularly for members of one sex. Although sexual preference will normally denote heterosexuality, bisexuality, or homosexuality, sexual preference can be more specific than any of those terms. For example, if a gender-conforming woman only has sexual desires for gender-conforming males, then one could say that that woman has a sexual preference for gender-conforming, heterosexual males. Sexual preferences are regulated by society through social expectations and pressures—especially through the heterosexist presumptions underlying most

²⁰ For an in-depth discussion of gender nonconformity, see *infra* Part IV.B.

gender ideals. The broad terms "man" and "woman" encompass the complex web constituting a person's sex, gender, and sexuality.

II. Title VII Sexual Harassment Law and *Oncale*

A. EEOC Guidelines and Federal Appellate Court Application of Title VII

Title VII of the Civil Rights Act of 1964 states, in relevant part, "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex."²¹ Relying heavily upon EEOC guidelines, the Supreme Court delivered the landmark decision *Meritor Savings Bank, F.S.B. v. Vinson*, interpreting Title VII to prohibit both "quid pro quo" and "hostile environment" forms of sexual harassment.²² In *Meritor*, the Court defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," and other forms of workplace conduct described in EEOC Guidelines.²³ In *Harris v. Forklift Systems, Inc.*, the Supreme Court clarified the legal requirements of the hostile work environment test.²⁴ The Court reaffirmed the basic prongs set forth in *Meritor* and explained that the plaintiff was not required to demonstrate psychological or physical injury.²⁵ Justice Ginsburg's concurring opinion added an important analysis to the ruling when she stated, "[t]he 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."²⁶

Justice Ginsburg's statement, and the presumptions underlying it, contributed to the controversy over same-sex harassment. Prior to the *Oncale* decision, the federal appellate courts had split on the question of whether Title VII prohibited same-sex harassment, and, if so, what forms.²⁷ By the time *Oncale* was decided, the majority of federal appellate courts had determined that there was a cause of action for same-sex

²¹ 42 U.S.C. § 2000e-2(a)(1) (1994). For a discussion of the legislative history regarding this provision, see Janet Castro, Comment, *Redefining the Parameters of Title VII in Accordance with Equal Protection Standards: The United States Supreme Court's Recognition of Same-Sex Sexual Harassment as a Form of Discrimination*, 9 SETON HALL CONST. L.J. 123, 171 n.24 (1998); see also Corey Taylor, Comment, *Same-Sex Sexual Harassment in the Workplace under Title VII: The Legal Dilemma and the Tenth Circuit Solution*, 46 U. KAN. L. REV. 305, 305 (1998).

²² See 477 U.S. 57, 65-66 (1986).

²³ *Id.* at 68 (citing 29 CFR § 1604.11(a) (1985)).

²⁴ See 510 U.S. 17, 21-23 (1993). For a more detailed description, see discussion of the *Harris* test, *supra* note 5.

²⁵ See *Harris*, 510 U.S. at 21.

²⁶ *Id.* at 25 (Ginsburg, J., concurring).

²⁷ See Storrow, *supra* note 6, at 689-93.

harassment under Title VII, but that it was only actionable in a narrow set of cases, most of which took the form of quid pro quo claims.²⁸

The *Oncale* decision, while extremely brief, makes clear that a same-sex sexual harassment claim is cognizable under Title VII.²⁹ Justice Scalia has used Justice Ginsburg's statement in *Harris* to emphasize the importance of comparing the relative conditions of employment between the sexes to analyze hostile environment claims. Scalia has provided several examples of same-sex sexual harassment, including when the harasser is a homosexual and the conduct is motivated by sexual desire; when the harasser is motivated by general hostility to the presence of members of the same sex in the workplace; and when the employer generally treats members of one sex worse than members of another.³⁰

Early indications suggest that the Court may have intended these three examples to be exhaustive. For example, in *Doe v. City of Belleville*, the Seventh Circuit had held that a same-sex harassment case was actionable on gender-stereotyping grounds.³¹ The Seventh Circuit's decision explicitly stated that the evidence required to determine causation may consist of conduct that reflects the harasser's belief that the plaintiff "did not conform to male standards."³² In effect, it held that regulation of gender nonconformity was a sufficient basis for determining that discrimination was "because of sex."³³ However, soon after *Oncale*, the Court vacated and remanded the Seventh Circuit's decision in *Belleville* on the basis of the *Oncale* decision.³⁴

This Note maintains that the Court has failed to give full effect to Title VII's purpose of eliminating sexual hostility in the workplace. Specifically, the Court's approach denies protection to workers who face a common type of same-sex sexual harassment, wherein a presumed heterosexual worker exhibits sexual behavior directed at a victim's gender

²⁸ See Castro, *supra* note 20, at 143-44; see also Storrow, *supra* note 6, at 693-715.

²⁹ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001-02 (1998) ("[Title VII] protects men as well as women . . . we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex.").

³⁰ See *id.* at 1002.

³¹ See 119 F.3d 563, 568 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998).

If H. were a woman, . . . [a]nd if the harassment were triggered by that woman's decision to wear overalls and a flannel shirt to work, for example—something her harassers might perceive to be masculine just as they apparently perceived H.'s decision to wear an earring to be feminine—the court would have all the confirmation it needed that the harassment indeed amounted to discrimination on the basis of sex.

Id.

³² *Id.* at 575.

³³ See *id.* at 575-77.

³⁴ See *City of Belleville v. Doe*, 118 S. Ct. 1183, 1183 (1998).

identity.³⁵ This Note criticizes Federal courts for their resistance to claims of Title VII plaintiffs who have been harassed because of societal gender regulation and not sexual desire.

B. Proving Causation to Judges: "Sex Flipping"

The majority of courts require a showing that but for the plaintiff's sex, the plaintiff would not have been discriminated against.³⁶ There are generally two ways of satisfying the but-for test. In the first, the plaintiff demonstrates membership in a "subordinated" class in the particular workplace context and shows that had he or she been of another sex, no victimization would have occurred. Under this analysis, the plaintiff demonstrates that the employer engaged in group-based discrimination (for example, the employer created an anti-male, but not anti-female environment). Second, the plaintiff can satisfy the test by showing that an individual of the opposite sex would have been treated differently (and better) in the same situation and under the same circumstances.³⁷ This methodology for proving but-for causation may be termed "sex flipping." Although some cases do not reflect this method, or reflect a modified version,³⁸ the method is pervasive in sexual harassment cases.³⁹

The scenario below demonstrates the use of sex flipping when harassment is a means of gender regulation: a female plaintiff argues that she exhibited masculine traits, and because she was not sufficiently feminine, she was discriminated against. The female plaintiff proves that discrimination was because of sex by arguing that, had she been a man, and exhibited the gender characteristics that she did, she would not have been

³⁵ See Katherine Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696-97 (1997).

³⁶ See *id.* at 711 ("[M]any courts have since adopted the D.C. Circuit's approach [of using the but-for test] . . ."). See, e.g., *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981) ("[T]he question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?").

³⁷ See, e.g., *McCoy v. Macon Water Auth.*, 966 F. Supp. 1209, 1218 (M.D. Ga. 1997) (finding that male supervisor's harassment of male employee was because of sex because supervisor was not sexually interested in women and a woman in the office would not have been subjected to similar treatment); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (requiring plaintiff to show that harassers did not treat male employees in the same way).

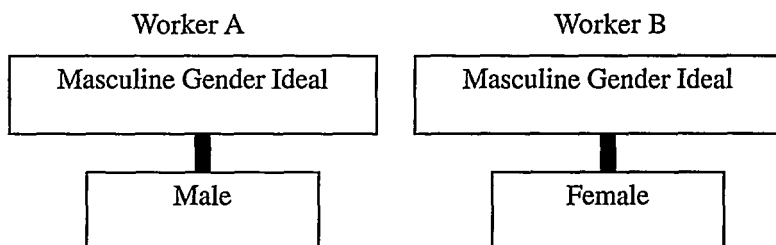
³⁸ See, e.g., *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992) (engaging in a modified version of sex flipping in which the court displaces the "male homosexual" plaintiff with a hypothetical "female homosexual").

³⁹ Numerous sexual harassment cases have held that harassment was because of sex using the sex flipping method. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). For the most part, this Note uses "sex flipping" to refer to the method in which individuals are switched within the counterfactual that confronts the judge: However, assessing causation on the basis of group-based discrimination usually takes the form of "group sex flipping"; that is, judges engage in the same process of substituting one sex for another, but they do it at a group level as opposed to an individual one.

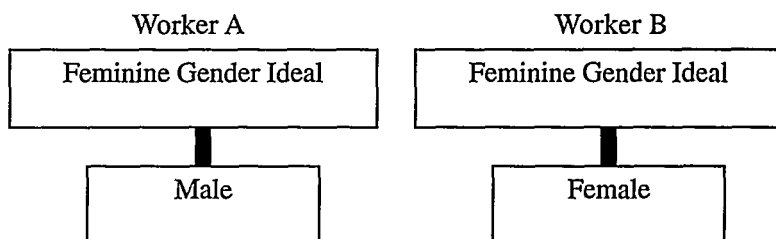
sexually harassed.⁴⁰ A man would argue that he expressed traits characteristic of the feminine ideal that led to his discrimination, but had he been a woman and manifested those characteristics, he would not have been discriminated against.⁴¹

Sex flipping allows the judge to imagine one of the two following pictures:

Female Worker/Victim—only Worker B is victimized



[OR] Male Worker/Victim—only Worker B is victimized



Because the only variable that has changed is “sex,” courts can easily determine that the discrimination was “because of sex.”

Courts believe that sex flipping allows them to follow the Supreme Court’s declaration that “[t]he phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”⁴² However, sex flipping is not necessarily the most effective tool for determin-

⁴⁰ The clearest example of this kind of sex flipping occurred in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding sex discrimination under Title VII).

⁴¹ Plaintiffs calling for sex flipping in gender regulation cases have had some, but not unequivocal, success in getting courts to use this method. One example of sex flipping that produced a judgment in the plaintiff’s favor is *Quick v. Donaldson*, 90 F.3d 1372 (S.D. Iowa 1996). *Quick* is a striking example because the opinion reiterates Ginsburg’s *Harris* standard twice in the course of denying summary judgment to the defendant. See *id.* at 1378–79.

⁴² *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted).

ing whether a plaintiff was harassed because of his or her sex.⁴³ Proving sexual harassment requires us to know what sexual harassment is and how it causes harm.

III. Theories of Title VII⁴⁴

Although the Supreme Court has clarified the simplest elements of sexual harassment, there appears to be little consensus on what harm Title VII was created to prevent. Many argue that Title VII was enacted to prevent the domination of one sex by another in the workplace. But this statement merely raises further questions. Does Title VII protect against domination of a person because they are of a particular sex, regardless of who the aggressor is—does it focus purely on the sex of the victim? Can we reasonably expect Title VII to promote the equality of the sexes by combating the growing influence of entrenched masculine supremacy—or must it go further and erode the masculine supremacy that already exists?

In an attempt to aggregate different voices in the debate over the meaning and significance of Title VII, this Note categorizes theories about the appropriate scope of Title VII protections based upon their understandings of the harm inflicted and of the means by which that harm is carried out. There are three categories in all.

The first category subsumes two major feminist theories about sexual harassment in the workplace. Both theories conceptualize the harm that Title VII was designed to combat as male dominance of women in the workplace, although they may disagree about the extent of that dominance.⁴⁵ That is, both theories view sexual harassment as defined by sex relations and sexuality (in other words, sexual desire and/or power disguised as sexual desire or aggression) as the mode through which female inequality and/or subordination is accomplished.

While both theories assume that male sexuality is predatory and heterosexual, one proposes that the use of masculine power in sexual ways

⁴³ The sex flipping model successfully detects sexual harassment in situations where the harassment is motivated by sexual desire for the victim. In opposite-sex harassment cases where there is a presumption of heterosexuality and evidence of sexual desire, as in same-sex harassment cases where there is a presumption of homosexuality and evidence of sexual desire, the sex flipping model functions effectively and should not be displaced.

⁴⁴ The following is not an attempt to arrive at the legislative purpose of Title VII at the time that it was enacted. Many commentators have opined that the inclusion of "sex" within the language of Title VII resulted from an attempt to defeat the bill before it was passed by Congress. See, e.g., Susan Estrich, *Sex at Work*, 43 STAN L. REV. 813, 816–17 (1991).

⁴⁵ See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1325 (1991) ("If the point of equality law is to end group-based dominance and subordination, . . . a greater priority is placed on rectifying the legal inequality of groups that are historically unequal in society . . ."); see also Estrich, *supra* note 44, at 841 ("[T]he very purpose of the law is to protect women . . .").

defines "sexual harassment." This theory, articulated and advocated by Catherine MacKinnon, explains that male dominance is perpetrated through the use of sexualized power.⁴⁶ Power acts through sexuality, and sexuality shapes gender.⁴⁷ The two-sex scenario, in which one dominates the other, produces two polar gender ideals, which are shaped by the profound inequality between the sexes.⁴⁸

The second theory within the first category targets unwanted *sexual* advances, the means by which men preserve their power over women in the workplace. These unwanted sexual advances produce male hierarchy because they are uniquely debilitating and dehumanizing in the context of workplace hierarchies.⁴⁹ This version assumes the presence of sexual desire on the part of the harasser, and asserts that the act of objectifying the victim functions as a form of discrimination through sexualized power. It focuses on women as victims primarily because they are more often the objects of unwelcome sexual desire, but this focus is not theoretically required.

The second category, developed by Vicki Schultz, treats gender segregation (or gender guarding) as the primary harm that Title VII should address. The premise is that a significant portion of sexual harassment is motivated by the desire "to maintain the most highly rewarded forms of work as domains of masculine competence."⁵⁰ Schultz argues that this harm is carried out through competence-undermining behavior (non-sexual, aggressive behavior). In this category, sexual harassment occurs when competence-undermining behavior is used to discriminate against a person because their sex, gender, and/or sexuality threaten the male dominance of a particular workplace.

Under this theory, Title VII should block attempts to delineate work and work competence along masculine and feminine lines. Schultz attempts to escape the heterosexual presumption and the problematic issue of "desire" by focusing on the profound tensions that cause men (predominantly) to harass women (predominantly) to prevent them from be-

⁴⁶ See MacKinnon, *supra* note 45, at 1294.

⁴⁷ See *id.* at 1302.

⁴⁸ See *id.*

⁴⁹ The victim of sexual harassment loses her humanity and becomes invisible as anything other than an object of male sexual pleasure. See Estrich, *supra* note 44, at 820 (comparing sexual harassment law to rape law in order to criticize Title VII jurisprudence for submerging the issue of sexuality). Implicit in Estrich's analogy is the presumption that the prototypical context of sexual harassment is one in which males impose their sexual desires upon unwilling females.

⁵⁰ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1690 (1998). For an example of gender guarding, see *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988). This theory also allows for sexual harassment in the case of male subordinates who harass female superiors, otherwise known as "bottom-up harassment." See Schultz, *supra*, at 1805 n.444. Under the first category of theories, the attempted subversion of the performance of female supervisors by subordinates is difficult to label as sexual harassment because it is neither motivated by sexual desire, nor characterized by a woman in a subordinate position to a man. See *id.* at 1767.

coming equally proficient in traditionally male spheres of competence. In her view, MacKinnon and Estrich fail to recognize that harassment that is motivated by aspirations for a gender-segregated workplace is actually more damaging to women than harassment motivated by sexual desire.

The third category seeks to prohibit all forms of gender regulation through Title VII because it produces sex stereotypes that deny people the liberty of exercising human agency in the creation of their selves. Katherine Franke and Kathryn Abrams propose theories of this type.⁵¹ This category defines sexual harassment not purely on the basis of sex subordination or gender segregation, but by the process of enforced gender conformity, consciously incorporating the harm of enforced sexuality (meaning sex-specified sexual preferences) within the definition of enforcing gender.⁵² Sexual harassment preserves male control through the creation of the workplace as a site of gender hierarchy where "masculine norms structure the working environment."⁵³ This theory, more than the others, accounts for the domination of males by males by explaining intra-sex inequalities based on gender hierarchies. Under this theory, equality jurisprudence must relax its understanding of sex from a strictly biological definition to a behavioral one. Sexual harassment perpetuates male and masculine control by gender regulation.⁵⁴ Therefore, gender regulation in the workplace should be targeted and eliminated, although sexual expressiveness need not be.

Despite the language of hierarchy and implicit suggestion that the domination of one sex by another is the real harm, what is ultimately at stake, under these theories, is an individual's human agency.⁵⁵ Title VII

⁵¹ Kathryn Abrams fits somewhat uncomfortably within this category. Abrams agrees that workplace environments are often structured to maintain male control, and that regulation of gender conformity is one process that accomplishes this goal. However, Abrams places female subordination to males at the center of her theory. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1215 (1998). Unlike Franke, Abrams is less concerned with the implications of and for sexual orientation in sexual harassment law. See *id.* at 1218–19.

⁵² For a discussion of this harm, see *id.* But see Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245 (1998). Both authors believe that sexual harassment is an offense to agency. See *id.* at 1254.

⁵³ Abrams, *supra* note 51, at 1219.

⁵⁴ See Franke, *supra* note 35, at 763.

⁵⁵ This statement may be a contentious claim. Both Franke and Abrams overtly express the importance of retaining female subordination at the center of sexual harassment jurisprudence; nevertheless, interpretation of their work suggests otherwise. See, e.g., Franke, *supra* note 13, at 8–9.

The wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women in a particular workplace. This re-conceptualization of the meaning of sex reflects the notion that we all possess a degree of sexual agency beyond the rigid determinism of biology. . . . Such a theory suggests that sexual equality jurisprudence should include a commitment to a fundamental right to determine one's gender independent of one's biological sex.

should protect against gender regulation by "vigilante" co-workers, but it should protect against this type of hostile action because of its capacity to deny humans their inherent right to structure their selves in the ways that they see fit.⁵⁶ This theory frames the issue as one of a denial of an individual liberty interest: gender regulation denies human agency and an individual's power to define him or herself.⁵⁷

Although an individual's ability to determine his or her gender identity freely is extraordinarily important, it is not necessarily infringement upon this liberty that invokes Title VII's prohibitions. Title VII is a bulwark against infringements upon principles of equality, not liberty.⁵⁸ Not only have the courts always interpreted Title VII from principles of equality, but the "restriction upon human agency" rationale does not provide a limiting principle. That is, what would happen if an employee felt that it was an expression of his or her sexual agency to walk around the workplace naked? Would it be discrimination for an employer to ask this person to cover up?

IV. Preventing Masculine Supremacy

The theory articulated in this Note builds from the third category of theories of Title VII protection. This Note proposes that Title VII should combat masculine supremacy—an institutionalized system discussed below. It argues, in contrast to scholars like Franke and Abrams, that the problem is primarily one of gender inequality, not restrictions on gender liberty or sex inequality. This harm is accomplished by both inter-sex and intra-sex gender regulation and, as such, should be considered sexual harassment. This theory fits comfortably within the plain language of Title VII, not because the systemic hierarchy is between the sexes, but because gender regulation cannot exist but for an individual's sex. Gender regulation forces a person of one sex to adopt his or her sex-specified gender ideal. One can only identify a person's sex-specified gender ideal when one knows the individual's sex. Although retaining the sex/gender distinction may make it more difficult to reconcile this theory with Title VII's plain language, there are practical concerns for doing so. However, sex and gender should not be conflated because of the inevitable biological restrictions that collapsing the two categories would impose upon the

Id.

⁵⁶ See Abrams, *supra* note 51, at 1220.

⁵⁷ See Franke, *supra* note 13, at 4 ("Notwithstanding an occasional gesture to the contrary, courts have not interpreted the wrong of sex discrimination to reach rules and policies that reinforce masculinity as the authentic and natural exercise of male agency and femininity as the authentic and natural exercise of female agency.").

⁵⁸ See, e.g., *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 64 (1986) (stating that Title VII strikes "at the entire spectrum of disparate treatment of men and women in employment" in order to provide a workplace free of discriminatory intimidation, ridicule, and insult) (internal citations omitted).

communal imagination when re-imagining new gender ideals for the future.⁵⁹ Part VII proposes a new conception of gender (focused on masculinity), multiple masculinities, and an accompanying methodology of causation, which is designed to deconstruct masculine supremacy in the workplace using Title VII.

A. Understanding Masculine Supremacy

American society pushes its citizens to accept the existence of two mutually exclusive gender ideals—one for each sex. This is the “gender dichotomy.”⁶⁰ Gender regulation is the illicit means of preserving the gender dichotomy. This Note argues that the gender dichotomy, and the gender inequality it invariably produces, are the primary harms that Title VII should combat.⁶¹ Thus, this understanding of Title VII is grounded in principles of equality, not liberty,⁶² but abandons presumptions about sexual preferences in the process of understanding how to dismantle hierarchical structures of masculine supremacy.

Gender ideals are characterized by two aspects. The first aspect consists of traits that society believes are unique to its paired sex. For example, people once thought that “maternal” instincts were a trait possessed only by women. The second aspect of a gender ideal involves traits that both genders possess, but that must be “acted out” differently by men and women.⁶³ It is primarily this second aspect of the gender ideal⁶⁴ that produces masculine supremacy—in the workplace and society in general—in part because modern American society has narrowed substantially its

⁵⁹ This point is discussed in detail, *infra* Part VI.

⁶⁰ The gender dichotomy is not only perpetuated by traditionalists; those advocating progressive social change may unwittingly perpetuate it. See, e.g., Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995). By framing the issue as one in which men who do not fit the masculine paradigm are “effeminate,” Case preserves the idea of two fixed genders that the sexes may adopt.

⁶¹ For an example of the ways in which the dichotomy weaves its way into contemporary discourse, see *id.* at 2–3. “When individuals diverge from the gender expectations for their sex—when a woman displays masculine characteristics or a man feminine ones—discrimination against her is now treated as sex discrimination while his behavior is generally viewed as a marker for homosexual orientation and may not receive protection from discrimination.” *Id.* at 2.

⁶² Focusing on equality at the systemic level, as opposed to liberty at the individual level, would to enable courts to understand Title VII without radically breaking from the academically and judicially developed understanding of Title VII’s purposes. Moreover, it enables courts to use Title VII for broad social purposes without transforming it into a civility code.

⁶³ This behavioral aspect of gender becomes transparent when viewing masculinity from the perspective of many gay men: “Rather than thinking of themselves as being masculine, gay men can come to think of themselves as acting masculine.” Brian Pronger, *Gay Jocks: A Phenomenology of Gay Men in Athletics*, in *RETHINKING MASCULINITY* 41, 51 (Larry May & Robert Strikwerda eds., 1993).

⁶⁴ Sex-specified “manifestations” of traits that we acknowledge are common to both sexes, such as inner strength, confidence, virtue, responsibility, etc.

belief in the existence of "sexed" traits, and in part because the second aspect is unquestionably socially produced and has become the primary tool with which the gender dichotomy is currently constructed.

Although people of the two sexes no longer exclusively perform traditional occupational sex roles,⁶⁵ social understandings of gender have stagnated. The simultaneous retention of gender ideals and abandonment of sex roles leads to a situation in which members of each sex are assigned genders, but those genders are not necessarily the gender ideal for his or her sex. For example, although men increasingly take on caregiver roles in families, a man who takes on the primary caregiver role is viewed as having adopted the feminine gender (he is the "mommy" in the family). As a result, despite the fluidity of the roles that men and women undertake, our conceptions of gender have remained largely unchanged. The activities that women once performed take on feminine genders and the people who perform them are often viewed as effeminate. Not only are personal attributes labeled by gender (self-denigrating or overly deferential behavior may be viewed as effeminate in a man), but certain jobs and career paths may be classified in gender terms as well.⁶⁶

The polarization of the two gender ideals, in combination with the contemporary construction of their relationship, produces a system of masculine supremacy that infects every dimension of social discourse, of which the workplace is one part. First, the mere fact that society has only two ideals produces a cognitive effect called in-group/out-group discrimination.⁶⁷ When two groups, such as masculine and feminine, are set in opposition to one another, human cognition leads people to distance themselves sharply from the other, and encourages them to view one group more positively than the other based in part on the reward value of group membership. Second, society requires men to be masculine and women to be feminine, where masculinity and femininity are sets of behaviors that only function effectively within a social structure that contains subordinate feminine persons and dominant masculine persons.

⁶⁵ See, e.g., WOLF, *supra* note 16, at 21, 25 ("In the United States between 1960 and 1990, the number of women lawyers and judges rose from 7500 to 180,000; women doctors from 15,672 to 108,200 . . ."). Although women have made observable progress in the professional world, attitudes are not yet completely egalitarian. See Beth Willinger, *Resistance and Change: College Men's Attitudes Toward Family and Work in the 1980s*, in MEN, WORK, AND FAMILY 108, 116 (Jane C. Hood ed., 1993).

⁶⁶ See Case, *supra* note 60, at 3. See generally Joseph H. Pleck, *Are "Family-Supportive" Employer Policies Relevant to Men?*, in MEN, WORK, AND FAMILY, *supra* note 65, at 217 (finding that males associate family leave policies with women and describing how the use of such family leave policies is emasculating).

⁶⁷ Human beings naturally impose normative values on categories once those categories are set in opposition to one another—even if the members of those categories are randomly assigned to each group. See Ann Locksley et al., *Social Categorization and Discriminatory Behavior: Extinguishing the Minimal Intergroup Discrimination Effect*, 39 J. PERSONALITY & SOC. PSYCHOL. 773, 773 (1980).

When the gender dichotomy becomes entrenched—especially a hierarchical dichotomy—society is precluded from deliberating about and recalibrating its gender ideals or the underlying structures that are necessary for them to function. The production of alternative ideals, especially multiple ideals, could propel us toward a more free and equal society by forcing reconsideration of the current gender ideals and their relationship to each other. More importantly, the pluralization of gender ideals would substantially decrease the likelihood of entrenching a new form of gender supremacy; that is, the existence of multiple genders for each sex substantially lessens the likelihood of future gender domination.

B. Gender Regulation: Protecting and Preserving the Gender Dichotomy

Same-sex, and often opposite-sex, harassment can be a form of gender regulation motivated by the harasser's desire to preserve the gender dichotomy. Because masculinity is so revered by American culture, men deeply internalize the masculine image; to relinquish the image would seem like a failure. Unfortunately, part of the masculine ideal's normative goodness is related to the fact that it is not feminine; without femininity, masculinity could not claim gender superiority.⁶⁸ But why can't we conceive of multiple non-feminine masculine ideals? Masculinity as a construct resists plurality because gender plurality jeopardizes the gender dichotomy that is a necessary prerequisite to masculine supremacy.⁶⁹

Nonconformist males pose a much greater threat to masculinity, and the gender dichotomy, than any woman can. Men who do not conform to masculinity are punished more severely than women who invade "masculine" space (or threaten the boundaries of masculinity).⁷⁰ Gender-nonconforming men pose an intensified threat, in part, because there are ultimately no meaningful physical differences that the threatened man can use to distinguish himself from the nonconformist. In addition, there is no way for a gender-conforming man to explain why a nonconforming man would *choose* to relinquish his claim to privilege and supremacy without diminishing the conformist's own status. The conformist is left with an uncomfortable quandary that is usually resolved through denigration, physical violence, or likening the nonconformist to a woman.⁷¹

⁶⁸ See Case, *supra* note 60, at 28–36.

⁶⁹ Gender plurality destabilizes the gender dichotomy not only by blurring the line between masculinity and femininity, but also by (1) reducing in-group/out-group discrimination effects; (2) revealing the artificiality and instability of the masculine category; and (3) demonstrating the reality that the gender dichotomy can be overcome.

⁷⁰ See *id.* at 3 ("The man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so.").

⁷¹ See, e.g., Doe v. Belleville, 119 F.3d 563, 575 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998) (in which harasser constantly questioned whether plaintiff was a "guy or a girl").

By resolving the conflict posed by the gender-nonconformist through emotional or physical violence, or gender regulation, the gender conformist not only extinguishes the threat, but reinforces his own gender ideal of masculinity.⁷² This dialectical process allows the harasser continually to reaffirm his conformity with the gender ideal while defining masculine norms in opposition to those who refuse to conform, those who support redefining the gender roles, and those who are feminine (contributing to the constant reintroduction of the gender dichotomy).

A person's desire to conform to gender ideals will depend upon some combination of the following: the manner in which gender ideals are presented to the individual during the process of gender assignment, the extent to which deviant gender ideals are presented as normatively positive, the individual's predisposition and/or cognitive readiness to conform to social teachings, the extent to which the individual comes into contact with gender nonconformists, and the extent to which the individual considers social sanction a meaningful threat.⁷³

Physical restraints or limitations (such as height and weight), as well as certain developmental difficulties (mental retardation and learning disabilities), may render an individual unable to comply with certain gender ideals. Some individuals who cannot physically comply with gender ideals consider themselves defective, but continue striving for the gender ideal—compensating for their physical limitation where possible.⁷⁴ Others, especially those who are unable to compensate for their deviations, will reject the dominant gender ideal (or the aspect that negatively affects them) to retain their sense of self-esteem.

V. The Inadequacy of Sexual Harassment Jurisprudence

If one accepts the argument that Title VII must prevent gender regulation because such regulation enables structures of masculine supremacy to thrive, then sex flipping is an inadequate methodology. Sex flipping

⁷² See Franke, *supra* note 35, at 693 ("Sexual harassment . . . is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects. This dynamic is both performative and reflexive in nature."); see also Abrams, *supra* note 51, at 1218-19.

⁷³ Parental expectations, encouragement, behavior, and employment all play powerful roles in gender conformity of children. See Aletha Huston & Mildred Alvarez, *The Socialization Context of Gender Role Development in Early Adolescence*, in FROM CHILDHOOD TO ADOLESCENCE 159-63 (Raymond Montemayor et al. eds., 1990) (presenting theories that suggest that secular and historical changes in society can affect sex role development, noting, in particular, the marked change in female adult roles and the current adolescent generation's experience of that change). Peer group determinations of acceptable gender nonconformity will also powerfully affect whether an individual desires to conform. See *id.* at 164.

⁷⁴ The phenomenon of gay men trying to achieve athletic prowess is one example of this compensation mechanism. See Pronger, *supra* note 63, at 45.

does not discover gender regulation in all cases, and it reinforces the gender dichotomy as a system of thought.

Sex flipping cannot capture many forms of gender regulation in a society of multiple and varied gender identities. Sex flipping is an effective methodology in a world in which two sexes conform unilaterally to one of two gender ideals. If all men and women are either "masculine" or "feminine," sex flipping will prove whether discrimination was based on sex. (This schema can account for the feminine man or the masculine woman.) Sex flipping would be appropriate because either a person has paired the "wrong" gender identity with his or her sex, and by sex flipping one can see that the "correct" pairing would eliminate discrimination, or the pairing is "right," in which case any difference in treatment is not sex discrimination. However, sex flipping is inadequate because individuals do not conform solely to either the masculine or the feminine ideal; men and women who do not conform to their sex-specified ideal do not simply de facto conform to the other sex's gender ideal. For each sex, any of a number of gender identities can attach, and they are not all equally socially accepted. Certain gender identities are of markedly less social value than others are, but sex flipping does not detect inequality *within* the sexes when that inequality is based on differentially valued genders.

What if a man is perceived not to be masculine, but also not to be feminine? Is such a thing possible? If it is, then what good does it do to ask whether the harasser would similarly discriminate against a woman in his position?⁷⁵ When same-sex harassment occurs between males, this method might detect the ability of "masculine" men to violently dominate "feminine" men; but it is not concerned with whether ideally masculine men are allowed to dominate non-traditionally masculine men violently. Understanding sex discrimination as a problem solely between the two sexes (or between the two genders) without simultaneously seeing it as part of a struggle for gender-group coherence within each sex-group skews the real focus.

Not only is sex flipping under-inclusive in a world of plural gender identities, but it is also affirmatively harmful for social and intellectual progress. Sex flipping preserves the bipolar gender dichotomy. For example, Justice Scalia's opinion in *Oncale*⁷⁶ assumes that sexual harassment can be identified and measured, almost scientifically, if one compares the employer's treatment of members of one sex with its treatment of members of another sex. This presumption—that one sex can provide a control group for the other—implies that Title VII must be understood

⁷⁵ Note that sex flipping is also faulty because it assumes that females exhibit "femininity." Women only work as a control group if they exhibit "feminine" traits in the context in question (or if they would be perceived as "feminine" by the harasser).

⁷⁶ See generally *Oncale*, 118 S. Ct. 998 (1998) (Scalia, J.).

within the theoretical framework of two genders in which one is dominant. Because sex flipping is only an effective methodology for detecting sex discrimination if we conceive of gender in terms of the gender dichotomy, using sex flipping as the sole method of proof of sex discrimination reinforces the belief in two genders. Requiring sex flipping as a methodology contributes to society's inability to develop conceptions of plural gender categories for the sexes. The methodology eliminates the possibility that masculine genders other than the prevailing masculine gender ideal might exist (i.e., masculine genders that are not the functional equivalent of the feminine gender ideal).

There are also several secondary reasons why sex flipping is an inadequate method of testing for same-sex harassment. Both men and women may be harassed because of their genders. It is absurd to assume that if both sexes are harassed, Title VII is negated and no claim exists for either. Moreover, sex flipping poses significant problems of proof when dealing with single-sex work environments.

VI. "Multiple Masculinities": An Answer for Sexual Harassment Law

A. *The Theory of Multiple Masculinities*

The theory of multiple masculinities is premised on the notion that society must not only tolerate gender nonconformity, but foster alternative visions of masculinity. Individual men should be free to deviate from the masculine gender ideal, and be assisted in pluralizing multiple masculine ideals through social acceptance.

Many theorists argue for society to accept gender nonconformity. Implicit in their arguments, however, is the assumption that we should not think in terms of categories. Instead, men and women should be free to adopt portions of the two gender ideals as they choose. This framework embraces the premise that the two polar genders exist, and anyone who does not fit comfortably within their "assigned" gender must be some combination of masculine and feminine. Kathryn Abrams argues that this freedom, "the capacity to put together the disparate elements of self—biological being, gendered subject, worker, sexual actor" is essential to a sense of personal agency.⁷⁷

Society must enable men to deviate from the masculine gender ideal; however, the conceptual framework of gender in which the poles of a "gender continuum" are "masculine" and "feminine" should be rejected. This conceptual framework requires one to assume that when a person moves away from one pole, he or she is moving closer to the other. Although this continuum framework superficially promotes gender plurality, it does so in a way that re-entrenches the gender dichotomy. Moreo-

⁷⁷ Abrams, *supra* note 51, at 1220.

ver, it does not force people to exercise their imaginations in reconceiving masculinity: it merely allows men to incorporate more aspects of femininity into their gender identities.

In order for society truly to engage in the process of developing new visions of masculinity, it must reconstruct gender as a multitude of categorical variables in which "masculine" and "feminine" are categories with subcategories. These subcategories (masculinities and femininities) may overlap but are not identical. The theory of "multiple masculinities" calls for society to conceptualize gender ideals pluralistically and accept the ability of multiple femininities and multiple masculinities to coexist as ideals in the same community (however defined). Freeing ourselves from the gender dichotomy frees us to envision what other "masculinities" might look like, and allows us to embrace and affirm those alternative visions as not only acceptable, but ideal.

1. Progress and Femininity

As a society, we are beginning to develop whole visions of the feminine that are separate from the Victorian gender ideal or the American housewife gender ideal, but that we do not think of as masculine. We have come to a point where we are able to conceive of a woman who is a high-level executive, who works hard, puts in long hours and likes to go mountain-biking on weekends as feminine, even if she is strong, firm and gives directives (in nonconfrontational ways). This woman would not have been considered feminine twenty years ago, but, today, she does not have co-workers asking her why she is trying to act like a "man." If such a question is posed today, it is either because feminist ideals have not permeated society deeply enough, or because we as a society have a clear idea of what it means to be masculine, and her description sounds somewhat like it.

Society has succeeded in reconceiving of the feminine in such a way that a woman may be viewed as feminine whether she possesses a particular trait that was traditionally nonfeminine, or whether she lacks a trait that was traditionally feminine. This pluralism has not been achieved with all relevant traits—the pluralization has been more successful with some than with others. For example, physical strength is no longer viewed as non-feminine; the media and the medical community have successfully inundated American society at enough levels with images of physically powerful women that society has accepted the trait as part of a vision of femininity. However, physical strength has not replaced physical weakness as a characteristic of femininity; they are part of different visions of the feminine. In many workplace contexts, various visions of the feminine manifest themselves through women with different gender identities; in these contexts, multiple feminine composites are able to

coexist.⁷⁸ Gender ideals for women have loosened in the spheres of leadership, intelligence, and independence.

2. *Images of Masculinity and Gender Plurality*

Society has yet to embark seriously upon the pluralizing of masculinity the way that it has with femininity. The work that is being, and has been, done by feminists to deconstruct the essence of femininity needs to be done in a more aggressive way with masculinity. When a man does not conform to what we know to be masculinity, too large a portion of our society is willing to use social and physical pressure to make him conform. A man might be viewed as gender-nonconforming either because he exhibits traits that have been traditionally identified with the feminine, or because he does not exhibit certain traits that comprise traditional masculinity. An example of the first kind of gender nonconformity is a man who exhibits a particularly nurturing or sharing disposition or who is particularly emotionally expressive. An example of the latter kind of nonconformity is a single man who is not (hetero)sexually active.

Popular culture provides a few models of men who exhibit nonconforming gender identities and who might serve as sketches for the development of new masculine ideals.⁷⁹ The movie *Life Is Beautiful* tells the story of a Jewish man in Italy during the Holocaust and the ways in which he affirmed life—for himself, his non-Jewish wife, and his son.⁸⁰ He is not a physically strong man, nor does he take up arms in defense of his people. He uses humor, love, and his belief that evil cannot triumph to protect his family, to survive, and to remain a dignified human being for as long as he lives. This character creates a vision of a man who is extremely powerful despite his powerless position in the world, a man who loves his family and protects them—not through territoriality and violence, but through comedy, ingenuity, and his ability to reinterpret the world.

The movie *Philadelphia* also offers an alternate vision of masculinity.⁸¹ Two homosexual men are in a loving, committed relationship. Both are strong and independent, and the audience sees that each possesses

⁷⁸ It is important to realize that pluralizing gender ideals can have different effects on different gender ideals. For example, African American women, who still bear the burden of slavery's legacy, may experience the opposite of that which white women experience as gender ideals pluralize. The loosening of gender ideals may allow a vision of African American women who are less physically strong and more delicate than they were once imagined to be.

⁷⁹ This Note uses examples from popular culture because such examples can be widely recognized and actively play a role in the iterative process of gender assignment and the shaping of communal gender ideals. The examples used are clearly innovative attempts to challenge traditional prototypes of masculinity, and, as such, they challenge processes of mainstream gender assignment.

⁸⁰ See *LIFE IS BEAUTIFUL* (Miramax 1998).

⁸¹ See *PHILADELPHIA* (Columbia Tri-Star 1993).

remnants of the masculine gender ideal. Yet they do not conform to their assigned gender ideals, nor are they "feminine." They are self-reliant men who care profoundly for each other and want to share their lives with each other. Although they are independent, they do not confront their lives and their fears alone—they confront them together. Their families are important to them, and the opinions of those about whom they care inform their most difficult decisions. Although they must struggle with terrible trauma, they talk about it, inviting others to understand their pain and to experience the tragedy in mutually supportive ways. Yet, their desire to share their emotions and decisions with others does not make them weak; it makes them stronger.

One final image of an alternative masculinity is that presented by Cuba Gooding, Jr.'s character, Tre, in the movie *Boyz 'n the Hood*.⁸² *Boyz 'n the Hood* portrays the desperate struggles of black men in South Central, Los Angeles, to survive and retain a sense of dignity and humanity. The movie, among other things, portrays the constant threats to black masculinity in a racist society and the different ways in which black men respond by creating visions of masculinity that can be attained in the presence of the constant social emasculation that bombards them. In the movie, Tre struggles with how to respond to police harassment, whether to pursue sexual "conquest" in order to prove his masculinity, and what will constitute, for him, appropriate expressions of masculinity through dress, sport, and possible gang violence. His greatest struggle occurs when he is faced with the way in which he, as a man, will "protect" his loved ones after his closest friend is murdered. He must decide whether it is proper for him to express his strength through violence or by refraining from engaging in further bloodshed. Tre's struggles are not simple to resolve, and part of his masculinity is defined by the fact that he does struggle—that he grapples with the tensions and is able to feel immense pain without transforming it into blind aggression. Tre is able to confront his anger, sadness, and fear without repressing it or transferring it into some other, more manageable emotion. While some of his friends choose to engage in further violence because they perceive such action as brave and masculine, the audience perceives the tremendous inner power that Tre exerts when he chooses not to find and kill his friend's murderer.

Society needs to be able to conceive of a man who does not have to relinquish a position of respect and stature within a community merely because he exhibits traits not currently conceived of as "masculine," such as empathy, passivity, open-mindedness, or nurturing. These are not feminine skills; they are often taught only to women, but are very important to being a man.⁸³

⁸² See *BOYZ 'N THE HOOD* (Columbia Tri-Star 1991).

⁸³ It is possible for the two sexes to manifest a given trait in ways that differ along sex lines, but not among masculinities and femininities. Similarly, if the two sexes manifest a

3. *Sexuality*

Because heterosexuality is so central to the masculine gender ideal, a man is usually viewed as gender-nonconforming if he is anything other than heterosexual.⁸⁴ Therefore, sexual expressiveness plays a key role for males; males have a vested interest in ensuring that others know of their heterosexual sexual preferences so that they may be viewed as conforming to the masculine gender ideal. In fact, other males may view silence suspiciously unless they receive circumstantial evidence of heterosexuality, such as being married or dating women. A man whose sexual expression is ambiguous or non-heterosexual is a strong candidate for gender regulatory sexual harassment.

For women, homosexuality is also viewed as gender-nonconforming to the dominant feminine idea, but it is not as anathema to femininity as it is to masculinity. Instead, women risk harassment if they are sexually expressive at all. That is, either a woman is heterosexually expressive, in which case the woman is "inviting" harassment, or she is homosexually expressive in which case she provokes harassment by "advertising" her gender nonconformity. Women are thus best able to avoid sexual harassment by refraining from sexual expression entirely.

4. *Multiple Masculinities*

The theory of multiple masculinities is not intended to canonize a new universal masculinity; it is intended to teach men that they have many options for expressing their manhood and to delegitimize the penalties imposed by society when men act in nontraditional ways. It is about creating composites of masculinity that positively reinforce and respect nonconformity with the currently dominating gender ideal(s). Most importantly, it is designed to allow society to realize that such men are not less worthy as men if they act in non-traditionally masculine ways. In fact, new masculinities might be construed as sexually attractive, reinforcing gender plurality through sexuality.

The multiple subcategories of masculinity do not have to be the same as the subcategories of femininity. This theory is designed to do more than take traditionally feminine attributes and relabel them as masculine. Instead, it is designed to spark creations of gender composites

single trait in the same way, that does not prevent that manifestation from being masculine when a man performs it and feminine when a woman performs it. This latter point might be viewed as linguistic squabbling, but it is more than that. Consider that physical strength in a woman might be considered feminine to some people, but most would agree that physical strength is not an exclusively feminine trait—it is very much a masculine trait on a man. There is actual good in deciding that a trait is masculine and feminine depending on which sex enacts it; this renaming is the first step in creating a space for multiple masculinities.

⁸⁴ See Pronger, *supra* note 63, at 45.

that may overlap in individual attributes, but that look different when one sets all of the gender conceptions side by side.⁸⁵ Some scientists argue that physical differences between men and women can legitimately alter behavior, sensibilities, sex roles (within and outside of the family), and personality traits.⁸⁶ Whether due to biology or socialization, however, these differences may yield gender identities and ideals that still divide along sex lines. Sex differences may naturally produce different composites of gender for men and women. This is not to suggest, for example, that if men simply cared for children more often or in more substantial ways, then such activities would produce alternative masculinities. Men of different ages, classes and cultures need to recreate their own notions of masculinity from a relatively bare slate. Recreating multiple gender ideals for any given community takes communication among men, as well as an understanding of the normative values that the larger society believes are essential to any understanding of masculinity.

B. Multiple Masculinities and Title VII Jurisprudence

Armed with the theory of multiple masculinities, we can revisit the question of which method is appropriate for deducing when same-sex harassment is because of sex. Instead of sex flipping, a judge should focus on the assailant's treatment of subsets of gender within a given sex group. Courts should employ a counterfactual assumption that requires them to imagine, in place of the victim, a person of the same sex who, unlike the victim, exhibits the gender ideal assigned to that sex. It is the victim's failure to conform his gender identity to this assigned gender ideal that elicits the harassment. This harassment is "because of sex" since sex is integrally paired with gender identity. In other words, *but for* the victim's sex, his gender identity could not be deemed proper or improper, and so would not have led to discrimination.

A court should compare the way that an employer (or co-worker) treats men or women who exhibit nontraditional masculinities or femininities to the way that he or she treats men or women who epitomize their respective gender ideals. Comparing different masculinities and femininities is the only way to prove the cause of the assault (the pairing of a nontraditional gender with the victim's sex). This examination does not entail an exclusive focus on gender, but rather a careful examination of

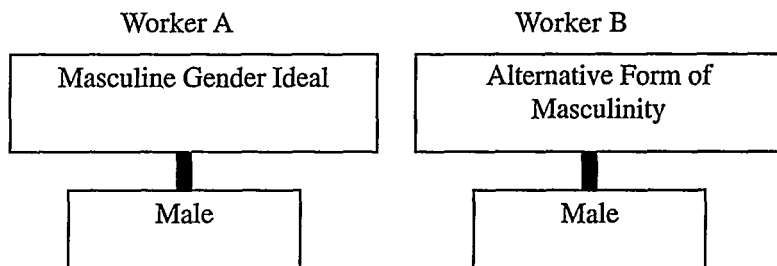
⁸⁵ For a psychological perspective of this idea, see generally William S. Pollack, *No Man is an Island: Toward a New Psychoanalytic Psychology of Men*, in *A NEW PSYCHOLOGY OF MEN* 33, 57 (Ronald F. Levant & William S. Pollack eds., 1995); *see also*, Franke, *supra* note 35, at 758 ("Goluszek's and Polly's male coworkers may have regarded them as 'failed men' but that is not the same thing as regarding them as women.").

⁸⁶ *See, e.g.*, GERDA SIANN, *GENDER, SEX, AND SEXUALITY: CONTEMPORARY PSYCHOLOGICAL PERSPECTIVES* 41-63 (critically examining the widely held essentialist positions of biological determinists).

the motivation behind the harassment, the pairing of sex and gender within individuals. Where harassment is motivated by the particular ways in which an employee manifests his or her sex (through gender), a court must find that the employee was discriminated against because of his or her sex.

The diagram for the methodology would look like the following:

Worker/Victim (male)—only Worker B is victimized



Consider, for example, Mark McWilliams and William Zalewski. McWilliams is an auto mechanic with a learning disability whose history of humiliation at the hands of his co-workers is retold at the beginning of this Note.⁸⁷ Zalewski was harassed because he was thought to be a virgin at age thirty-four.⁸⁸ Being learning disabled is not part of the feminine gender ideal, and it is unclear the extent to which retaining one's virginity would still be identified as a feminine trait. Neither of these traits, however, is viewed as masculine; in fact, it is precisely because these traits are viewed as conflicting with masculine ideals that these two men were harassed.⁸⁹ Using a sex flipping method, a court would only con-

⁸⁷ See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996).

⁸⁸ Zalewski was the plaintiff in a same-sex sexual harassment suit in New Jersey. See *Zalewski v. Overlook Hosp.*, 692 A.2d 131, 131–32 (N.J. Super. Ct. Law Div. 1996).

[P]laintiff's co-workers . . . began to harass him, apparently because they believed him to be a virgin. They confronted him with the slang terms "whacko," "jerk-off," and "3-5, 3-5," thus insinuating that the plaintiff masturbates in lieu of having sex with women. The co-workers also placed pictures with captions on the plaintiff's desk and in his locker, which made reference to plaintiff's lack of sexual relations with women At no time did the co-workers suggest plaintiff's sexual orientation might be other than heterosexual, and there is no evidence plaintiff is homosexual or bisexual.

Id. at 131–32.

⁸⁹ Certain traits, such as mental retardation, might be viewed as non-gendered traits—unrelated to gender ideals—and therefore not related to one's sex. However, some non-gendered traits have a certain gender salience—that is, they take on gendered meanings because they bear some particular relationship (favorable or unfavorable) to gendered traits. For example, mental retardation may be gender salient because competency and an

sider these plaintiffs to be harassed because of their sex if the plaintiff could show that these traits are considered appropriately "feminine" by society, such that a woman exhibiting them would not have been harassed. Yet, unless courts construct femininity as inclusive of everything that is not part of the masculine ideal, these traits cannot reasonably be identified as part of the feminine ideal. If the law constructs femininity as everything that is not masculine, it must also simultaneously constrict appropriate forms of masculinity to the single masculine gender ideal that is the one thing that femininity is not. Such a jurisprudence would reinforce the gender dichotomy by allowing for only two genders, and ultimately would constrict femininity by reifying a social prohibition on the overlap of individual traits that society forces into gender ideals through gender assignment. Instead, courts must incorporate into the law the position that McWilliams and Zalewski did *not* act in a traditionally feminine manner—they acted in a non-traditionally masculine manner, and they were sexually harassed because of it. Title VII's ability to intervene on behalf of men who exhibit alternative masculinities will determine whether it is able to carry out its mission of eliminating masculine supremacy.

VII. Conclusion

Sexual harassment is in the process of being reconceptualized as a result of increasingly developed understandings of the complexities of the triangular relationship between sex, gender, and sexuality. These understandings are changing as society becomes increasingly receptive to gender plurality. Courts must facilitate this social movement toward gender plurality because it is a movement toward the kind of equality that Americans should be able to expect in their workplaces, as well as in society at large.

ability to protect oneself and family are fundamental to the masculine gender ideal. Retardation may be viewed as an impediment to this fundamental aspect of masculinity. Because certain gender salient traits are more directly associated with one gender ideal than the other, sex flipping might be able to identify sex discrimination on that basis, but it would be difficult to prove, especially if there is some level of gender salience with both gender ideals.

