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Recent Thinking about Sexual Harassment: A Review Essay

THE VARIETY OF SEXUAL HARASSMENT CLAIMS

Twenty-five years ago, Catharine MacKinnon made her pathbreaking argument that sexual harassment constitutes sex discrimination under Title VII of the 1964 Civil Rights Act.[1] Her work entrenched a paradigm of sexual harassment as sexual conduct that men impose on women because they are women. Since then, a variety of plaintiffs whose complaints do not fit this paradigm have sought relief under antidiscrimination law. These include women who have been harassed in nonsexual ways; gays, lesbians, and transsexuals who have been harassed on account of their sexual orientation and identities; and heterosexual men who have been bullied by other men. This proliferation of claims has challenged MacKinnon's original model and given rise to new theories of sexual harassment.

This review essay considers recent approaches to understanding sexual harassment, taking Catharine MacKinnon and Reva Siegel's *Directions in Sexual Harassment Law* as a primary guide. This work comprises nearly forty concise contributions from leading legal academics and lawyers active in sexual harassment litigation. It offers a trenchant and insightful survey of the most important recent developments

This review essay considers recent theories of the wrong of sexual harassment, taking as its central reference point *Directions in Sexual Harassment Law*, ed. Catharine MacKinnon and Reva Siegel (New Haven: Yale University Press, 2004), henceforth, *DSHL*, while also considering several important articles on the subject. I thank Tyler Burge, Ann Garry, Barbara Herman, Alison Jaggar, Helen Longino, Seana Shiffrin, participants in the philosophy colloquia at the University of Colorado, Boulder and UCLA, and the Editors of *Philosophy & Public Affairs* for helpful advice.

1. *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), henceforth, *SHWW.*

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concerning sexual harassment, including theories that have been devised for legal codes in other countries.[2]

Theories of sexual harassment have, to varying degrees, attempted to satisfy three desiderata: to provide a normative account of what is wrong with sexual harassment; to offer sociological insight into the causes, effects, and meanings of sexual harassment; and to fit complaints of sexual harassment to legal remedies. I shall argue that these desiderata are in tension with one another. Sexual harassment is not a unified phenomenon, either normatively or sociologically. Our understandings of its nature and its wrongs have sometimes been distorted by the attempt to fit them into available legal remedies. This is understandable, given that most writing about sexual harassment is by legal academics and lawyers, who have sought theories that can help victims gain relief.

The new theories of sexual harassment are best understood in contrast with MacKinnon's original theory. MacKinnon defined two types of sexual harassment, both subsequently recognized as prohibited by Title VII of the Civil Rights Act of 1964 by the Supreme Court in *Meritor Savings Bank v. Vinson*.[3]

> *Quid pro quo:* a supervisor conditions the job, pay, promotion, perks, or other material benefits of work on the employee's submission to sexual intercourse, groping, or other forms of "verbal or physical conduct of a sexual nature"[4] (for example, ogling, genital exposure, having to listen to sexual fantasies), by the supervisor, coworkers, or customers.
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> *Hostile environment:* an employee is subject to unwelcome sexual conduct by the employee's supervisors, coworkers, clients, or customers, with "the purpose or effect of unreasonably interfering" with the employee's ability to work, or "creating an intimidating, hostile, or offensive working environment."[5]

2. It also considers the historical context of practices of sexual harassment, alternative remedies to sexual harassment, and controversies over the ways sexual harassment laws regulate speech.

3. 477 U.S. 57 (1986). See also Alexander v. Yale University, 459 F. Supp. 1 (D. Conn., 1977) (finding sexual harassment of students in federally funded schools illegal under Title IX). This review, following the bulk of the literature, focuses on sexual harassment in the workplace.

4. Equal Employment Opportunity Commission, 29 C.F.R. § 1604.11 (a) (1998).

5. *Id.*

MacKinnon analyzed sexual harassment as a consequence and expression of gendered inequalities of work. Sex segregation at work consigned women to poorly paid, subservient "female" jobs (secretary, waitress, nurse, domestic servant, flight attendant) that invited their sexual objectification, from dress codes that required them to appear sexually alluring, to tasks that required them to serve men's personal needs, to norms that expected them to smilingly accept abuse. Men exploited this vulnerability to sexually subordinate them: to treat them as sexual objects, fit for sexual use regardless of their wishes. Sexual harassment was sex discrimination because it forced upon women a socially inferior role through their sexual subordination to men.[6]

MacKinnon correctly anticipated that the courts would not view the wrong of sexual harassment in terms of female sexual subordination. So she supplied an alternative "differences" account, based on the Title VII criterion of differential treatment, that explained how sexual harassment was sex discrimination. On this account, sexual harassment was wrong because it treated women differently from men: it singled them out on the basis of their sex (that is, as females) for deleterious treatment to which males were not subjected.[7] The post-*Meritor* judiciary, imperfectly following this account, established a *standard paradigm* of sexual harassment. In the paradigm case (1) the harasser is male, the victim, female; (2) the harassment expresses the harasser's sexual desires; (3) it consists in unwelcome sexual conduct; (4) it targets the complainant. This model assumed that sexual harassment expresses a natural heterosexual desire of men for women gone overboard. It is courtship turned boorish. The courts imagined that the typical forms of harassing conduct were sincere sexual propositions, sexual compliments, and requests for dates: acts that would be innocent had they been welcome by their targets. Sexual harassment was sex discrimination on the presumption that the harassers were heterosexual, and so subjected female workers to sexual attention that they were not imposing on male workers.

The standard paradigm took heterosexual desire, rather than sex-role stereotyped sexual subordination, as the key element turning sexual harassment into sex discrimination. It identified the wrong of sexual harassment with its differential treatment of men and women, whereas

6. *SHWW*, pp. 9–23, 174–91, 219.
7. *SHWW*, pp. 192–208.

MacKinnon located the wrong in the subordination of women as women. Yet it shared with MacKinnon's analysis a common, narrow focus on sexual conduct by men that targets women. The narrow focus of both models appeared to exclude diverse types of conduct that many find objectionable, even though they implicate the sexuality or gender identity / orientation of their victims.

Recent thinking about sexual harassment has been inspired by people who object to sex- and gender-related conduct that appears to fall outside the scope of the standard paradigm. Here are some typical types of deviating cases:

> *Gender harassment:* coworkers of any rank engage in verbal and physical conduct, not necessarily sexual, that expresses hostility toward women holding "men's" jobs and denigrates the feminine, with the intent or effect of undermining victims' ability to do their jobs. For example, coworkers might address a female firefighter as a "damn bitch," tell her that a man is needed for her job, and assert that her femininity makes her incompetent. Her coworkers might sabotage her equipment, refuse to train her, and refuse to integrate her into the informal social life of the workplace (for example, eating common meals in the firehouse). Her supervisor might assign her to "female" tasks not part of the normal job description (for example, secretarial work), assign her to undemanding tasks, or assign her impossible tasks and write negative reviews of her performance. Her subordinates might refuse to take orders from her.[8]
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> *Gender policing:* coworkers of any rank engage in verbal and physical harassment of gender nonconformists—of masculine women and effeminate men. For example, coworkers might accuse a muscular woman of being a lesbian (regardless of her known sexual orientation), or suggest that she has a penis. Men may harass other men perceived to be effeminate. A sexually shy man who has not had a girlfriend might be ridiculed for his sexual naiveté, subjected to "bagging" (grabbing his testicles), threatened with rape, or forced to his knees while a broomstick is shoved into his anus.[9]

8. See Vicki Schultz, "Reconceptualizing Sexual Harassment," *Yale Law Journal* 107 (1998): 1683–805 for discussion of cases.

9. See Katherine Franke, "What's Wrong with Sexual Harassment?" *Stanford Law Review* 49 (1997): 691–772 for discussion of cases.

Sexual orientation / identity harassment: coworkers of any rank harass employees for being gay, lesbian, transsexual, or queer in other ways. Harassment may include both sexual taunting and assault, and nonsexual conduct.

"Horseplay": male coworkers bully and haze other workers, forcing them to submit to sexual and nonsexual battery, assault, and insult, including bagging, goosing, genital exposure, genital taunting, running a gauntlet, mock rape, and wrestling.

Pornographic workplace: coworkers fill the workplace with sexually objectifying representations of women. This includes display of pornography and open discussion of what the workers or others have done, and fantasies of what they would like to do sexually to women.

Sexual banter and flirtation: coworkers tell sexual jokes, flirt, date, and playfully tease one another in sexually explicit ways. Rumors fly about their sexual relationships, infidelities, and breakups. Although the targets of these forms of conduct do not object, other coworkers exposed to such open, sexually explicit conversations and activities find them offensive and unwelcome.

Consider how these cases deviate from the standard paradigm and from MacKinnon's original analysis. Gender policing, sexual orientation / identity harassment, and horseplay are commonly practiced by men on other men. Neither these types of harassment, nor gender harassment, necessarily express sexual desire. Gender harassment, gender policing, and sexual orientation / identity harassment impose sexist standards on others (in treating women, femininity, or feminine people as inferior, or in forcing people to conform to sex-role stereotypes), but not necessarily by means of sexual conduct. Horseplay, similarly, does not always involve sexual conduct. The pornographic workplace does not target the complainant, although it sexually objectifies members of her sex. Both it and sexual banter raise questions of bystander standing: may an offended witness of sexually explicit speech and conduct, who is not targeted, sue for sexual harassment?

Confronted with such deviating cases, some courts have haltingly revised the standard paradigm. Scattered rulings over the past twenty years recognize sexual harassment claims under Title VII in cases of

male-on-male gender policing,[10] pervasive displays of pornography used to harass the plaintiff,[11] gender harassment of women by means of nonsexual conduct,[12] sexual orientation harassment of gay men,[13] and adverse employment actions taken against transsexuals for their failure to conform to gender stereotypes.[14] But the law is unsettled in these types of cases and often lacks a coherent rationale. The difficulty is that although many people find the conduct in these cases to wrongly victimize others, and demand a legal remedy for these wrongs, it is not evident that these wrongs always amount to sex discrimination. I shall argue that alternative laws aimed at securing the dignity and autonomy of workers and students would offer more coherent and comprehensive remedies for some wrongs now alleged to constitute sex discrimination.

THE WRONG OF SEXUAL HARASSMENT

Three fault lines run through the controversies over how to conceive of the wrong of sexual harassment. First, does the core wrong of sexual harassment consist in an injury to groups, or to individuals? Second, does it consist in sexism, understood as male dominance, or sex discrimination in a symmetrical sense (in which men and women may play interchangeable roles in any sexist act), or the oppressive *enforcement* of conventional norms of gender, sexual orientation, and sexual expression, or the *violation* of conventional norms of respect for individuals? (By implication, are the primary victims females, sex groups [males and females alike], or anyone who deviates from conventional norms of gender and sexual orientation, or anyone at all, irrespective of group membership?) Third, does "conduct of a sexual nature" figure more as a problem to be regulated, more as a liberty to be protected, or more as a sideshow to understanding sexual harassment? Different theories' answers to these questions shape the scope of what they see as sexual harassment.

The group-based theories may be called *equality theories*, because they view the core interest injured by sexual harassment to be equality

10. Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).
11. Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (1991).
12. McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) at 1138.
13. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).
14. Smith v. City of Salem, 378 F.3d 566 (2004).

among social groups. MacKinnon's equality theory offers a tight-knit set of answers to the three questions above: the core wrong of sexual harassment consists in a group injury, the subordination of women by men, which is achieved primarily through sexual conduct. Sexual harassment is part of the spectrum of forms of sexual conduct, including also rape, prostitution, and pornography, that keep women subordinate, not just sexually, but economically, politically, and socially. Since the main goal of this theory is the abolition of female sexual subordination (with the expectation that women's other disadvantages will fall in its wake), call this view the *sexual equality* theory of sexual harassment.

Many feminists believe that MacKinnon's focus on sexual offenses against women is a distraction from more important causes of women's disadvantages, such as their concentration in poorly paid jobs, gender roles that assign them the bulk of unpaid housework and dependent care duties, and nonsexual forms of sex discrimination, such as refusal to hire, train, and promote women on the same terms as men. They agree with MacKinnon that the chief wrong of sexual harassment is a group injury, and consists in male domination of women. They stress the economic consequences of harassment, however, and treat as irrelevant whether the harassing conduct is of a sexual or nonsexual nature. Since the main goal of this theory is the abolition of women's economic disadvantages, call this view *economic equality* theory.

The "differences" theory adopted by the courts agrees with MacKinnon that the core wrong of sexual harassment is a group injury, and that the harassment manifests sexism. But it understands sexism as discrimination on the basis of biological sex, which men and women may suffer alike. Hence, despite its initial reliance on the standard paradigm, it is readily extended to sex-reversed cases, such as female-on-male quid pro quo sexual harassment. Because its model of inequality abstracts from the real-world asymmetry of victimization—the fact that most victims of sexual harassment are female—and treats men and women as interchangeable in its formula for sex discrimination, call this view *formal equality* theory.

Theories that view the core wrong of sexual harassment as an injury to individuals divide into two broad types, depending on whether they represent the injury as an oppressive enforcement or a violation of conventional norms. *Sexual autonomy* theories view sexual harassment as an oppressive enforcement of conventional sexist and homophobic

norms of gender and sexuality. It forces people to conform to these norms, and punishes anyone who deviates: masculine women, effeminate men, gays and lesbians, transsexuals, and anyone else who expresses an unconventional sexuality or sexual identity. These theories seek to protect individual freedom of sexual expression.

Dignity theories abstract from the possibly sexist or homophobic intent and effects of harassing behavior, locating the wrong instead in the means harassers use to achieve their objectives. On this view, sexual harassment is wrong mainly because it intimidates, torments, and humiliates people, not because it does this more to some groups than others, or does these things in the name of enforcing conventional norms of gender and sexuality. Dignity theories uphold conventional norms of respect for individuals, rather than challenging conventional norms of gender and sexuality.

These theories take opposing positions on the significance of sexual conduct at work and school. The sexual and formal equality theories, tied to the standard paradigm, view certain types of sexual conduct as the main problem. Although they do not condemn all sexual expression as sexist, in practice they do not accord any positive value to sexual conduct at work and school. Hence, they offer no protection against overbroad regulations of sexuality in these settings. Dignity theory, insofar as it views modesty as a component of dignity, also supports strong regulation of sexuality at work and school. Sexual autonomy theorists fear that the sexual regulation permitted by these theories threatens sexual autonomy, especially for people with queer sex / gender identities. Only by recognizing sexual autonomy as a positive value can sexual harassment law avoid reproducing the harm that sexual harassment itself inflicts: the imposition of conventional heterosexist norms on sex / gender deviants. Economic equality theory draws attention away from sexual conduct to nonsexual harassing behavior, which it regards as more pervasive and damaging. Hence, it is less restrictive of sexual expression than MacKinnon's theory, and more compatible with the goals of sexual autonomy theory.

In the following discussion, I shall argue that no single theory of sexual harassment accounts for all of the valid moral and legal claims that can be raised in the cases. The equality (antidiscrimination) frame for understanding sexual harassment that is dominant in the United States offers a stilted account of and incomplete protection for people's

dignitary and autonomy interests. We have constructed the phenomena around the available legal remedies, rather than around a comprehensive normative account of the wrongs at stake. Nevertheless, feminists are right to see the majority of cases as expressions of male dominance. Dignity theory, which neglects the systematic character of most sexual harassment, offers an unsatisfying sociological account of most cases, although it has impressive normative scope. And while MacKinnon exaggerates the causal significance of sexual conduct for explaining the subordination of women, her theory, suitably extended, identifies a strong cord that runs through a surprising variety of sexual harassment cases, although not all of them.

DIGNITY THEORY

Dignity theory locates the core wrong of sexual harassment in the abusive means harassers use to advance their ends, rather than in the sexist or heterosexist intent or effects of their conduct. On the dignity account, what is wrong about sexual harassment is that it coerces, threatens, torments, intimidates, insults, humiliates, and degrades its victims. These are dignitary injuries, harms to an individual's standing as a person.[15]

Dignity theory offers the most conservative account of the wrong of sexual harassment, because it does not challenge conventional norms of gender and sexuality. Hence, it is potentially capable of persuading everyone, even advocates of male dominance and conventional sexual morality, that sexual harassment is wrong. Dignity theory also has the widest scope, covering all of the types of cases claimed as sexual harassment.[16] Men and women alike can suffer a dignitary injury at the hands of any person, male or female. Hence, dignity theory can cover male-on-male horseplay, which is not obviously discriminatory.[17] It does not

15. Anita Bernstein, "Treating Sexual Harassment with Respect," *Harvard Law Review* 111 (1997): 445–527.

16. Rosa Ehrenreich, "Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment," *Georgetown Law Journal* 88 (1999): 1–64.

17. See Margaret Talbot, "Men Behaving Badly," *New York Times*, 13 October 2002, 52ff. (arguing that a dignity frame offers a superior account of the wrong of male-on-male hazing than sexual harassment law's discrimination frame). Talbot reports that as of 2001, 13.7 percent of sexual harassment complaints registered with the EEOC were filed by men. Male-on-male filings overwhelmingly complain about horseplay and gender policing, not sexual advances made by gay men.

privilege sexual over nonsexual injuries. Hence, it can recognize nonsexual gender harassment and policing as wrong. Conventional understandings of dignity incorporate norms of modesty. A person may feel her dignity affronted not just by references to her own sexuality, but by any references to anyone's sexuality. Dignity theory can therefore comprehend complaints over sexual banter and the pornographic workplace.

The wide scope and persuasive appeal of dignity theory would not be normative advantages if they did not pick out genuinely objectionable features of the cases. But they do. Acts that coerce, torment, intimidate, and humiliate people are morally objectionable. Even dignity theory's controversial inclusion of modesty interests is reasonable from a moral point of view. It is obnoxious to subject people to pornography and sexual banter when the hearers find them deeply offensive and have no ready means of avoiding them. (As we shall see below, however, whether such morally objectionable conduct should be subject to legal regulation is another matter.)

Dignity theory claims an advantage over all equality theories. Equality theories offer a remedy against sexual harassment through antidiscrimination laws, which protect workers against discriminatory abuse. But it is not evident that the wrong of unwelcome sexual advances, the paradigm case of sexual harassment, consists in sex discrimination.[18] The wrong seems better understood as an affront to the victim's will. Moreover, the coercive and hierarchical structure of work invites many kinds of humiliations and abuses. Antidiscrimination laws therefore offer workers incomplete protection against abuse. Dignity theory can ground laws that shield workers from all abuse. Following this line of thought, Lea VanderVelde argues that workers should have sweeping rights against harassment at work and employer coercion over their private lives, whether or not it is discriminatory or sexual in nature.[19] She recommends securing these rights by replacing U.S. at-will employment with just-cause requirements for discharge, and perhaps by adopting

18. This point is illustrated by the hypothetical case of the bisexual sexual harasser, who does not discriminate by sex in choosing his victims. Even if the bisexual harasser treats his male victims differently from his female victims, it is the unwelcomeness of the sexual advances, rather than the differential treatment by sex in itself, that is most objectionable about his conduct.

19. Lea VanderVelde, "Coercion in At-Will Termination of Employment and Sexual Harassment," *DSHL*, pp. 496–515.

European-style laws against mobbing (systematic hostility directed against a worker).

Laws against mobbing and employer coercion with respect to workers' private lives would provide vital protections against dignitary injuries. But just-cause requirements for discharge may be overkill. By escalating the costs to employers of firing people, they would likely make employers more reluctant to hire employees regarded for one reason or another as higher risk. The workers most likely to lose out would be those who already have the poorest access to jobs: individuals in segregated, economically depressed communities.

The sweeping scope of dignity theory is a liability in one respect. Although people do have a moral claim against violation of their modesty interests, their claim to legal protection against sexual banter that does not target or mention them, and contains no sexist or homophobic content, is weak. Pluralism about conceptions of the good prevails in sexual matters. What some find offensive, others find liberating. Citizens need to be free from state interference to work out these cultural disagreements for themselves. The state has a compelling interest in ensuring the equality of workers. When inequality is not implicated by workplace speech, however, the state should keep out.

Dignity theory captures a vital part of what makes sexual harassment wrong. Yet its account is incomplete in three ways. First, sexual harassment inflicts material disadvantages, not just dignitary harms, on its victims. Gender harassment drives and keeps women out of better-paying "male" jobs, reinforcing the sex segregation of occupations, the economic vulnerability of women, and their dependence on and subordination to male providers at home. Dignity theory neglects this causal nexus between sexual harassment, the feminization of poverty, and domestic subordination, which plays a role in women's disadvantages, even if its magnitude is hard to measure, and is less pivotal than MacKinnon claims. Second, dignity theory individualizes and depoliticizes the harm of sexual harassment. It obscures the group-based, gendered character of most forms of sexual harassment—the fact that it subordinates women as women, people perceived to be feminine as feminine, gays and lesbians as sexual deviants.[20]

20. Susanne Baer, "Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law," *DSHL*, pp. 586–87, 598.

Third, it fails to grasp the ways the indignities of sexual harassment are institutionalized in the sex segregation of occupations. Rosa Ehrenreich, characterizing workers' dignitary expectations, says, "When going to work, employees expect to enter a realm in which their treatment will be based on their job descriptions," not on their gender, sexual attractiveness, or willingness to engage in intimacies with others.[21] However, what if their job descriptions are gendered, such that performing one's femininity through obsequious tending to the intimate needs of others, listening to sexual banter, and graciously absorbing their sexual impositions, are part of one's job? What if being sexually harassed is part of one's job description?[22] Suppose an airline markets itself as providing sexual entertainment for its business customers, and so requires its female flight attendants to be sexually attractive and dress in revealing uniforms.[23] Airlines require flight attendants to perform "emotional labor," consisting in emotional displays (or suppressions of emotion) designed to put customers at ease.[24] Female flight attendants are expected to cheerfully tolerate customers' anger, rudeness, ogling,

21. Ehrenreich, "Dignity and Discrimination," p. 28.

22. *SHWW*, pp. 18–23.

23. Compare *SHWW*, pp. 44–45 (describing sexual harassment of waitresses by customers as an employer-imposed working condition), and Wilson v. Southwest Airlines 517 F. Supp 292 (N.D. Tex. 1981) (rejecting airline's claim that the business aim of maintaining its "sexy image" entitled it to hire only sexually appealing women for its flight attendant jobs). Although *Wilson* is a BFOQ sex discrimination case (not a sexual harassment case), it invites inquiry into the working conditions for "attractive female flight attendants" on an airline that promotes itself as in the sex entertainment business. Had the airline's claim been upheld, any business would have been free to sexualize its female-dominated jobs involving contact with customers, thereby forcibly turning millions of women into official sex workers. See Kimberly Yuracko, "Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination," *California Law Review* 92 (2004): 147–213 (arguing that courts' reluctance to allow pervasive sexualization of women's jobs explains and justifies their BFOQ decisions). MacKinnon's point (*SHWW*, pp. 30–31), amplified by the contributions of Reva Siegel, Adrienne Davis, and Tanya Hernandez to *DSHL* (pp. 1–39, 457–78, 479–95), is that sexualization of work requirements has historically been the unofficial condition of many women workers, especially black women workers from slavery on.

24. See Arlie Hochschild, *The Managed Heart: Commercialization of Human Feeling* (Berkeley and Los Angeles: University of California Press, 1983), for discussion of the gendered norms of emotional labor structuring the job of flight attendant. Male flight attendants are permitted to assert their masculine authority so as to escape the indignities inflicted on female flight attendants. See also Jane Larson's contribution to *DSHL*, pp. 129–37, extending Hochschild's analysis to incorporate a notion of "sexual labor" as a condition of many women's work.

flirtation, propositions, and "accidental" brushing against their bodies. Airlines never would have dreamed of imposing these requirements if the job of flight attendant were gendered male and men overwhelmingly staffed it. Yet such requirements are not seen as undignified for a woman.

Dignity theorists in the United States tend to recommend enforcement of sexual harassment claims through tort law, where people find remedies for dignitary injuries. Many common sexually harassing behaviors are intentional torts: assault, battery, invasion of privacy, defamation, intentional infliction of emotional distress. However, feminists are rightly skeptical of a tort-based approach to sexual harassment.[25] Tort law has been unfriendly to sexual harassment claims. It trivializes and undercompensates "feminine" emotional injuries, and sets a high bar of dignitary offense before deeming an act tortious. State laws limit torts against employers. Dignitary tort law was designed to handle isolated, individualized wrongs. Antidiscrimination law is better suited to address systematic problems such as sexual harassment.

Consider the hypothetical case of the flight attendants. The airline's hiring criteria, dress code, behavioral requirements, and marketing strategy make female flight attendants more vulnerable to sexual harassment by inviting customers to treat them as sexual playthings. Tort law, by directing flight attendants to sue customers one by one, would offer no remedy. Cases in which any single imposition rose to the level of an intentional tort would be rare. Antidiscrimination law, by contrast, allows workers to sue their employer for the cumulative effects of numerous subtortious indignities suffered regularly as a condition of their work. It also places responsibility for the hostile environment on the agent best able to structure work conditions so as to prevent such impositions. It recognizes that sexual harassment is caused by gendered expectations about acceptable conduct that are structured by employers.

The limitations of tort law, however, are not intrinsic to the dignity theory of sexual harassment. In Europe, where it has been widely adopted, it has been untethered from the common law of torts.[26] The

25. *SHWW*, pp. 164–74; Judith Resnik, "The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment," *DSHL*, pp. 248, 306–23.

26. See Baer, *DSHL*, pp. 582–601 (discussing dignitary remedies in Germany and the European Union).

same is true of Israel's sexual harassment law, which is arguably the most powerful law of its type in the world.[27] Israel's Basic Law affirms a right to "dignity, respect, honor, and liberty." Its sexual harassment statute incorporates an antisubordination norm of equality by interpreting the right to dignity, respect, and honor as a right against "degrading" treatment on account of the target's sex, gender, or sexual orientation. It offers heightened protection to employees, students, and patients, in recognition of their vulnerability to exploitation by institutional superiors. Deeply informed by feminist legal activists, Israeli law even prohibits harassment that takes place on public streets under its civil and criminal codes. Freed from the need to frame the wrong in terms of discrimination, Israeli law is able to protect people from all kinds of harassment based on their sex, gender, or sexuality.

AUTONOMY THEORY

Autonomy theorists stress the importance of preserving workers' freedom to express their gender and sexuality at work through banter, flirtation, open sexual relationships, clothing, and adornments. Some (whom I will call *positive liberty theorists*) trace the core wrong of sexual harassment to the ways it violates the liberty of women and sexually deviant subjects to express their sex / gender identities. Others (whom I will call *negative liberty* or *libertarian theorists*) have taken these liberty interests to undermine the case for regulating sexual conduct at all, even when plaintiffs perceive it as harassing. Before examining the positive liberty theorists, we should consider whether the libertarians are right.

Libertarian theorists argue that MacKinnnon and the standard paradigm of sexual harassment law, by obsessively focusing on sexual conduct, have injected sexual Puritanism into antidiscrimination law.[28] Sex-positive feminists such as Vicki Schultz observe that sexual harassment law colludes with managerial motives to suppress sexual

27. Orit Kamir, *DSHL*, pp. 561–81.

28. See Jeffrey Toobin, "The Trouble with Sex," *The New Yorker*, 9 February 1998, 48ff.; Katie Roiphe, *The Morning After: Sex, Fear, and Feminism* (Boston: Little, Brown, 1994); Jane Gallop, *Feminist Accused of Sexual Harassment* (Durham, N.C.: Duke University Press, 1997); and Janet Halley, *DSHL*, pp. 182–200.

expression in the workplace.[29] Queer theorists such as Janet Halley argue that sexual freedom requires severe constraints on sexual harassment law, lest others turn their "homophobic panic" at being a real or imagined object of queers' sexual attention into a legal claim. The standard paradigm's inquiry into the defendant's sexual orientation threatens to turn being queer into a virtual status crime, insofar as homophobic plaintiffs construe being sexually desired by someone of the same sex as a hostile work condition.[30] The best workplace regime with respect to sexuality, Halley argues, would be a libertarian one. Schultz does not go that far, but argues that sexual harassment law be focused on gender harassment, without placing weight on whether the harassing conduct is of a sexual or nonsexual nature.[31]

In a related libertarian vein, Kingsley Browne objects that sexual harassment law chills legal sex- and gender-related speech.[32] U.S. law

29. "The Sanitized Workplace," *Yale Law Journal* 112 (2003): 2061–193. Other writers concur that employers suppress workplace sexuality to avoid conflicts of interest and promote professionalism and efficiency. See Carol Sanger, "Consensual Sex and the Limits of Harassment Law," *DSHL*, pp. 87, 90, and Abigail C. Saguy, "French and American Lawyers Define Sexual Harassment," *DSHL*, p. 607.

30. Halley, *DSHL*, pp. 183, 195; Franke, *DSHL*, p. 177. This worry is exaggerated. Most male-on-male complaints involve horseplay and gender policing, not unwanted sexual advances from gay harassers. See Marc Spindelman, *DSHL*, p. 204, and n. 17 above.

31. Schultz, "Reconceptualizing Sexual Harassment." MacKinnon replies to the Puritanism charge by arguing that sexual harassment law enforces norms of sexual equality, not conservative sexual mores (*DSHL*, pp. 672–704). To prove that unwelcome sexual conduct is discriminatory, plaintiffs must show that it treats people differently based on their sex, not merely that it violates modesty norms. Although MacKinnon is right about the law's official rationale, the question is how the law works in practice. Courts, following the standard paradigm, have tended to presume without further inquiry that male sexual conduct that targets women is "based on sex," and hence discriminatory. See Franke, "What's Wrong with Sexual Harassment?" p. 736. Moreover, sexual harassment law gives managers incentives to regulate workplace sexuality beyond what the law requires.

32. *DSHL*, pp. 399–416. Browne's claim that this is unconstitutional is contested by Frederick Schauer and Robert Post (pp. 347–64, 382–98, arguing that the workplace setting turns harassing communication from what would be protected speech if it took place in public forums into unprotected discriminatory conduct), Dorothy Roberts (pp. 365–81, arguing that the First Amendment should be interpreted as including a democratic equality norm that permits regulation of subordinating speech in the workplace), and Jack Balkin (pp. 437–54, arguing that workers are captive audiences with respect to harassing speech, and hence have a right not to be subjected to it). Although I agree with Browne that sexual harassment law generates managerial incentives to overregulate employee speech, I find persuasive Post's and Balkin's arguments that such regulation is not unconstitutional.

makes employers liable for sexual harassment practiced by employees, judging its severity and pervasiveness in the "totality of the circumstances." Employer liability gives firms incentives to regulate legal employee sexual conduct to steer wide around the law's prohibitions. The "totality of the circumstances" rule gives employers further incentives to clamp down. A sexual remark that is legal in itself may figure in a pattern of workplace sexual conduct by all employees that constitutes a hostile atmosphere. Browne's anecdotal evidence of employers overreacting to trivial sexual banter is reinforced by reports of U.S. labor lawyers that firms often fire workers accused of harassment, even when the legal complaint would fail in court on the merits.[33]

French law comes closest to realizing the libertarian vision of autonomy theory in the arena of sexual harassment. It prohibits only sexual battery and quid pro quo sexual harassment. To protect sexual freedom, it permits sexual banter, unwelcome sexual attention and comments, the pornographic workplace, and the sexual insults characteristic of gender harassment, gender policing, and sexual orientation / identity harassment. This laxness, it has been suggested, reflects a "boys will be boys" attitude toward sexism and rejection of what the French see as U.S. litigiousness and Puritanism.[34]

Does such a libertarian approach to workplace sexuality make sense? I think not. The libertarian model of sexual autonomy focuses on the liberty interests of the communicator. Sexual expression, however, involves both a communicator and a target of communication. In public spaces, targets of sexual expression are free to walk away if they object to the message, but at work and school, targets are a captive audience. Their autonomy interests also give rise to legitimate claims.[35]

This insight underwrites the positive liberty theories of Drucilla Cornell and Katherine Franke. They focus on targets whose self-presentation deviates from conventional sex-role stereotypes, occasioning sexual harassment in the form of gender and sexual orientation / identity policing. Because such harassment threatens the freedom of its victims to express their gender and sexuality, they argue that respect for individual autonomy may require some regulation of

33. Saguy, *DSHL*, pp. 608–9.
34. As Abigail Saguy argues in *DSHL*, pp. 602–17.
35. As Jack Balkin argues in *DSHL*, pp. 437–54.

sexual conduct.[36] Suspect conduct also includes gender harassment (conduct that punishes women for occupying a male job role) and sexual orientation / identity policing (conduct that forces people to perform their sexuality in ways that conform to conventional heterosexual roles).

The legal anchor for this "anti-gender policing" view of autonomy theory in Title VII is *Price Waterhouse v. Hopkins*. In that case, the plaintiff, an aggressive, successful "rainmaker" for her firm, won relief because she was denied a partnership for failing to conform to feminine norms of appearance and conduct.[37] Its philosophical anchor, according to Cornell, turns on an interpretation of Rawls's idea of "the social bases of self-respect."[38] To exercise their autonomy right, people need space for self-definition—an imaginary domain—free not just from sexual coercion but from sexual humiliation, which undermines their self-respect. This implies freedom from being publicly treated as an object of another's sexual fantasies and from being abused or degraded for having a deviant sexual identity or self-presentation.[39]

Autonomy theorists have done illuminating work defining the proper legal test for sexual harassment. They aim to refine tests that will avoid gratuitous repression of innocent sexual conduct and minimize the influence of androcentric, sexist, and homophobic perspectives. The current test for sexual harassment requires that the conduct (1) be "based on sex" (that is, treat people differently on account of sex); (2) be "unwelcome" by the plaintiff;[40] and (3) either unreasonably interfere with the plaintiff's ability to work, or amount to an "intimidating, hostile, or offensive" environment.[41] Much critical attention has focused on the "unwelcomeness" standard. On what grounds may unwelcomeness be inferred?

36. Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (New York: Routledge, 1995); Franke, *DSHL*, pp. 169–82 and "What's Wrong with Sexual Harassment?"

37. 490 U.S. 228 (1989). Price Waterhouse was a straightforward differential treatment case, not a sexual harassment case. Franke's theory, which opposes the enforcement of sex / gender stereotypes, folds sexual harassment back into differential treatment analysis, rather than treating it as a separate kind of sex discrimination claim.

38. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 440.

39. Thus, Cornell objects to the pornographic workplace, for publicly regarding a class of people as fit to be treated as mere objects of others' sexual fantasies. See *The Imaginary Domain*, pp. 170–72, 183–90, 213–14.

40. Meritor, 477 US at 68.

41. Equal Employment Opportunity Commission, 29 C.F.R. § 1604.11 (a) (1998).

Most sexual harassment cases involve acts such as threats, insults, battery, and work sabotage, which are abusive and hostile on their face.[42] Dignity theorists have also stressed this point. I agree with those who argue that facially abusive acts should be treated as presumptively unwelcome, just as they are treated in racial harassment cases.[43]

Arguments over the criteria for inferring unwelcomeness bring out the tension between sexual equality feminists and positive liberty theorists such as Cornell, who worry that sexist and androcentric judges and juries will see welcomeness when it is not there; and negative liberty theorists such as Halley, who worry that homophobic judges and juries will presume the unwelcomeness of any queer sexual expression. The first camp worries that unwelcomeness inquiries risk inviting jurors and judges to interpret the plaintiff's desires through the lens of stereotypes about "bad girls," who are presumed to welcome sexual assault because they engage in sexually explicit self-display.[44] Subjective tests also risk judgments according to androcentric standards. Men and women tend to use different standards for judging whether a woman welcomes a man's sexual advances.[45] Women tend to signal unwelcomeness by changing the subject, leaving the room, politely saying "no," and avoiding the harasser.[46] Men often perceive sexual advances to be welcome despite such signals. Women judged by men's perceptions would get no relief. To reduce this risk, some feminists have proposed that unwelcomeness be judged from the perspective of the "reasonable woman" rather than the officially gender-neutral, but implicitly androcentric

42. Louise F. Fitzgerald, "Who Says? Legal and Psychological Constructions of Women's Resistance to Sexual Harassment," *DSHL*, p. 102, and Kathryn Abrams, "Subordination and Agency in Sexual Harassment Law," p. 117.

43. As Abrams argues in *DSHL*, p. 118. See also Fitzgerald, *DSHL*, p. 104. She and Bernstein, "Treating Sexual Harassment with Respect," p. 502, would allow welcomeness as an affirmative defense.

44. Cornell, *Imaginary Domain*, pp. 191–93. The most notorious case of such "bad girl" reasoning is Reed v. Shepard, 939 F.2d 484, 486–87 (7th Cir. 1991), in which a plaintiff who was repeatedly battered (including having a cattle prod shoved between her legs) was judged to have welcomed her treatment in part because she wore revealing clothes and engaged in vulgar sexual banter.

45. See extensive references in *DSHL*, pp. 98–100, 106–8.

46. Fitzgerald, *DSHL*, pp. 98–101. More drastic methods, such as lodging a complaint with the boss, mark complainants as malcontents and threaten their careers.

"reasonable person."[47] But sexual libertarians worry that such a particularized subjective standard would invite other refinements, such as "the reasonable heterosexual man," whose "reasonable" homophobic panic would put queers in constant danger of a lawsuit.[48]

To protect deviant sexual subjects, autonomy theorists usefully urge that sexual harassment claims be detached from inquiry into the sexual orientation and desires of the defendant, and as much as possible from the plaintiff's subjective states as well. Rather, attention should focus on the objective character of the harassing act. This is reflected in the proposal to infer unwelcomeness immediately from facially hostile acts. For sexual advances unaccompanied by overt hostility, autonomy theorists Cornell and Kathryn Abrams propose that the test should focus on the defendant's regard for the target's will. Did the defendant act unilaterally, heedless of her wishes? Or did he actively aim at a mutually agreeable encounter, taking pains to determine what she wanted?[49] This test would reduce the risk of false negatives, at risk of increasing the false positives. Determining what risks are worth taking requires an empirical investigation into the kinds of claims and errors that are most frequently made, and may suggest tailoring tests to different workplace contexts.[50]

Autonomy theorists Cornell and Franke offer attractive sex-positive models of many of the moral claims underlying objections to sexual harassment. Cornell's attention to the sexual autonomy of the targets of sexual expression cannot satisfy the libertarian demands of queer theorists such as Halley. Once we recognize that the exercise of one person's

47. The Ninth Circuit adopted this approach in Ellison v. Brady, 924 F.2d 872 (1991). However, research suggests that jurors do not apply the "reasonable woman" standard differently from the "reasonable person" standard. See B. A. Gutek, et al., "The Utility of the Reasonable Woman Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination," *Psychology, Public Policy and the Law* 5 (1999): 596–629.

48. Janet Halley, "Sexuality Harassment," *DSHL*, p. 196.

49. Abrams, *DSHL*, p. 119; Cornell, *Imaginary Domain*, pp. 194–96.

50. In this spirit, Vicki Schultz presents evidence that sexual advances toward women are more likely to be welcome in work settings where men and women are integrated and functionally equal, and more likely to be harassing in settings where women are either a token presence or concentrated in subordinate "female" jobs. This supports a more lenient test in integrated settings (to avoid false positives and reduce employer incentives to suppress workplace sexuality), and a more stringent test in sex-segregated settings (to avoid false negatives and give employers incentives to integrate the workplace). Schultz, "The Sanitized Workplace."

sexual liberty may interfere with another's sexual autonomy, we must confront the need for autonomy theories to make substantive judgments about the relative importance of different liberties. If we think of liberty rights as defining a space around each person that may not be invaded, may that space include unwilling *targets*? I stand with Cornell and Franke, and against Halley, in claiming that the liberty interests of unwilling targets override those whose sexual interests include subjecting others to unwelcome sexual attention. May it include an unwilling *audience* of nonderogating sexual self-expression that addresses and mentions others, or no one? I stand with Cornell and Franke again in claiming that individuals' liberty interests in sexual self-expression override the interests of third parties in a sexually modest workplace. But I admit that the "nonderogating" qualifier raises a real conflict between queers and feminists. Some modes of queer self-expression involve open mockery of conventional heterosexual norms. I know of no way to legally permit these that would not also permit open mockery of women.

Autonomy theory does not offer a complete account of sexual harassment. The wrong of sexual harassment is not limited to its violation of sexual autonomy. It also inflicts material injuries. By shifting the focus of feminist sexual harassment theory away from male dominance of women to the confinement of men and women alike to sex-stereotyped roles, autonomy theory not only underplays the asymmetry of sexual harassment as a social phenomenon (in which women are the vast majority of victims), but also fails to recognize ways in which men suffer from male dominance, and not just from sexual repression, for example, in horseplay, a class of cases Franke's theory excludes from coverage.[51] Most importantly, autonomy theory does not capture the point of view of victims who hold conventional views of sexual and gender identity. An effeminate male victim of gender policing may have no interest in cultivating an effeminate persona. He may want to be more masculine. To cast his injury as a violation of his freedom to be gender deviant does not reflect his sense of injury. But he does care about not being treated as an inferior because of involuntary aspects of his self-presentation. Equality theory does a better job explaining his objection to harassment.

51. "What's Wrong with Sexual Harassment?" pp. 767–69.

EQUALITY THEORY

Equality theory views sexual harassment as wrong because it is sexist. It captures features of sexual harassment the other theories do not explain: its function in maintaining the sex segregation of jobs, enforced sex roles, and the connection between women's economic disempowerment and sexual subordination at home and at work. However, equality theory must detach itself from the standard paradigm to account for many cases of discriminatory harassment. There are two ways to do this. First, formal equality theory could be expanded to include discrimination on the basis of all irrelevant factors having to do with sex, gender, sexual orientation, or sexual conduct. I shall argue against this approach, because it loses sight of the central goal of antidiscrimination law, to protect salient social groups from discrimination. Second, sexual equality theory could be expanded by providing an analysis of how male dominance is expressed in a wide range of harassing acts that do not necessarily target women or have sexual content. I shall argue that this approach identifies a problem shared by a wide range of cases, but that some cases still fall outside its scope.

Consider why sexual harassment law needs to be extended to allow for sexual harassment claims that deviate from the standard paradigm. U.S. courts have relied on the standard paradigm's assumption that harassment is motivated by sexual desire to establish that a plaintiff's treatment is because of her sex. Assuming that her harassers are heterosexual and that their motive is sexual desire, they target her for sexual advances because she is a woman. This inference fails for gender harassment of female workers in "male" jobs, used to maintain a male monopoly on these jobs, and to preserve them as symbols of masculine pride. Gender harassment typically consists of verbal denigration of women and femininity, along with nonsexual conduct, such as refusal to train and equipment sabotage, aimed at undermining women's self-confidence and abilities to do their jobs. Because much of this conduct is nonsexual, some courts have segregated plaintiffs' complaints of nonsexualized differential treatment from their complaints of sexual harassment. Each claim often fails when viewed in isolation from the other. The sexual harassment claim fails because the denigrating sex talk is not enough by itself to substantially alter the plaintiff's conditions of work. The differential treatment claim fails because the plaintiff cannot

show that the nonsexualized harassment is discriminatory if she cannot cite the sexual insults as evidence of hostility to women.[52]

These courts' analysis is plainly misguided. The fault lies with the standard paradigm's focus on sexual conduct and motivation. As *McKinney v. Dole* recognized, singling out women for nonsexualized hostile treatment constitutes sex discrimination. Vicki Schultz recommends that this error be remedied by replacing the standard paradigm with gender harassment as the core model for sexual harassment.[53] This focus fits economic equality theory, which finds sexual harassment wrong because it deprives women of equal access to the economic and psychic benefits of work and school. These consequences of sexual harassment are important. However, the gender harassment model does not explain what is wrong with sexual orientation / identity harassment and gender policing, which also seem to involve unjust discrimination.

This thought motivates the first strategy suggested above, to extend formal equality theory by means of an expansive understanding of differential treatment "because of sex." Suppose we define "sex" for purposes of Title VII to include biological sex, gender, and sexuality, where the latter includes sexual orientation, identity, and all modes of self-presentation as a sexual being.[54] Then, besides the standard paradigm, formal equality would account for the wrong of gender harassment, gender policing, and sexual orientation / identity harassment.

Formal equality theory would still have trouble with male-on-male horseplay in all-male workplaces. *Oncale v. Sundowner* illustrates this difficulty. Oncale was a male oil platform worker who was subject to brutal horseplay by two coworkers. They repeatedly threatened him with rape, held him down while one pressed his penis against his head and arm, and shoved a bar of soap between the cheeks of his

52. Schultz, "Reconceptualizing Sexual Harassment," pp. 1711–44, documents the disaggregation problem in numerous cases. MacKinnon disputes Schultz's reading of several cases, and argues that courts are no better at grasping discrimination in sexual form than in nonsexual form (*DSHL*, pp. 679–80, 694–98). MacKinnon and Schultz exaggerate their differences. Both accept that sexual and nonsexual sexist conduct commonly go together and must be judged together. Although they disagree about the relative causal impacts of sexual and nonsexual conduct, that does not change the legal analysis.

53. Schultz, "Reconceptualizing Sexual Harassment."

54. William Eskridge explores the distinct implications of each definition of "sex" in *DSHL*, pp. 155–68, arguing that how expansive "sex" is for Title VII purposes depends on the political mobilization of aggrieved groups pressing for relief under the law.

buttocks while he showered. The Supreme Court broke from the standard paradigm in recognizing that "sexual harassment need not be based on sexual desire."[55] It offered three evidentiary routes for proving that male-on-male harassment is "because of sex": the plaintiff could show that his harassers were homosexual (a logical extension of the standard paradigm), that the harassment expressed hostility toward men (gender harassment), or that women workers were not harassed. None of these routes was available to Oncale. His harassers were heterosexual. They were not hostile to men in general. No women worked on the oil platform.

This difficulty arises from formal equality's comparative conception of equality. Formal equality says that sexual harassment is wrong because H, in harassing A on account of A's sex, makes A unequal to, that is, relatively disadvantaged in comparison with, B, who is not harassed and who is of the opposite sex. Oncale could not prove that he was a victim of sexism, because he was not disadvantaged compared to women.

Suppose we stretched the meaning of "sex" for Title VII purposes to include all kinds of sexual interest and sexual conduct.[56] Then Oncale would have a claim. This expansion can be tied to formal equality theory by a conventional account of why discrimination is wrong: because it treats individuals differently on the basis of irrelevant traits and interests. However, such an expansion of Title VII would run counter to the logic underlying the development of antidiscrimination law. In the United States, labor law has operated on a presumption of at-will employment. Antidiscrimination constraints have been enacted only when arbitrary discrimination has been pervasive enough to systematically disadvantage salient social groups, such as African Americans, women, the elderly, and the disabled. The proposed expansion would detach formal equality's comparative conception of equality from any requirement that the people being compared belong to different social groups, or that the law promote the equality of disadvantaged groups. It would thereby individualize Title VII's nondiscrimination norms. The proposed rationale for expansion also stops at an arbitrary point: why

55. 523 U.S. at 80.
56. I thank Seana Shiffrin for this suggestion.

single out sex-related traits for special treatment rather than banning discrimination on the basis of any irrelevant trait?

Sexual equality theory suggests a different approach to handling deviant cases of discriminatory harassment. It says that sexual harassment is wrong because H, in harassing A "because of sex," makes A unequal, that is, sexually subordinate, to H as a man or as playing a male role, or to men more generally, or to masculine men. H manifests or enforces male dominance in harassing A.[57] The meaning of the act, rather than the basis on which the harasser chooses the target, is what makes the harassment sexist, and hence discriminatory. The key insight of recent sexual equality theory is that male dominance is expressed in many cases that deviate from the standard paradigm, in which the harassers are always male, their victims always female, and their mode of harassment always sexual.

Kathryn Abrams explains how this is so.[58] Gender harassment functions to maintain a male monopoly on relatively privileged jobs, and to mark femininity as inferior, because it is linked to incompetence at these jobs. Along with gender policing of women, it also functions to keep subordinate female roles occupied. Both types of harassment reinforce separate spheres of work and conduct, with the female sphere inferior in esteem, prerogatives, and material rewards. Pornography and open sexual fantasizing about women marks the workplace as male space, dominated by a sexist view of women as men's sexual playthings. Harassment of lesbians and female-to-male transsexuals amounts to gender boundary policing, ensuring that women stay women and accept their role as men's sexual objects. In all of these cases, harassment of women is discriminatory because it is sexist: it asserts the superiority of men over women, the masculine over the feminine, and ensures that women stay in subordinate, feminine positions.

What about harassment of men? Gender policing, in which men are harassed for effeminacy or for deviating from masculine norms, establishes the superiority of masculine persons over feminine persons, the dominance of masculine norms in the workplace, and separate spheres

57. Note that a woman could manifest male dominance in assuming a male harasser's role (for example, initiating horseplay), and could enforce it through sexual orientation / gender policing of gender deviant people.

58. Kathryn Abrams, "The New Jurisprudence of Sexual Harassment," *Cornell Law Review* 83 (1998): 1169–230.

for men and women. Male-on-male sexual orientation / identity harassment fulfills similar functions.[59]

Male-on-male horseplay raises subtler challenges. Abrams suggests that horseplay marks the workplace as masculine, expresses male camaraderie, and functions as an informal sexist criterion of competence on the job.[60] This better explains why women would have a complaint against it than why men would. Think of it this way: horseplay is rightly understood to be "male" behavior ("boys will be boys"). It is a masculinity contest. It places the participants in a male hierarchy, whereby the winners celebrate their male dominance by reducing the losers to a subordinate, feminized position. Unlike male-on-male gender policing, the losers are not harassed because they are independently judged to be effeminate, but constituted as less masculine by the harassment itself.

Abrams's theory of sexual harassment has great unifying power, allowing us to see the wide variety of ways in which male dominance is expressed, not just in direct subordination of women to men, but in the subordination of feminine people to masculine people, and feminine norms to masculine ones. It preserves the central insight that sexism is centrally about the subordination of women, while recognizing that men can be victims of sexism, too.

Sexual equality theory cannot explain what is wrong with all of the cases, however. Sexual equality theory seems to have a better explanation of the wrong in quid pro quo cases than formal equality, because it points to something genuinely objectionable about them: that the harassers have sexually subordinated the victims. Yet sexual equality theory requires more than this. It requires that the sexual subordination be a group injury: it must subordinate *on the basis of sex*. MacKinnon secures this inference by claiming that the meaning of sexual subordination just is to place the victim in a feminized position.

59. Christopher Kendall defends this claim in *DSHL*, pp. 221–43. This raises the issue of whether stigmatization of gays and lesbians is a manifestation of sexism, or an independent mode of oppression. I believe that while homophobia is not reducible to sexism, they are closely linked. Consider that the dominant insult against gay men is that they are effeminate, and of lesbians, that they are masculine. This suggests that homophobia reflects the same attitudes that motivate gender policing: the desire to keep separate spheres for men and women, with the masculine sphere maintaining a monopoly on dominant traits.

60. Abrams, "The New Jurisprudence of Sexual Harassment," p. 1211.

Perhaps most of the time, this is what sexual subordination means. Even in many male-on-male cases, the inference is clear.[61] However, not all sexual impositions manifest male dominance or feature the aggressor taking on a male role. Female-on-male and female-on-female quid quo pro cases do not fit that model. And who would be in a feminized position, who in a subordinate position, if a gay male supervisor used economic threats to solicit sex from a subordinate gay male worker whom he requires to assume the position of a penetrator? Halley rightly stresses queer theory's insight that sex, gender, and sexuality are categories in flux, that there cannot be a fixed gendered meaning to sexual subordination. Sexual equality theory thus faces a counterexample akin to the bisexual sexual harasser: the sexual aggressor who subordinates while assuming a stereotypically female sexual role. If this person should not get off the sexual harassment hook, sexual equality theory cannot explain why.

Sexual autonomy theory easily explains such cases: unwanted sexual advances motivated by sexual desire are wrong because they violate the target's sexual autonomy, whether or not they also constitute the feminine gender as sexually subordinate. This means that the core wrong in the paradigm case of sexual harassment is not discrimination, but sexual coercion; not a group injury, but an individual one. That this explanation poorly fits the purpose of antidiscrimination law suggests that we have misled ourselves by seizing on the nearest effective remedy of a grievous wrong. We have read the wrong from the remedy rather than from close normative analysis of the case.

In practice this appropriation of the law for a purpose it does not quite fit matters little. The vast majority of sexual harassment cases involve hostile, not sexually motivated, conduct. Even in cases where sexual desire is the motive, the violation of sexual autonomy nearly always also manifests male dominance. Nevertheless, the two injuries are distinct.

CONCLUSION

Directions in Sexual Harassment Law offers an indispensable guide to recent theorizing about sexual harassment. Virtually every essay offers

61. Christopher Kendall documents how gay male pornography explicitly casts subordinate males in feminized positions in *DSHL*, pp. 230–38.

illuminating insights and arguments, clearly and succinctly, on an important aspect of sexual harassment theory. This review essay has focused on the latest theories of wrongs and remedies, most of which are cogently represented in *DSHL*.

I have argued that the dignity, autonomy, and equality theories each capture an important dimension of the wrongs of sexual harassment. Dignity theory best explains the inherent objectionability of harassing conduct. But absent a focus on the sexist content of nearly all harassment, it individualizes and depoliticizes the wrong. Autonomy theory captures the coercive nature of sexual harassment. It also best preserves room for sexual freedom. But it neglects the material inequalities produced by sexual harassment, as well as its disproportionate targeting of women. Equality theory best captures the dynamics of sexism and male dominance in institutional settings, highlighting the group-based harms of sexual harassment. It is also most sensitive to the material conditions of sex inequality, the causal nexus of gendered material disadvantage and sexual subordination. Not all cases of sexual harassment manifest male dominance, however. Some are better understood as violations of individual autonomy and dignity.

Turning our attention from wrongs to remedies, new choices arise. The greatest practical strength of equality theory is its embodiment in a system of antidiscrimination law that enforces institutional liability for sexual harassment.[62] Laws that focus on isolated, individual wrongdoers are less effective in ending systematic abuses.[63] Antidiscrimination law has also served an important educative function, helping people see the sexism in many forms of sexual harassment. Yet, the U.S. focus on discriminatory harassment has not served the victims of nondiscriminatory workplace abuses. European dignity-based legal regimes offer remedies

62. Judith Resnik creatively suggests additional institutional remedies. See *DSHL*, pp. 247–71 (defending bystander standing, collective bargaining, liability insurance, and OSHA regulation of sexual harassment). But see Janine Benedet, *DSHL*, pp. 420–21 (criticizing union-based grievance arbitration in Canada for focusing more on procedural protections for harassing coworkers than on employer responsibility for setting norms). David Oppenheimer, *DSHL*, pp. 272–89, and Deborah Rhode, *DSHL*, pp. 290–306, argue for strengthening institutional liability of employers and schools for sexual harassment by employees and students.

63. Criminalization of sexual harassment may lead to underenforcement, as in France. *DSHL*, p. 618.

for a wider range of dignitary injuries, but at the cost of individualizing people's understanding of the harm of sexual harassment and thereby reducing the effectiveness of the law as an instrument for combating institutional sexism. The tension between individual and group-based models of harm persists, both here and abroad, in theory and practice.[64]

64. I thank Alison Jaggar for this observation.

CORRECTION

The cover and table of contents of volume 34, number 2 carry an incomplete title for Michael Otsuka's article; it should be "Saving Lives, Moral Theory, and the Claims of Individuals."