

# CREATING MASCULINE IDENTITIES: BULLYING AND HARASSMENT “BECAUSE OF SEX”

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*This Article deals with group harassment of women and men in the workplace under Title VII of the 1964 Civil Rights Act. In Oncale v. Sundowner Offshore Services, the Supreme Court held that Title VII forbids harassment by members of the same sex, but it also emphasized that Title VII is implicated only if the harassment occurs “because of sex.”*

*Oncale’s “because of sex” requirement has spawned considerable confusion in same-sex and different sex harassment cases. This Article focuses on four fact patterns that confuse courts, scholars, and employment lawyers. In the first scenario, men harass women in traditionally male jobs, but the harassment is not directed specifically at the women. In the second, men harass other men who apparently do not conform to socially-accepted gender norms of masculinity. In the third, men harass other men, apparently hazing newcomers or engaging in “horseplay” with established workers. In the fourth, men harass women using means that are not sexual or gendered.*

*The Article uses masculinities research, combined with new bullying research to provide the key to understanding the*

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*gendered nature of these behaviors when the behaviors are not overtly sexual or gendered. It provides a theoretical framework for the conclusion that gender is embedded in the workplace, and that harassing behavior at work is often rooted in perceptions of gender difference and inferiority of the feminine and efforts to reinforce the masculinity of the group and of the job.*

## INTRODUCTION

"Male bonding is institutionalized learned behavior whereby men recognize and reinforce one another's bona fide membership in the male gender class and whereby men remind one another that they were not born women."<sup>+</sup>

Title VII of the 1964 Civil Rights Act,<sup>1</sup> as interpreted by the United States Supreme Court, grants a cause of action to employees for sexual harassment that creates a hostile work environment.<sup>2</sup> To maintain a hostile work environment cause of action, the plaintiff must prove that the harassing behavior was unwelcome, sufficiently severe or pervasive to alter the terms and conditions of the work environment, and because of sex.<sup>3</sup> One question that has vexed courts and commentators is what the term "because of sex" means. In the sexual harassment context, one possible definition would be that the behavior occurs because of sexual interest of the harasser in the victim. Indeed, when courts first recognized sexual harassment as sex discrimination, they conceived of a male supervisor who harasses a female subordinate in order to fulfill his sexual desires and/or dominate her. Given this desire-dominance paradigm,<sup>4</sup> courts concluded that sexual harassment perpetrated by a man on a woman occurs because of sex. Presuming the heterosexuality of the male harasser, courts reasoned that if it were not for the victim's sex, the harasser would not have sexually harassed her.<sup>5</sup>

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+ John Stoltenberg, *Toward Gender Justice*, in FEMINISM AND MASCULINITIES 41, 42 (Peter F. Murphy ed., 2004).

1. 42 U.S.C. § 2000e (2000).

2. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 72 (1986).

3. See *Harris*, 510 U.S. at 21–22; *Meritor Savings Bank FSB*, 477 U.S. at 66–67.

4. This term was coined by Vicki Schultz. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692 (1998).

5. For a description of this phenomenon, see *id.*

Another possible interpretation of the term is that the behavior occurs because of the biological sex of the victim, whether or not it is related to sexual interest. In the 1990's, a number of cases raised the question of whether harassment by a member of the same biological sex as the victim creates a cause of action under Title VII.<sup>6</sup> In *Oncale v. Sundowner Off-shore Services*,<sup>7</sup> the Supreme Court held that Title VII forbids harassment by members of the same sex, but it did not limit a finding of sexual harassment to behavior occurring because of sexual interest. Rather, severe or pervasive harassment linked to the sex of the victim created a cause of action under Title VII.

A third definition of "because of sex" expands the term "sex" to include "gender." In *Price Waterhouse v. Hopkins*, a failure to promote case, the Supreme Court concluded that the term "because of sex" includes discrimination because of one's failure to live up to stereotypical norms of one's gender.<sup>8</sup> In other words, Title VII prohibits more than discrimination based on the biological sex of the victim. It also forbids discrimination because of gender. "Sex" refers to biological sex, whereas "gender" refers to the social expectations of a person based on that person's biological sex. Thus, a biological woman's sex is female, and society would expect her gender to be feminine.<sup>9</sup> Some lower federal courts have extended the *Price Waterhouse* reasoning to sexual harassment cases. These courts hold that harassment because of a failure to conform to gendered expectations, if sufficiently severe or pervasive, violates Title VII.<sup>10</sup>

Despite the Supreme Court's and some lower courts' clarification of the definition of "because of sex," questions remain about the term's meaning. *Oncale* emphasized that same-sex harassment violates Title VII only if the harassment occurs because of sex. It did not, however, adequately explain what "be-

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6. See, e.g., *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (concluding that sexual harassment by a male supervisor of a male subordinate does not state a cause of action under Title VII); *Doe v. City of Belleville*, 119 F. 3d 563, 574 (7th Cir. 1997) (holding that a cause of action exists under Title VII for same-sex sexual harassment), *vacated and remanded*, 523 U.S. 1001 (1998) (vacating and remanding in light of the Supreme Court decision in *Oncale*).

7. 523 U.S. 75, 79-82 (1998).

8. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (concluding that the employer's discrimination against the plaintiff for her failure to conform to feminine stereotypes is discrimination "because of sex").

9. Gender does not always conform to biological sex. See *infra* note 128.

10. See cases discussed *infra* Part II.C.2.

cause of sex" means in this context, and it has spawned considerable confusion in both same sex and different sex harassment cases.<sup>11</sup> The lower federal courts' confusion is most acute in cases in which a group of men harasses women or men. This confusion arises because courts do not appear to understand the difference between sex and gender. Their view of behavior occurring because of sex incorporates traditional beliefs about gender, sex and sexual attraction. The opinions assume that sexual harassment results from the normal sex drive of an individual harasser and that "because of sex" necessarily requires the harasser's conscious intent to harass the employee because of biological sex. While these views may be accurate in some individual cases, they do not describe all of the potential motivations of either individual men or of groups of men who harass.

This Article posits that masculinities theory and new research on the gendered nature of bullying can help courts and juries to understand that certain group harassing behaviors occur because of sex. The research demonstrates that many group behaviors considered normal are very damaging to the victims and occur with the conscious or unconscious motivation

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11. See, e.g., Hilary S. Axtell & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155, 236-43 (1999) (arguing that courts should employ a broad definition of "because of sex" and should not read *Oncale's* dicta to limit sex to biological definitions, but rather should view sex as the result of the construction of one's gender identity); Marianne C. DelPo, *The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment*, 40 SANTA CLARA L. REV. 1, 23-24 (1999) (defining "because of sex" as requiring motivation of the actor and asking whether the victim would have been harassed if he or she were of the opposite sex); L. Camille Hebert, *Sexual Harassment as Discrimination "Because of . . . Sex": Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439, 458-59 (2001) (arguing that courts interpret *Oncale* in such a way that they frequently conclude that sexually specific behavior does not occur because of sex); Robert A. Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at the Crossroads*, 20 HOFSTRA LAB. & EMP. L.J. 185 (2003) (criticizing scholars who have argued that the statute should reach not only behavior that is motivated by the sex of the individual, but also behavior that has a disparate effect on women (or men)); Andrea Meryl Kirshenbaum, *"Because of Sex": Rethinking the Protections Afforded Under Title VII in the Post-Oncale World*, 69 ALB. L. REV. 139, 173-76 (2005) (noting the wide variety of interpretations of "because of sex" by courts and arguing that either Congress should respond or the Court should explain "because of sex" further); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1793-94 (2002) (arguing that courts should return to a sex per se rule which would hold an employer liable for sexual harassment if sexual means are used to harass).

of reinforcing gender norms in the workplace or punishing those who do not conform to those norms. This is the first Article aimed at a legal academic audience that analyzes the new results in bullying research. This new bullying research strongly suggests that gender is a salient factor in many bullying behaviors. Masculinities theory—when combined with this new bullying research, feminist theory, and organizational theory—provides the key to understanding the gendered nature of these behaviors when the behaviors are not overtly sexual or gendered, or when they appear to encompass hazing or horseplay. It provides a theoretical framework for the conclusion that gender is embedded in the workplace. Finally, masculinities theory demonstrates that harassing behavior at work is often rooted in male workers' perception that the feminine is inferior and in those workers' efforts to reinforce the masculinity of the group and of the job.

This Article employs four fact patterns to support this thesis. In the first, a group of men harasses women in traditionally male jobs, but the harassment is not directed specifically at the women. In the second, a group of men harasses other men who apparently do not conform to socially-accepted gender norms of masculinity. In the third, men harass other men, hazing newcomers or engaging in horseplay with established workers. In the fourth, a group of men harasses women using means that are not sexual or gendered.<sup>12</sup>

*Men Harassing Women in Traditionally Male Jobs—Not Directed Specifically at Women*

The first set of cases typically involves male coworkers and supervisors, in a sex-segregated and predominantly-male working environment, who harass women using sexual or gendered behavior, or both; foul, sexually-tinged language; and gendered derogatory comments about women.<sup>13</sup> When men in these workplaces are subject to the same environment as the women, and the harassing behavior is not specifically directed at the women, some courts have held that the perpetrator is an “equal

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12. While female-on-male harassment and female-on-female harassment occur, this Article does not focus on those fact patterns.

13. See, e.g., *Ocheltree v. Scollon Prods.*, 308 F.3d 351 (4th Cir. 2002), *rev'd*, 335 F.3d 325 (4th Cir. 2003) (en banc); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (concluding that an illegal hostile work environment existed where pornographic materials and derogatory remarks were prevalent in a formerly all-male workplace).

opportunity harasser.”<sup>14</sup> Using a “but for” analysis, these courts reason that because both men and women are subject to the same behavior, the harassment does not occur because of the woman’s sex or gender. They conclude that the harassing behavior is not directed at women and that the unwanted behavior occurred in the all-male workplace even before the women entered the workforce. Therefore, the biological sex of the women victims is not a “but for” cause of the harassment.<sup>15</sup>

### *Men Harassing Men Who Do Not Conform to Gender Norms*

In a second typical scenario, men harass other men in the workplace. This harassment ordinarily involves sexual behavior or language directed at victims who present themselves as not sufficiently masculine.<sup>16</sup> Courts disagree as to whether

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14. See, e.g., *Ocheltree*, 308 F.3d at 356–58 (overturning the lower court’s denial of the defendant’s motion for judgment as a matter of law after a jury verdict for the plaintiff in part because comments and gestures that were not specifically directed at the plaintiff could not have occurred because of her sex), *rev’d*, 335 F.3d at 331–35 (concluding there was sufficient evidence of differential treatment for a plaintiff’s verdict, but not reaching the question of whether the same behavior may constitute differential treatment of men and women); *Petrosino v. Bell Atl.*, No. 99-CV-4072(JG), 2003 U.S. Dist. LEXIS 4616, at \*19–20 (E.D.N.Y. Mar. 20, 2003) (granting summary judgment to the defendant because both men and women were exposed to similar behavior), *rev’d* 385 F.3d 210, 222–23 (2d Cir. 2004) (concluding that even though both men and women were exposed to the hostile treatment, daily disparagement of women through demeaning depictions and offensive sexual jokes is an impediment to women at work); cf. *Holman v. Indiana*, 211 F.3d 399, 402–04 (7th Cir. 2000) (concluding that because the defendant allegedly subjected both men and women to the behavior, he was an “equal opportunity harasser” and the behavior could not have occurred because of either’s sex).

15. Other courts conclude that they should consider the differential effect of the behavior on the women as well as differential treatment to determine whether behavior occurred because of sex. See, e.g., *Petrosino*, 385 F.3d at 222–23 (concluding that common exposure of men and women to sexually offensive material does not preclude the woman from relying on the behavior to demonstrate the hostile work environment occurred because of sex); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994) (rejecting defendant’s argument that the harassment did not occur because of sex where both men and women were subject to abuse); cf. *EEOC v. Nat’l Educ. Assoc.*, 422 F.3d 840, 845–46 (9th Cir. 2005) (concluding in an environment where the boss was male and most of his subordinates were female that evidence of differences of subjective effects of the behavior on men and women is “relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific”).

16. Courts that find a cause of action under these circumstances rely on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to reach this result. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264–65 (3d Cir. 2001) (stating that a plaintiff may prove same-sex sexual harassment by demonstrating that the harasser acted to punish the victim’s non-compliance with gender stereotypes and

this fact pattern creates a cause of action if the victim is homosexual.<sup>17</sup> Even courts that recognize that there is a potential cause of action for gender harassment often grant summary judgment to defendants because they conclude, as a matter of law, that the harassment occurred because of the victim's sexual orientation or perceived sexual orientation rather than his sex or gender.<sup>18</sup>

### *Men Harassing Men—Hazing, Horseplay and Incivility*

Like the second fact pattern, this scenario involves severe male on male harassment. While the behavior—taunting, pinching, grabbing of male genitalia, and other forms of horseplay—is similar to that in the second fact pattern above, the victim here does not demonstrate gender non-conforming behavior or dress. Rather than punishing the victim's non-conformity to gender norms, the harassing behavior establishes the masculine norms for the group and the job. Because federal courts have stated that horseplay and incivility are not compensable by Title VII,<sup>19</sup> victims rarely bring these cases.

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that once the victim proves that the harassment occurred because of sex, sexual orientation is irrelevant and it is no defense that the harassment may have been partially motivated by anti-gay animus); see *infra* Part II.C.2.

17. See, e.g., *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062–65 (7th Cir. 2003) (assuming that gay men cannot avail themselves of the sex stereotyping doctrine); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (five members of the court concluding that the sexual orientation of the plaintiff is irrelevant to a claim under the sex stereotyping doctrine of *Price Waterhouse*).

18. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–65 (6th Cir. 2006) (affirming a motion for judgment on the pleadings because, according to the court, the plaintiff alleged only sexual orientation discrimination even though there was an explicit allegation of gender stereotyping and facts that suggested that his harassment occurred because he was not sufficiently masculine), *cert. denied*, 127 S. Ct. 2910 (2007). Courts agree that discrimination because of sexual orientation is not discrimination because of sex. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (stating that although discrimination based on sexual orientation is reprehensible, it is not prohibited by Title VII); cases cited *infra* Part II.C.2.

19. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (assuming that male-on-male horseplay does not create a sufficiently severe or pervasive hostile work environment); *Shafer v. Kal Kan Foods, Inc.* 417 F.3d 663, 665–66 (7th Cir. 2005) (affirming the lower court's grant of summary judgment in a sexual harassment case brought by a male plaintiff who suffered from serious physical sexual abuse because sexual harassment differs from sex play); *In re Smurfit-Stone Container Corp.*, 122 Lab. Arb. Rep. (BNA) 33, 41 (2005) (Kravit, Arb.) (stating that the Seventh Circuit distinguishes between sexual horseplay and sex discrimination in determining whether behavior is sufficiently severe or pervasive to create an actionable hostile work environment).

The bullying and masculinities literature, however, demonstrates that this behavior occurs in many workplaces and that the behavior, when severe, causes harm to at least some of the men experiencing it. Furthermore, the literature demonstrates that the behavior is inextricably linked to the gender of the job and of those performing it.

*Men Harassing Women Using Gender-Neutral Behavior or Language*

This final fact pattern is rarely litigated. Men harass female coworkers or subordinates using neutral means that are not sexual or gendered. It is particularly difficult to prove that the harassing behavior occurs because of sex because the men may use and abuse legitimate work standards to criticize the women. For example, in a workplace such as a university that values intellectual pursuit and scholarly activity, accusations of poor research are legitimate criticisms if true. If, however, a false accusation is used to undermine a woman's reputation and ability to succeed in the institution because of her sex or gender, it is illegal. Because the behavior is gender-neutral, it is often difficult to establish in individual cases that the behavior occurred because of sex.

In all four fact scenarios, masculinities theory and the new research on bullying can help courts and juries determine that many of these behaviors occur because of sex and, therefore, violate Title VII if sufficiently severe or pervasive.

This Article builds on work completed almost a decade ago by legal scholars who proposed new theories to explain a myriad of harassing behaviors and to define which behaviors constitute illegal sex discrimination. Law professors Vicki Schultz,<sup>20</sup> Katharine Franke,<sup>21</sup> and Kathryn Abrams<sup>22</sup> articulated theories concerning the underlying causes and harms of sexual harassment.<sup>23</sup> They have influenced courts and have

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20. See Schultz, *supra* note 4.

21. See Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

22. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998).

23. Another important article written pre-*Oncale* on the theory of sexual harassment is Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997).



had an even greater impact on gender and discrimination scholars.<sup>24</sup>

These scholars have demonstrated that the “sexual desire-dominance paradigm,”<sup>25</sup> which courts adopted in defining harassment, does not account for the varying patterns of harassment occurring in the workplace. As a result, the Supreme Court and a few lower federal courts conclude that sexual or gender harassment may occur even in the absence of evidence of the perpetrator’s sexual desire for the victim.<sup>26</sup>

But many recent cases ignore the theories propounded by Schultz, Franke, and Abrams. Moreover, these theories may not provide a comprehensive accounting of all sex-based harassment. As Professor Abrams recognized, there are so many different types of harassment and motivations for harassment that one overarching theory may not be possible.<sup>27</sup>

This Article takes these scholars’ work as an important starting point. It uses cases decided after these scholars published their articles, as well as masculinities theory and research on bullying and harassment, to interpret, supplement, and, in some cases, revise the accounts of these legal scholars in an attempt to explain why these harassing behaviors occur because of sex.

Although gender is embedded in institutions, this Article posits that it is still possible to cure the problems caused by its presence at work. New research by organizational theorists

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24. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (Pregerson, J., concurring) (citing Schultz, *supra* note 4, at 1755 n.387); *Butler v. Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 267 (5th Cir. 1998) (citing Schultz, *supra* note 4; Franke, *supra* note 21, at 764; and Abrams, *supra* note 22); see also Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 646 n.87 (2005) (citing Schultz, *supra* note 4); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 554 n.30 (2001) (citing Schultz, *supra* note 4; Franke, *supra* note 21; Abrams, *supra* note 22; and Bernstein, *supra* note 23).

25. See generally Schultz, *supra* note 4.

26. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80–81 (1998) (holding that same-sex harassment is actionable and need not result from sexual desire); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788–89 (7th Cir. 2007) (stating that sexual desire need not be present for actionable sexual harassment under Title VII).

27. Abrams, *supra* note 22, at 1217. Some of the variables that I observe include whether the content of the behavior is sexual, gendered, or neutral; whether the perpetrators and victims are individuals or a group; whether the perpetrators and victims are women or men; whether motivations for the behavior are conscious or unconscious; the relative job status of the perpetrators and the victims in the workforce; and whether the behavior is directed at particular individuals or pervasive throughout the workforce.

Robin Ely and Debra Meyerson suggests that employers' actions in training and establishing goals for a group of employees can dramatically reduce the most damaging masculinities in an all-male, tough, blue-collar workplace.<sup>28</sup> While these results have yet to be replicated in other employment settings, they offer important insights and hope for well-meaning managers that it is possible to construct a gender-neutral workplace in which employees thrive without sacrificing production and efficiency.

Part I discusses workers' creation of their masculine gender identities in organizations. It analyzes the extensive research on bullying in schools and workplaces that demonstrates that much bullying, although gender-neutral in content, occurs in order to reinforce the masculinity of individuals and groups of men and of the job itself. Part II explores the legal landscape of sexual harassment law and analyzes the Supreme Court's jurisprudence and the theories proposed by scholars to interpret sexual harassment law. It also evaluates the lower courts' response to *Oncale* and to the legal scholars' arguments. Part III posits that women, and many men, will not enjoy equal employment opportunity until society recognizes that gender is embedded in institutions. That is, gender is an invisible part of organizational structure. Moreover, through individual and group behaviors, men and women negotiate their roles and power within institutions. Much of this negotiation consciously or unconsciously revolves around gender norms and expectations, practice of masculinities, and bullying. Unbridled competitive masculinities and bullying are harmful to most women and to all but the most gender-conforming men. Masculinities and bullying practices define and reinforce certain work as masculine and feminine. Regardless of individual differences and skills, they limit masculine work to the most masculine of men and assign work defined as feminine to women. Finally, this Article concludes that courts should look to masculinities theory and the new research on gender and bullying to provide a theoretical background for understanding that harassing behavior occurs because of sex. This understanding provides an important interpretive tool in determining whether harassing behavior violates Title VII.

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28. Robin J. Ely & Debra E. Meyerson, *Unmasking Manly Men: The Organizational Reconstruction of Men's Identity* (Harv. Bus. Sch. Working Paper, 2006) (on file with the author).

## I. MASCULINITIES THEORY, GENDER IDENTITIES, AND THE LAW AT WORK

This Part provides a theoretical background that Part II applies to the law of sexual harassment. It analyzes masculinities theory and the social science research on bullying, harassment, and hazing. Although social scientists define and study these phenomena separately, many of the behaviors described by these phenomena are the same. Using new research on gender and bullying, this Part argues that many bullying behaviors result from gender and have a disparate impact on gender non-conforming men and women. This Part concludes by using masculinities theory to examine the relationship among the diverse social science research on these phenomena, demonstrating the importance of recognizing that these behaviors have gender implications for both men and women.

### A. *Masculinities and Organizational Theory*

Although some believe that gender is the natural result of biology, masculinities theorists and feminists have made a strong case that gender is socially constructed.<sup>29</sup> Social scientists agree that gender is not fixed; rather, it is variable and negotiable.<sup>30</sup> Individuals perform and construct their gender identities through social context.<sup>31</sup> Society privileges certain types of gender performances.<sup>32</sup> The hegemonic masculinity is

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29. See, e.g., Deborah Kerfoot & David Knights, *Managing Masculinity in Contemporary Organizational Life: A 'Man'agerial Project*, 5 ORG. 7, 8 (1998); Judith Lorber, *Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality and Gender*, 66 SOC. INQUIRY 143, 144–145 (1996). For a discussion of feminist and masculinities literature that posits that gender is socially constructed, see Ann C. McGinley, *Masculinities at Work*, 8 OR. L. REV. 359, 368–70 (2004).

30. See, e.g., JUDITH BUTLER, *BODIES THAT MATTER* 230–31 (1993) (noting that gender is a performance and is changeable); JUDITH LORBER, *PARADOXES OF GENDER* 244–45 (1994) (describing interactions in which men and women “do gender”).

31. See Lorber, *supra* note 29, at 144 (arguing that society has artificially constructed binary concepts of gender (male and female and heterosexual and homosexual) and that adopting these concepts reinforces the society’s construct of normal and deviant groups); see also R.W. CONNELL, *MASCULINITIES* 64 (1995) (rejecting the concept of biological causes for differences between men and women and arguing that much of the difference is socially constructed).

32. See CONNELL, *supra* note 31, at 76–77 (describing the “hegemonic masculinity” as the “masculinity that occupies the hegemonic position in a given pattern of gender relations”); Lorber, *supra* note 29, at 143–46 (arguing that gender categories represent power rather than sex and determine which group will dominate other groups).

the culturally dominant masculinity. In many workplaces, it is aggressive, competitive, hard-driving, entrepreneurial, authoritarian, and careerist.<sup>33</sup> It is not fixed, but can change depending on the times or the organizations.<sup>34</sup> It is a complex system affected by race, class, education, and other variables.<sup>35</sup> Those who cannot achieve hegemonic masculinity negotiate forms of masculinity that are subordinated to hegemonic masculinity.<sup>36</sup> In fact, a particular worker may be located in a space in which his masculinities are both predominant as to some workers and subordinated as to others.<sup>37</sup>

Moreover, gender is imbedded in the very structure of organizations.<sup>38</sup> That is, assumptions about gender inform the way that work is organized.<sup>39</sup> While individuals bring their gender identities into the workplace and perform them at work, gender is a structure that supports the organizational design.<sup>40</sup> For example, the organization is constructed to work most efficiently where men are the primary or sole breadwinners. The invisible gendered premise accepted by most organizations is that workers should work to their utmost capacity and, in the case of white-collar workers, should be available to work at all hours in order to get the work done. Underlying this concept is

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33. See David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER, WORK & ORG. 2, 13–16 (1994); Kerfoot & Knights, *supra* note 29, at 7.

34. See Kerfoot & Knights, *supra* note 29, at 12 (noting that masculinity is not fixed but fluid, contingent and shifting).

35. See Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 192, 195 (2002) (noting that masculinities are “formed by race and class”).

36. See David L. Collinson & Jeff Hearn, *Men and Masculinities in Work, Organizations, and Management*, in HANDBOOK OF STUDIES ON MEN AND MASculINITIES 289, 293–98 (Michael S. Kimmel et al. eds., 2005).

37. See Mark Maier & James Messerschmidt, *Commonalities, Conflicts and Contradictions in Organizational Masculinities: Exploring the Gendered Genesis of the Challenger Disaster*, 35 CAN. REV. SOC. & ANTHROPOLOGY 325 (1998) (explaining the shuttle Challenger disaster as partly resulting from a combination of hegemonic and subordinated masculinities).

38. See CONNELL, *supra* note 31, at 72 (arguing that state organizational practices are structured in relation to gender and reproduction).

39. See Patricia Yancey Martin, *“Said and Done” Versus “Saying and Doing”*: *Gendering Practices, Practicing Gender at Work*, 17 GENDER & SOC’Y 342, 344, 357 (2003) (noting that gender is an institution and that gender practices are aspects of the institution).

40. See CONNELL, *supra* note 31, at 29–30 (concluding that gender is a structure in organizations); Stephen Whitehead, *Disrupted Selves, Resistance and Identity at Work in the Managerial Arena*, 10 GENDER & EDUC. 199, 205 (1998) (noting that white males are privileged by the gender discourse prevalent in organizations).

the implicit assumption that the worker has a male body that does not bear children and has a partner or wife who deals with his every outside need—bears his children and cares for them, buys and prepares his food, buys and washes his clothing, maintains his home and other possessions, and organizes his social life.<sup>41</sup>

Gender is enacted in varying and complex ways through organizational behavior.<sup>42</sup> The organization assigns genders to certain jobs, and the expectations of persons doing those jobs are built upon a traditional division of labor in the family.<sup>43</sup> In both blue and white-collar workplaces, the jobs that perform the primary and most respected work of the institution are gendered male. The jobs that serve the auxiliary role of helping the men are performed by females. This division of labor reflects and reinforces the traditional roles of men and women in the family.<sup>44</sup> Thus, jobs of bankers, lawyers, and doctors are gendered male while jobs as secretaries, paralegals, and nurses are gendered female.

The normative masculinity in the American workplace includes aggression, competition, and anxiety.<sup>45</sup> Although numerous masculinities exist in tension with one another, the powerful hegemonic masculinity is white, middle class, and heterosexual.<sup>46</sup> Our culture rewards white middle-class men who compete to prove their masculinity, exclude women from power because they lack masculinity, and exclude men from power who do not live up to the normative definition of masculinity.<sup>47</sup> Masculinity as anti-femininity “lies at the heart of contemporary and historical conceptions of manhood, so that masculinity is defined more by what one is not rather than who one is.”<sup>48</sup> Masculinity involves a flight from the feminine, and

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41. See JOAN WILLIAMS, UNBENDING GENDER 64–68 (2000); Collinson & Hearn, *supra* note 36, at 294.

42. See Martin, *supra* note 39, at 344–45.

43. *Id.*

44. See WILLIAMS, *supra* note 41, at 71–72.

45. See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in FEMINISM & MASCULINITIES 182, 183–84 (Peter F. Murphy ed., 2004).

46. *Id.* at 184.

47. *Id.* at 184–85.

48. *Id.* at 185. As Kenneth Karst states, “[t]he main demands for positive achievement of masculinity arise outside the home, and those demands reinforce the boy’s need to be what his mother is not. In the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all the others: don’t be a girl.” Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 503 (1991).

a fear of homosexuality. Men prove their masculinity to other men in order to gain acceptance.<sup>49</sup> This effort is a "homosocial event" that requires men to test themselves in order to prove to other men that they are masculine.<sup>50</sup> This is a dangerous experience for men, full of risk and relentless competition.<sup>51</sup>

The flight from femininity as articulated in Freudian theory holds that a young boy must separate from his mother in order to develop into a sexual being as a man.<sup>52</sup> The boy repudiates his mother and her traits of nurturance, compassion, and tenderness;<sup>53</sup> suppresses these traits in himself; and learns to devalue women.<sup>54</sup> "Masculine identity is born in the renunciation of the feminine, not in the direct affirmation of the masculine, which leaves masculine gender identity tenuous and fragile."<sup>55</sup> Because masculine identity depends on its differentiation from the feminine rather than on an affirmation of its own value, as a concept, it is weak and problematic.

Those practicing masculinities see homosexuality as feminine behavior; homophobia "is a central organizing principle of our cultural definition of manhood. Homophobia is more than the irrational fear of gay men, more than the fear that we might be perceived as gay."<sup>56</sup> It is a fear that other men will recognize that men are not as masculine as they pretend to be.<sup>57</sup> This fear creates shame and leads to an unwillingness to stand up for others who are being harassed.<sup>58</sup> Moreover, it compels men to enact exaggerated masculine behaviors and to project attitudes that women and gays are "the other" with whom men compare themselves in order to establish their own "manhood."<sup>59</sup>

Historically, immigrants, people of color, women, children, and homosexuals have played "the other." Black slaves were seen as dependent, incapable of defending their women and children.<sup>60</sup> Irish and Italian immigrants were too emotional,

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49. Kimmel, *supra* note 45, at 185.

50. *Id.* at 186.

51. *Id.* at 186-87.

52. *Id.* at 185-87.

53. *Id.* at 185-86.

54. *Id.*

55. *Id.* at 186.

56. *Id.* at 188.

57. *Id.* at 189.

58. *Id.*

59. *Id.* at 191.

60. *Id.* at 191-93.

and Jews were too bookish.<sup>61</sup> Asian men—first the Japanese and then the Vietnamese—were seen as effeminate, soft, small, and weak.<sup>62</sup> Alternatively, many of these groups were perceived as wild beasts, hyper-masculine, and sexually aggressive.<sup>63</sup> Either construction views these “others” in gendered fashion.<sup>64</sup>

While masculinities theory shares many premises with feminist theory and draws much of its analysis from feminism, masculinities research attempts to demonstrate why a reverence for the hegemonic forms of masculinity harms men.<sup>65</sup> It acknowledges that men as a group are powerful, but also claims that individual men often feel powerless.<sup>66</sup> These feelings of powerlessness derive from pressure on men to act as breadwinners, to compete with other men to demonstrate their masculinity, and to deny their emotions.<sup>67</sup> Two leading American masculinities theorists, Michael Kimmel and Joseph Pleck, analyze how men react to feelings of powerlessness.<sup>68</sup> Kimmel argues that men mistakenly conclude that their powerlessness results from their relationships with women.<sup>69</sup> In fact, men feel powerless because the “rules of manhood” define only a small fraction of men as masculine.<sup>70</sup> Pleck asserts that men experience a loss of power because women have expressive and masculine-validating power over men.<sup>71</sup> Women exercise expressive power over men by helping men to express emotions.<sup>72</sup> They exercise masculine-validating power when they act in a submissive, feminine way in order to build up the men’s masculinity.<sup>73</sup> When women do not exercise expressive power on behalf of men or refuse to validate the men’s masculinity by acting submissive and feminine, men “feel lost and bereft and

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61. *Id.* at 192.

62. *Id.*

63. *Id.* at 191–93.

64. *Id.* at 193.

65. See Peter F. Murphy, *Introduction*, in *FEMINISM & MASCULINITIES* 9–10 (Peter F. Murphy ed., 2004); Joseph H. Pleck, *Men’s Power with Women, Other Men, and Society: A Men’s Movement Analysis*, in *FEMINISM & MASCULINITIES* 57–60, 67 (Peter F. Murphy ed., 2004).

66. See Kimmel, *supra* note 45, at 194–195.

67. See generally *id.*; Pleck, *supra* note 65, at 59–60.

68. *Id.*

69. See Kimmel, *supra* note 45, at 194–95.

70. See *id.* at 195.

71. See Pleck, *supra* note 65, at 59–60.

72. *Id.* at 59.

73. *Id.* at 59–60.

frantically attempt to force women back into their accustomed role."<sup>74</sup>

Pleck and Kimmel explain that in response to their feelings of powerlessness, men dominate women in order to prove to other men that they are strong and powerful.<sup>75</sup> Pleck describes a scene in a novel in which a young man goes with his friends to gang rape a woman. When his turn comes up, he is impotent, and his friends pull down his pants and rape him.<sup>76</sup> Explaining this scene, Pleck notes:

[M]en do not just happily bond together to oppress women. In addition to hierarchy over women, men create hierarchies and rankings among themselves according to criteria of 'masculinity.' Men at each rank of masculinity compete with each other, with whatever resources they have, for the differential payoffs that patriarchy allows men.<sup>77</sup>

Pleck also notes that in this society "one of the most critical rankings among men deriving from patriarchal sexual politics is the division between gay and straight men."<sup>78</sup> He states:

Our society uses the male heterosexual—homosexual dichotomy as a central symbol for *all* the rankings of masculinity, for the division on *any* grounds between males who are 'real men' and have power and males who are not. Any kind of powerlessness or refusal to compete becomes imbued with the imagery of homosexuality.<sup>79</sup>

In a blue-collar environment, competing masculinities are stark.<sup>80</sup> Laborers, who are powerless to adopt the white-collar hegemonic masculinity, perform their own forms of masculinity as a means of resisting their more powerful managers who perform the hegemonic masculinity.<sup>81</sup> Because the blue-collar worker's masculinity is subjugated to the hegemonic masculinity of the white-collar worker, blue-collar workers react to and

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74. *Id.* at 60.

75. Kimmel, *supra* note 45, at 195; Pleck, *supra* note 65, at 61–64.

76. See Pleck, *supra* note 65, at 61 (describing a scene from the novel *SMALL CHANGES* by MARGE PIERCY).

77. *Id.* at 61–62.

78. *Id.* at 62.

79. *Id.*

80. See David L. Collinson, 'Engineering Humor': Masculinity, Joking and Conflict in Shop-floor Relations, 9 *ORG. STUD.* 181, 184–185 (1988); see also *infra* discussion accompanying notes 236–60.

81. *Id.*



resist hegemonic masculinity. The resistance includes performances of hyper-masculinity and comparisons of their white-collar superiors to women ("pansies").<sup>82</sup> These performances of hyper-masculinity are often directed at women who work in "men's jobs."<sup>83</sup> They are also directed at men who are outsiders because they do not conform to the definition of hyper-masculinity that is required of the men on the job.<sup>84</sup>

Women and effeminate men may be harassed to undermine their competence, to force them out of the job, and to preserve the job as a masculine enclave.<sup>85</sup> Men also direct this behavior at newcomers, and even at those who have been in the workplace for a period, in order to assure that they conform to the group's masculine norms and that they perform the behaviors that reinforce the norms.<sup>86</sup> Because these behaviors assure the job's masculine identity and the masculine identity of those holding the jobs, the behavior occurs because of sex.

Masculinities theory can help us understand why the harassing behavior of groups of men occurs because of sex. This theory is clarified further by research on bullying behaviors in schools and work. The next Subpart analyzes the bullying research; the newer research on bullying demonstrates that gender is an important factor in many bullying behaviors.

### *B. Social Science Research on Bullying, Mobbing, and Harassment*

This Subpart gives a comprehensive view of the bullying research. It begins with a historical account of the early bullying research, and then discusses newer bullying research by feminists. Traditional bullying experts clearly distinguish between what they call sexual harassment and bullying.<sup>87</sup> This distinction, however, is not unassailable. Recently, feminist researchers have begun to do empirical and theoretical work

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82. *Id.*

83. *Id.*

84. *Id.*

85. See Schultz, *supra* note 4, at 1762–69.

86. *Id.*; cf. PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS 166–79 (2d ed. 2007) (describing hazing in college fraternities).

87. See, e.g., Stale Einarsen et al., *Bullying and Harassment at Work and Their Relationship to Work Environment Quality: An Exploratory Study*, 4 EUR. WORK & ORG. PSYCHOL. 381 (2001).

that leads to the conclusion that bullying has a gender aspect to it.<sup>88</sup>

After describing the historical traditional approaches to the bullying research, this Subpart analyzes the new feminist research on bullying, which links bullying to gender. This Subpart also examines the research on hazing and horseplay and demonstrates that although the terminology may differ from the bullying terminology, much hazing and horseplay fits within the definition of bullying and is significantly related to gender. After discussing these different research threads, this Subpart employs masculinities theory to argue that sexual and gender harassment, bullying and hazing are different terms that often describe the same behaviors. It explains that although the traditional bullying researchers distinguish sexual harassment from bullying, Title VII law has a broader interpretation of illegal harassment because it bans non-sexual harassing behavior if it occurs because of sex or gender. This background prepares the reader to consider how Title VII harassment law should apply to these behaviors, a discussion which takes place in Part II *infra*.

### 1. Historical Background of Bullying Research

Early bullying researchers were mostly German and Scandinavian, and their work was divided into two groups. Developmental and educational psychologists studied bullying (which they called mobbing) in schools. Organizational psychologists studied bullying in the workplace. Because these two groups of scholars had different training and orientation, they took different approaches. The school specialists focused more on the individual traits of the bullies and the victims, whereas the organizational specialists considered the institutional and environmental causes of bullying. Both of these groups of traditional researchers, however, concluded that bullying was not a gendered phenomenon. This Subpart describes the research results of the traditional scholars who studied bullying in schools and workplaces and draws comparisons between the two disciplines. Because of the historical fact that these researchers did not work together, the school bullying and work bullying research is described separately here. Workplace bullying experts can learn a great deal about hu-

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88. See *infra* Part IB.2.a.

man behavior and the gendered nature of bullying by examining the bullying behaviors of school children as well as bullying that takes place at the workplace. This is particularly true when we consider an ethnographic study of school children that is described below.

*a. Bullying (Mobbing)<sup>89</sup> at School*

The early bullying research, conducted by developmental and educational psychologists in schools, examined behavior such as teasing and badgering directed at a victim who had little ability to retaliate or to control the behavior.<sup>90</sup> Researchers focused on the characteristics of the bullies and the victims,<sup>91</sup> and concluded that the presence of an aggressive child was a necessary precondition for bullying in schools to occur.<sup>92</sup> They defined bullies as boys who oppressed or harassed others regularly, and characterized bullies as personalities with anti-social conduct disorder.<sup>93</sup> They found that sixty percent of those who were bullies in sixth through ninth grade had at least one criminal conviction by age twenty-four, as compared with only ten percent of those who were not classified as bullies or victims.<sup>94</sup>

This research found that victims were less assertive or aggressive, physically weaker, and often possessed outsider characteristics.<sup>95</sup> Victims were more anxious and insecure than other boys, and they reacted to bullying by withdrawing.<sup>96</sup> The victims suffered from heightened depression, but the research did not clarify whether the depression was a cause or a conse-

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89. Scholars also refer to "bullying" as "mobbing" and/or "harassment." The term "mobbing" originally referred to behavior by a group, but currently refers to behaviors by individuals and groups. See Einarsen et al., *supra* note 87, at 382-83. Because "bullying" is the term used contemporaneously by scholars to describe bullying, mobbing, and some forms of harassment, I employ the term "bullying" in this Article.

90. See *id.* at 383.

91. See *id.*; Beate Schuster, *Rejection, Exclusion, and Harassment at Work and in Schools*, 1 EUR. PSYCHOL. 293, 294, 300-02 (1996).

92. See Schuster, *supra* note 91, at 300.

93. See Stale Einarsen, *Harassment and Bullying at Work: A Review of the Scandinavian Approach*, 5 AGGRESSION & VIOLENT BEHAV. 379, 383 (2000).

94. Schuster, *supra* note 91, at 300.

95. *Id.* at 301.

96. *Id.* Gary and Ruth Namie found that victims fall into three categories in the workplace: nice people, vulnerable people, and superior people. GARY NAMIE & RUTH NAMIE, *BULLETPROOF YOURSELF AT WORK!* 54 (1999).

quence of the bullying.<sup>97</sup> Developmental and educational psychologists concluded that the personalities of the bullies and the victims account for bullying.<sup>98</sup> This theory, however, is controversial, especially to the extent that these studies suggest that the victim had particular characteristics that may have caused the bullying.<sup>99</sup> More recently, researchers disagree with the stereotype of schoolyard bullies as clumsy and not sophisticated, based on findings that schoolyard bullies are intelligent, socially skilled, and often well-liked.<sup>100</sup> Not all bullies are psychopaths or sociopaths.<sup>101</sup> These are clinical terms that apply to only 0.5 percent of the population.<sup>102</sup> Newer studies raise doubts about the view that bullies lack self-confidence.<sup>103</sup>

While early educational psychologists did not focus on the gendered aspects of bullying in school, an ethnographic study conducted in a school in the United States suggests that girls and boys experience bullying differently.<sup>104</sup> The researchers interviewed three middle school boys and three middle school girls.<sup>105</sup> They asked the students about their perceptions of bullying, the feelings generated by bullying and their recollection of strategies employed to end bullying.<sup>106</sup> The girls were much more verbal in their descriptions of the bullying and analysis of potential strategies to combat it.<sup>107</sup> All of the girls and one of the boys raised gender issues. One girl mentioned that bullying is unfair, but characteristic of how boys treat girls.<sup>108</sup> Another mentioned that the boys called girls names and revealed the contents of the girls' lockers if the girls refused to help the boys with school work.<sup>109</sup> One girl acknowledged that she knew that a few people in the class were bullying one of the boys.<sup>110</sup> She said, "*They kind of treat him like*

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97. Schuster, *supra* note 91, at 301–02.

98. *Id.* at 303.

99. *See id.* at 303.

100. CHARLOTTE RAYNER ET AL., WORKPLACE BULLYING: WHAT WE KNOW, WHO IS TO BLAME AND WHAT CAN WE DO? 79 (2002).

101. *Id.* at 106.

102. *Id.*

103. *Id.* at 79–80. *See also* Einarsen et al., *supra* note 87, at 383–84.

104. *See* Tiram Gamliel et al., *A Qualitative Investigation of Bullying*, 24 SCH. PSYCHOL. INT'L 405 (2003).

105. *Id.* at 405.

106. *Id.* at 407–08.

107. *Id.* at 415.

108. *Id.*

109. *Id.*

110. *Id.*

*he's a girl.*"<sup>111</sup> She blamed the victim because he did not retaliate in response to the bullying.<sup>112</sup>

The boys distinguished horseplay from bullying. While they reported engaging in horseplay, they did not consider it to be bullying.<sup>113</sup> They admitted that the behavior was consistently directed at one of the boys and agreed that boys get more abuse when they do not fight back.<sup>114</sup> A passive and shy boy was at risk of bullying according to both the girls and the boys.<sup>115</sup>

The girls either were bullied more frequently, or they perceived themselves to be. From the boys' perspective, horseplay "only crosses the line into victimization when two factors are present. First, the victim does not wish to engage in horseplay and, second, the victim does not respond or responds passively in the face of such rough-and-tumble behaviour."<sup>116</sup>

Other recent research finds a causal link between attributes and behavior of the victim and repeated bullying.<sup>117</sup> Children who are bullied or excluded socially tend to be less assertive and more withdrawn.<sup>118</sup> This submissive response rewards the bully's behavior and increases bullying.<sup>119</sup>

Notably, the studies in schools did not focus on the environmental or structural factors that either encouraged bullying or that permitted it to exist. That focus came in studies of workplace bullying, which will be examined in the next Subpart.

### *b. Bullying at Work*

Scandinavian and German scholars, and more recently British and American scholars, extended the study of bullying behavior to the workplace. Bullying, as defined by these scholars, usually includes a repeated set of negative behaviors in the workplace that occur over a period of at least six months and a

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 418.

117. See generally Claire L. Fox & Michael J. Boulton, *Longitudinal Associations Between Submissive/Nonassertive Social Behavior and Different Types of Peer Victimization*, 21 VIOLENCE & VICTIMS 383 (2006).

118. *Id.* at 396.

119. *Id.*

victim who has difficulty defending him or herself.<sup>120</sup> The behaviors include acts that repeatedly and persistently torment a person. These acts may harm a victim's reputation or ability to relate to coworkers or to perform the job.<sup>121</sup> These acts include social isolation at work, exclusion, devaluation of the work the person does, teasing, insulting remarks, ridicule and gossip, giving the person tasks that are too simple, and exposing the person to physical violence or threats of violence.<sup>122</sup>

Individuals or groups can engage in bullying. Bullying by groups occurs when the target violates the culture or norms of the group.<sup>123</sup> Even where there is only one bully, often a group of employees contributes to the bullying passively by allowing it to occur.<sup>124</sup> The target of the bullying interprets the group's behavior as supporting the bullying, even though the reason for silence may be fear or self-protection.<sup>125</sup>

Many scholars who attempt to measure bullying exclude sexual harassment from the definition of bullying.<sup>126</sup> Their definition of sexual harassment, however, is both narrower and broader than that envisioned by American anti-discrimination law. The European researchers define sexual harassment as using sexual means to harass a person, and the definition is often limited to the imposition of unwanted sexual advances on a victim at work.<sup>127</sup> It does not include harassment that is focused on the sex or gender of the victim.<sup>128</sup> In contrast, the Supreme Court has concluded that sexual means are not suffi-

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120. Einarsen et al., *supra* note 87, at 383. Denise Salin, who combines European and U.S. research on bullying, defines bullying as "*repeated and persistent negative acts towards one or more individual(s), which involve a perceived power imbalance and create a hostile work environment.*" Denise Salin, *Ways of Explaining Workplace Bullying: A Review of Enabling, Motivating and Precipitating Structures and Processes in the Work Environment*, 56 HUMAN REL. 1213, 1214-15 (2003); see also Pamela Lutgen-Sandvik et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact* 44 J. MGMT. STUDIES 837, 838 (2007) (copy on file with the author) (using Einarsen's definition).

121. See Einarsen et. al., *supra* note 87, at 383.

122. See Einarsen, *supra* note 93, at 383.

123. RAYNER ET AL., *supra* note 100, at 110.

124. *Id.*

125. *Id.* at 111-12.

126. See Einarsen et al., *supra* note 87, at 381-82, 387.

127. See *id.*

128. Throughout this Article I distinguish sex from gender. "Sex" refers to the biological sex of a person whereas "gender" refers to the social expectations of a particular biological sex. Where there is a divergence between the person's sex and gender, an individual often suffers harassment at work.

cient proof of sexual harassment;<sup>129</sup> nor does the Court limit the definition of illegal harassment to unwanted sexual advances.<sup>130</sup> Rather, a number of courts have held that it is unlawful to harass a person because of his failure to live up to the society's stereotypical expectations of his gender.<sup>131</sup>

Defining bullying to exclude sexual harassment, Scandinavian studies conducted in the late Twentieth Century found that between 3.5 percent and 10 percent of respondents had experienced bullying at work.<sup>132</sup> In English speaking countries, studies find a much higher incidence of bullying at work.<sup>133</sup> A recent study in the United States found that bullying occurred between twenty and fifty percent more often in American workplaces than in Scandinavian workplaces.<sup>134</sup>

Organizational factors contribute to bullying behavior at work.<sup>135</sup> These factors include workers' inability to monitor their own work, lack of clear goals, and lack of constructive leadership.<sup>136</sup> The differences between the school bullying experts and the workplace bullying experts may be due largely to their different disciplines which view bullying through different lenses. Those who study school children are developmental and educational psychologists, whereas the workplace experts

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129. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

130. See *id.* at 80 (holding that a hostile work environment need not be motivated by sexual desire); see also *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788-89 (7th Cir. 2007) (concluding that a hostile work environment can occur without sexual behavior); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 905 (1st Cir. 1988) (concluding that a verbal attack that demonstrates anti-female animus can contribute to a hostile work environment).

131. See *infra* Part II.C.2.

132. See Einarsen et al., *supra* note 87, at 384. Some of these studies employ slightly different definitions of bullying or different ways of measuring bullying. For example, some studies give a definition and ask the responders to state whether they have experienced bullying. Others give a list of behaviors and ask if responders have experienced one or more of the behaviors at least once a week for more than a six month period. Other studies ask whether the responders had experienced those behaviors over a life time. See also Schuster, *supra* note 91, at 298-99. Schuster notes that Leymann's study found a rate of 3.5 percent, and that Niedl found a rate of 4.4 percent in Austria in a research institute and 7.8 percent in a hospital. *Id.* at 295.

133. See Einarsen, *supra* note 93, at 384-85.

134. See Lutgen-Sandvik et al., *supra* note 120, at 28.

135. See, e.g., Einarsen, *supra* note 93, at 387-99; Nathan A. Bowling & Terry A. Beehr, *Workplace Harassment From the Victim's Perspective: A Theoretical Model and Meta-Analysis*, 91 J. APPLIED PSYCHOL. 998, 1005 (2006) (finding that work environment affects the likelihood of harassment and that, compared to environmental factors, victims' individual differences seem to have little effect on whether harassment will occur).

136. See Einarsen et al., *supra* note 87, at 390.

are organizational psychologists.<sup>137</sup> The behaviors described by both groups, however, are practically identical.<sup>138</sup> Each group would benefit by learning from the other group. While the school research emphasized personal characteristics of the bully and the victim, the organizational psychologists consider the environment and workplace structures that lead to bullying. It is evident from the research produced by both of these groups that both personal and structural factors contribute to bullying behaviors.<sup>139</sup>

## 2. New Theories on Gender and Bullying

While traditional scholars conclude that bullying is not a gendered behavior, feminists studying bullying conclude that much bullying behavior is linked to gender. This Subpart describes this literature. It also examines the phenomena of hazing and horseplay and notes the gendered aspect of much of these behaviors.

### *a. Linking Bullying to Gender*

Many scholars insist that sex and gender have little to do with bullying.<sup>140</sup> The Scandinavian studies concluded that men and women were bullied in equal percentages to their representation in the workforce.<sup>141</sup> Moreover, these studies showed that both men and women engage in bullying behavior.<sup>142</sup> Men, however, were primarily bullied by men, while women were bullied by both men and women. A Swedish study produced similar results.<sup>143</sup>

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137. Schuster, *supra* note 91, at 294.

138. *See id.* at 302–03.

139. *See id.* at 303.

140. *See* Carol Jones, *Drawing Boundaries: Exploring the Relationship Between Sexual Harassment, Gender and Bullying*, 29 WOMEN'S STUD. INT'L F. 147, 147–50 (2006) (explaining that bullying researchers draw boundaries between bullying and sexual harassment and that the boundaries are caused by the narrow concept that sexual or gendered harassment is sexual in nature); Deborah Lee, *Gendered Workplace Bullying in the Restructured UK Civil Service*, 31 PERSONNEL REV. 205, 206–08 (2002) (discussing bullying scholars' view of gender and noting that some see bullying as unrelated to gender whereas others minimize the importance of gender and others may categorize sexual harassment as a form of bullying but seek to differentiate it from bullying).

141. *See* Einarsen, *supra* note 93, at 386.

142. *Id.*

143. *Id.*



There is increasing evidence that gender and bullying are interrelated. Even Stale Einarsen, the most well-known Scandinavian bullying expert, who defines bullying as not related to gender, used gendered terms to analyze why certain societies experience more bullying in the workplace than others.<sup>144</sup> Noting that English speaking countries have a much higher rate of bullying than Scandinavian countries, he explained that cultures with smaller "power distance"<sup>145</sup> and less hierarchy, such as Scandinavian countries, experience less bullying.<sup>146</sup> In countries where there is a greater "power distance" among individuals, such as the United States, one would expect more bullying.<sup>147</sup> Scandinavian countries are more "egalitarian" and *feminine*, he notes.<sup>148</sup> "Feminine cultures prescribe its [sic] members not to be aggressive, dominating, and assertive in social relationships. Further, they value unisexual and fluid sex-roles, as well as equality between the sexes."<sup>149</sup> This view reinforces the position of masculinities theorists that masculine structures and behaviors are imbedded into the workplace, at least in English-speaking countries.

In support of this theory, Einarsen discusses sexual harassment at work (defined narrowly as "unwanted sexual advances") and notes that empirical studies support this position.<sup>150</sup> He notes that American studies demonstrate that a much higher percentage of American women than Scandinavian women are subject to sexual harassment. Referring to American and Scandinavian studies of sexual harassment, Einarsen notes that sixty percent of American women were exposed repeatedly to unwanted sexual attention, compared to twenty-seven percent of Norwegian women.<sup>151</sup> Of those who were exposed to unwanted sexual attention, thirty-six percent of American women believed themselves to be victims of sexual harassment, but only five percent of Norwegian women thought the same.<sup>152</sup> "Androgynous sex-roles and feminine values may prescribe Norwegian men to be less sexually ag-

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144. See *id.* at 384-85.

145. Power distance is "the interpersonal power or influence difference between two persons as perceived by the least powerful of the two." *Id.* at 385.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

gressive and dominating than American men, while Norwegian women may feel free to stop, retaliate, or report a certain behavior if experienced as unwanted.”<sup>153</sup> Einarsen’s need to revert to examples of sexual harassment and to use gendered terms to describe the incidence of bullying in Scandinavian countries and the United States demonstrates that bullying is not wholly unrelated to gender. In fact, his theory is that the more “feminine” countries have less bullying demonstrates the inexorable link between gender and bullying. While his research may not support a conclusion that the perpetrators and victims of bullying differ in incidence by gender, such a showing is not necessary to conclude that bullying is gendered.

In fact, even though finding that women suffer bullying disproportionately is not necessary to conclude that bullying is gendered, other studies demonstrate that more women are the object of bullying. A comprehensive study in Great Britain found that women in senior management experienced significantly more bullying than their male counterparts.<sup>154</sup> While 15.5 percent of female senior managers reported bullying over a five year period, only 6.4 percent of male senior managers reported bullying over the same period.<sup>155</sup> Although none of the men who reported having been bullied said that the bullying occurred on a regular basis, 4.5 percent of the women reported regular bullying.<sup>156</sup> Men were bullied almost exclusively by men, whereas women were bullied by men and women.<sup>157</sup> The

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153. *Id.*

154. Helge Hoel et al., *The Experience of Bullying in Great Britain: The Impact of Organizational Status*, 10 EUR. J. WORK & ORG. PSYCHOL. 443, 449 (2001); see also Ann Cary Juliano, *Harassing Women with Power: The Case for Including Contra-power Harassment Within Title VII*, 87 B.U. L. REV. 491, 495–96 (2007) (arguing that contra-power harassment, by men of women superiors, should be recognized as illegal harassment under Title VII); Noreen Tehrani, *Bullying: A Source of Chronic Post Traumatic Stress?*, 32 BRIT. J. GUIDANCE & COUNSELING 357, 360 (2004) (finding women managers were bullied at a rate of forty-three percent whereas men were bullied at a rate of thirty percent).

155. Hoel et al., *supra* note 154, at 449.

156. *Id.* Denise Salin found, like Hoel, that women in higher positions are victims of bullying more than their male counterparts. Denise Salin, *Prevalence and Forms of Bullying Among Business Professionals: A Comparison of Two Different Strategies for Measuring Bullying*, 10 EUR. J. WORK & ORG. PSYCHOL. 425, 435 (2001).

157. Hoel et al., *supra* note 154, at 450. Hoel and her colleagues found that in the supervisor and manager levels 62.2 percent of men who were bullied were bullied exclusively by men whereas 30.4 percent of women who were bullied were bullied exclusively by men and 37.3 percent of women were bullied exclusively by other women. Only 9.3 percent of men were bullied exclusively by women. Approximately equal proportions of men and women were bullied by a mixed group

authors concluded that as women progressed higher in the organization, they became more vulnerable to negative behaviors than men. The authors posited that men who feel threatened by women in traditional male jobs may bully the women in order to exclude them from the positions, and men often used sexual harassment to accomplish this goal.<sup>158</sup> A Swedish study found that both men and women suffer threats, violence, and bullying when occupying temporary or part-time positions, but women with permanent job contracts endure significantly more threats and violence than men who have the same job status.<sup>159</sup>

Finally, a comprehensive study of incivility in the workplace in the United States found that incivility is prevalent in the American workplace, with two-thirds of respondents reporting disrespect, condescension, and social exclusion.<sup>160</sup> The study defined incivility as not having a gendered content; nonetheless, it found that female employees experienced incivility at a higher rate than male employees did.<sup>161</sup> These findings suggested that female and male employees were targeted at different rates of incivility based on their sex, and that incivility could potentially create a disparate effect on the work environment of females.<sup>162</sup>

In a study of incivility occurring in the federal courts, the authors noted that commentators have depicted attorneys as gladiators, barbarians, and professional combatants.<sup>163</sup> These characterizations are masculine, and the study found that many attorneys engage in uncivil strategic behavior.<sup>164</sup> Many more women than men reported that they suffered gender incivility in the federal courts.<sup>165</sup> Moreover, when both men and women experience mistreatment, women experience gendered

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of men and women. *Id.* Men workers and supervisors, but not senior managers, report higher frequency of exposure to negative behaviors than their female counterparts. The authors attributed this result to horizontal and vertical segregation in the job market. This suggests, according to the authors, that male work environments are more hostile than those that are predominantly female. *Id.* at 461.

158. Hoel et al., *supra* note 154, at 461. This study evidently included sexual harassment in the study of bullying.

159. Marjan Vaez et al., *Abusive Events at Work Among Young Working Adults*, 59 RELATIONS INDUSTRIELLES/INDUS. REL. 569, 573, 576–79 (2004).

160. Lilia M. Cortina et al., *Incivility in the Workplace: Incidence and Impact*, 6 J. OCCUPATIONAL HEALTH PSYCHOL. 64, 75 (2001).

161. *Id.*

162. *Id.*

163. Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235, 236 (2002).

164. *Id.*

165. *Id.* at 246.

treatment, and men experience non-gendered, general mistreatment.<sup>166</sup> Women reported that they were ignored or excluded from conversations among attorneys and between judges and male attorneys.<sup>167</sup> They also claimed that they were discredited professionally, silenced, and experienced gender disparagement—jokes and comments that were sexist, stereotyped women, or trivialized sex discrimination and other legal issues.<sup>168</sup> Some of the subjects explained that although much of the behavior is not explicitly anti-female, they believe it occurs because of gender.<sup>169</sup>

In a study on the gendered nature of bullying in higher education, researchers evaluated the importance of gender in the perception and experience of bullying and found that, while researchers and their subjects perceive that gendered power is related to sexual harassment, bullying, in contrast, is seen as falling within organizational power.<sup>170</sup> Some harassment, however, may involve bullying behavior. Researchers found that managers more often perpetrated bullying than colleagues, but one-fifth of the cases reported bullying by colleagues on the same level as the victims.<sup>171</sup> Women, they found, were more likely to be targets of bullying.<sup>172</sup>

The higher education study concluded that the bully often has more organizational power than the victim, and he or she uses that power to bully the victim.<sup>173</sup> The bully with more power can subvert the mentoring systems established to protect and support the staff, abusing those systems to bully or intimidate the victim.<sup>174</sup> He can also use the concept of strong managerial control to mask bullying.<sup>175</sup>

Furthermore, women and men perceived the behavior differently. Some men, but no women, denied the existence of bullying altogether.<sup>176</sup> Men saw some of the behavior as

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166. *See id.* at 246–47.

167. *Id.* at 247.

168. *Id.*

169. *Id.* at 253. Ironically, other women insisted that the behavior does not occur because of gender.

170. Ruth Simpson & Claire Cohen, *Dangerous Work: The Gendered Nature of Bullying in the Context of Higher Education*, 11 GENDER, WORK & ORG. 163, 165 (2004).

171. *Id.* at 170.

172. *Id.* at 179.

173. *Id.* at 170, 175–76.

174. *Id.* at 176.

175. *Id.* at 177–78.

176. *Id.* at 171.

“strong management,” a technique within the organizational structures.<sup>177</sup> Women, in contrast, saw the behavior as personal and reported experiencing emotional distress.<sup>178</sup> This study, when compared to the interviews of school children described in Part I.B.1.a above, signals the importance that women and girls assign to behaviors they label as bullying. Men and boys, on the other hand, downplay the behavior as “horseplay” or “management techniques.”<sup>179</sup>

Because men view bullying as an organizational technique, they are less likely to see bullying as a cause for concern and may be more reluctant to intervene on behalf of victims.<sup>180</sup> Women are more likely to seek social support, or to report to their manager, than to go to personnel.<sup>181</sup> They use a more “avoidance/denial” coping strategy, which may be counterproductive because it encourages the bully to escalate the bullying over time.<sup>182</sup>

Studies of coping strategies of men and women in workplaces where bullying occurs have found that men are more aggressive and confrontational when bullied than women, who are more submissive; women seek more social support in response to bullying.<sup>183</sup> For women, increased bullying is associated with increased avoidance.<sup>184</sup> These differences between men and women’s coping strategies mirror those of boys and girls who are bullied at school.<sup>185</sup>

These studies demonstrate that gender is very much a part of bullying, but not in the sense of what bodies—men’s or women’s—occupy managerial positions. Rather, the organizational power relations are heavily gendered. The “managerial prerogative” over decision making is a masculine discourse that is based on power and control.<sup>186</sup> Gendered assumptions were present in the performance reviews in higher education in Britain because they are linked to “masculinist concerns with

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177. *Id.* at 171–72.

178. *Id.* at 172.

179. *Id.* at 171–72.

180. *Id.* at 179–80.

181. *Id.*

182. *Id.* at 181.

183. See Ragner F. Ólafsson & Hanna L. Jóhannsdóttir, *Coping with Bullying in the Workplace: The Effect of Gender, Age and Type of Bullying*, 32 BRIT. J. GUIDANCE & COUNSELING 319, 329 (2004).

184. See *id.*

185. *Id.* at 330.

186. Simpson & Cohen, *supra* note 170, at 182.

personal power and the ability to control.”<sup>187</sup> Both men and women can “invest their sense of being in masculinist discourses.”<sup>188</sup> Some women, rather than challenging the masculinist discourse, conform to it and employ bullying tactics themselves.<sup>189</sup> “[W]hile, irrespective of gender, much bullying involves the abuse of power, such behaviour cannot be divorced from gender considerations.”<sup>190</sup> The authors of the higher education study concluded:

[W]e find gender differences in the scale and perception of bullying as well as in the target responses. We consider the implications of these differences for bystander intervention, for the scale of bullying and for the ability of targets to stop the behaviour. Drawing on bullying literature, we point to the critical role of organizational structures in understanding bullying behaviour. In particular, we refer to the capacity of bullies to capture and subvert structures and procedures to their own ends. While some aspects of bullying may cut across gender, we locate these common factors within the masculinist discourses of management. This throws light on the possible interconnections between sexual harassment and bullying behaviour. While sexual harassment is ‘overtly’ gendered, bullying also needs to be seen as a gendered activity—although at a different, and perhaps more deep-seated, level. Bullying therefore needs to be put in a gendered context in order to further our understanding of this behaviour.<sup>191</sup>

This conclusion makes the important link between sexual harassment and bullying behaviors. It acknowledges that sexual harassment is an “overtly” gendered behavior whereas bullying may be gendered covertly. But Title VII law does not require that sexual harassment be “overtly” gendered. In fact, the only limitation under Title VII is that the behavior occurs or affects women disproportionately because of sex.<sup>192</sup> Title VII applies both to behavior that is gendered and sexual and to behavior that is gender neutral so long as it is because of sex. The fact that the bullying is gendered should at least permit the inference that it occurs because of sex.

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 183.

192. Here, the term “sex” includes gender.

Deborah Lee, a British psychologist who has done significant work on gender and bullying, agrees that workplace bullying is gendered.<sup>193</sup> She notes that organizational structures are designed to reproduce male power through recruitment and selection methods, job grading and career ladders, and work hours.<sup>194</sup> Her interviews demonstrate that at least in the UK, the restructuring of the civil service system and the establishing of performance pay offered the organization a means of bullying that is based on gender.<sup>195</sup>

She describes two scenarios that she believes occurred as a result of gender. One interviewee, a woman, was passed over for the promotion that was rightfully hers based on her experience and tenure in the job because her boss believed that she did not conform to the appropriate conduct for a woman in the workplace.<sup>196</sup> Another, a man, was treated poorly because the manager judged him as not having sufficient control over his family life.<sup>197</sup> Both, Lee concluded, were subject to gendered expectations.<sup>198</sup> The woman seeking the promotion was insufficiently feminine and too aggressive for a woman, whereas the man did not conform to the notions of man as breadwinner that the boss expected.<sup>199</sup>

Lee explains that men are judged badly if they are unable to keep their home and work lives separate.<sup>200</sup> A "man's man" is a family man in the sense that he takes seriously his status as breadwinner, and will be rewarded for his breadwinner status.<sup>201</sup> He is not a "man's man" if he perceives his family responsibilities as including time off work to pick up his wife after her operation in the hospital.<sup>202</sup> Lee concludes that the absence of gender analysis in current workplace bullying discourse is problematic.<sup>203</sup> Although both men and woman

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193. See Lee, *supra* note 140, at 206.

194. See *id.* at 207–08 (citing SUSAN HALFORD & PAULINE LEONARD, GENDER, POWER AND ORGANISATIONS 50–56 (2001)).

195. See *id.* at 212. She notes that women in organizations who are tolerated tend to play quasi-familial, limited roles. For example, the "aunt" is the older woman with senior status but no power. *Id.* at 215. The "daughter" is a younger woman who is allowed a few privileges but who has no real power. *Id.* (citing HALFORD & LEONARD, *supra* note 194, at 83).

196. See *id.* at 213–15.

197. *Id.* at 222.

198. *Id.* at 214–20.

199. See *id.*

200. *Id.* at 221, 225.

201. *Id.* at 222–23.

202. *Id.*

203. See *id.* at 225.

can bully and both can experience bullying, these facts do not prevent the behavior from being gendered.<sup>204</sup>

Carol Jones, a British feminist psychologist, also criticizes the mainstream bullying literature for tending to view bullying as gender neutral<sup>205</sup> and demonstrates the link between bullying and same-sex harassment of men. She explains that bullying experts often consider "bullying" and "harassment" to be general categories that subsume other forms of harassment such as sexual, gender, or racial harassment.<sup>206</sup> This approach obscures the gendered nature of organizations and bullying. The mainstream bullying scholars ignore gender; as evidence that bullying is gender-neutral, scholars note that both men and women are targets of bullying, and both men and women act as bullies.<sup>207</sup> Many of the bullying theorists attribute bullying, therefore, to organizational power alone.<sup>208</sup>

In response, Jones notes that many of the newer surveys demonstrate that women are more often the targets of bullying than their male counterparts.<sup>209</sup> Moreover, she reiterates that the research shows that as women move up the management ladder, they become subject to increased bullying; this research demonstrates that it is not merely organizational power that is responsible for bullying.<sup>210</sup>

The predominance of men as bullies would not surprise masculinities theorists. Men use sexual, gendered, and neutral means of harassment in order to demonstrate their own masculinity. The next Section on hazing and horseplay suggests that these behaviors occur in order to assure the male gender identity of the exclusively male group, and to create unity and to assure that women and outsider men do not join the club. This behavior, perhaps more than any other, in sex-segregated workforces maintains the status quo of segregation between men's jobs and women's jobs.

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204. *Id.*

205. See Carol Jones, *Drawing Boundaries: Exploring the Relationship Between Sexual Harassment, Gender and Bullying*, 29 WOMEN'S STUD. INT'L F. 147, 148 (2006).

206. *Id.* at 147.

207. *Id.* at 152 (reviewing the reasons why mainstream scholars claim that bullying is not gendered).

208. See *id.* at 151–52.

209. See *id.* at 151.

210. See *id.* at 152.



*b. Hazing and Horseplay*

Stale Einarsen and Bjorn Inge Raknes studied general harassment of men in a blue-collar sex-segregated workplace. The workplace was approximately ninety-five percent male. They defined harassment as distinct from sexual harassment.<sup>211</sup> They found a fairly high rate of harassment of men in a predominantly male workplace.<sup>212</sup> At least 88.5 percent of the men who answered the questionnaire had experienced one of the negative behaviors<sup>213</sup> during the previous six months<sup>214</sup> and most of the harassing behavior was propounded by co-workers.<sup>215</sup>

Younger men experienced more harassing behaviors than older men.<sup>216</sup> The researchers believe this may be because young workers were exposed to widespread horseplay and joking as well as hazing rituals for newcomers.<sup>217</sup> These behaviors "probably function" as an expression and test of male identity.<sup>218</sup> This research is important to the question of whether the behavior occurs "because of sex" because even though the researchers distinguish general harassment from sexual harassment, their conclusion that the behavior is a "test of male identity" relates to the gender of the victim. The male victims of the behavior, however, insisted that they had not been "sexually harassed." The victims and the researchers clearly defined sexual harassment much more narrowly than the behavior made unlawful by Title VII. Title VII forbids both sexual harassment and gender harassment. Harassment that

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211. Sexual harassment was defined as "[u]nwanted sexual advances," "[u]nwanted sexual attention," "[o]ffending telephone calls or written messages," and "[d]evaluing of your 'rights' and opinions with reference to your gender." Ståle Einarsen & Bjørn Inge Raknes, *Harassment in the Workplace and the Victimization of Men*, 12 VIOLENCE & VICTIMS 247, 252, 254 (1997).

212. *Id.* at 251.

213. To test whether a person had suffered bullying the authors administered the "Negative Acts Questionnaire" which consisted of a long list of acts or behavior that the employee may have experienced. Examples of these acts include the spreading of gossip or rumors, repeated offensive remarks, ridicule, and the withholding of information that is necessary to the person's job. *Id.* at 250, 253.

214. *Id.*

215. Harassment, as defined by the researchers, took five possible forms: (1) manipulation of the victim's reputation, (2) manipulation of victim's ability to perform work tasks, (3) manipulation of victim's ability to communicate with coworkers, (4) manipulation of social circumstances, and (5) violence or threats of violence. *Id.* at 249.

216. *Id.* at 259.

217. *Id.*

218. *Id.*

tests a person's "male identity" must occur because of gender under Title VII.

A predominant form of male identity harassment is hazing. Hazing is "an activity that a high-status member orders other members to engage in or suggests that they engage in that in some way humbles a newcomer who lacks the power to resist, because he or she wants to gain admission into a group."<sup>219</sup> Hazing rituals are prevalent in military academies and college fraternity and sorority inductions, even though many colleges and universities prohibit specific hazing behaviors.<sup>220</sup> Hazing rituals are ordinarily secret and may involve excessive drinking, forcing a pledge to eat feces or to wear diapers, the placement of the hazed in dark closed coffins, nudity, and phallic references.<sup>221</sup> Far from a harmless induction ceremony, hazing has resulted in serious injury and death.<sup>222</sup>

College campuses are infamous homes to hazing rituals. Peggy Reeves Sanday, an anthropologist, studies the culture of some<sup>223</sup> fraternities and the universities' support of such culture.<sup>224</sup> She analyzed the fraternity rape culture on college campuses in *Fraternity Gang Rape*.<sup>225</sup> A gang rape in 1983 at a University of Pennsylvania fraternity prompted her original study.<sup>226</sup> She found that men who join fraternities are subjected to severe hazing rituals in order to bond with the fraternity "brothers." These rituals unite the group and substitute family connections, love, and individual values for the values of the group. Once the inductee passes a secret test of masculinity, he then "becomes a man." Women are relegated to sex objects. During the hazing rituals, the pledges are accused of be-

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219. HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* xxv (1999).

220. *See id.* at 31-37, 92-115.

221. *See id.* at 131-32; SANDAY, *supra* note 86 at 166-79.

222. *See* NUWER, *supra* note 219, at 237-80 (listing "a chronology of deaths" occurring mostly by hazing).

223. Sanday makes it clear that the particular fraternity involved in the rape and the University of Pennsylvania are not the only institutions where this behavior occurs. In fact, she demonstrates that the behavior is normalized. By the same token, she is careful to state that not all fraternities or members of fraternities comport themselves in the ways discussed in her book or in this Article.

224. *See* SANDAY, *supra* note 86.

225. *Id.*

226. *Id.* at 36-38. Because the victim was in an alcoholic state and, according to Sanday, unable to give consent to sexual relations with a group of fraternity brothers, Sanday refers to the "alleged rape" as a "rape." *Id.* I will follow suit in this Article.

ing “wimps” and “pansies” and are forced to prove that they are “real men.”<sup>227</sup> She explains:

These rituals stamp the pledge with two collective images: one image is of the cleansed and purified “manly” self bonded to the brotherhood; the second image is of the despised and dirty feminine, “nerdy,” and “faggot” self bonded to the mother. Thus the process of becoming a man and a brother relies on negation and humiliation as a ritual device in order to break social and psychological bonds to the family in establishing new bonds to the brotherhood. The traumatic means employed to achieve these goals induces a state of consciousness that makes the abuse of women a repetition of cleansing the self of the inner, despised female as brothers renew their fraternal bonds.<sup>228</sup>

Once fraternity “brothers” enter into a homo-social relationship with one another, they build their unity and masculine status by denigrating women and girls. They attend pornographic films together, engage in group rituals and treat women as sexual objects.<sup>229</sup> Although the members speak about “pulling train” and “corpse riff” which refers to gang raping a woman who is comatose due to drugs or alcohol,<sup>230</sup> the brothers deflect the blame to the woman who, the brothers conclude, deserved the treatment she received.<sup>231</sup> Their common discourse reflects the “explosive nature” of male sexuality and the concept that “boys will be boys.”<sup>232</sup> Women are expected to control their own sexual behavior and are also responsible for controlling the men’s behavior.<sup>233</sup> The men, in contrast, by exercising their dominance over the women sexually, gain prestige and enhanced masculinity.<sup>234</sup> The hazing rituals, as well as group behavior once the pledges become brothers, break the young man’s bonds with his family so that he can exorcise all of his despised feminine aspects, bond with his fraternity brothers, and become a real man.<sup>235</sup>

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227. *Id.* at 165.

228. *Id.*

229. *See id.* at 140.

230. *Id.* at 89.

231. *See id.* at 106.

232. *Id.* at 83.

233. *See id.* at 106.

234. *See id.* at 83.

235. *See id.* at 165, 166–77.

Although not as secret and ritualistic, men also engage in hazing of newcomers in the workplace in order to assure group unity. Social scientists have studied the performance of masculinities in workplace environments that are all male or predominantly male. Even in the absence of women workers, the men enact masculinities in relationship to one another. That is, they engage in competitive ritual behaviors such as sexual humor, aggressive derogatory comments, and physical touching and grabbing of other men's genitals. The men compete aggressively by engaging in these behaviors in order to prove their masculinity to one another.

In many blue-collar workplaces, the competition takes the form of aggressive humor and derogatory comments. For example, men use humor to build a sense of solidarity, to break the monotony of their jobs, and to resist the tight control exercised over them by the managers.<sup>236</sup> In a study of the relationship between humor and masculinity in blue-collar shops in England,<sup>237</sup> the men working on the shop floor developed a "shared sense of masculinity" by adopting exaggerated nicknames for each other and by using hyper-masculine banter on the shop floor, "permeated by uninhibited swearing, mutual ridicule, [and] displays of sexuality and 'pranks.'"<sup>238</sup> By contrasting their own hyper-masculinity with what they characterized as effeminate behavior of management, the men actively resisted their subordination by management.<sup>239</sup> Note that their resistance was couched in explicit gender terms. They characterized management as effeminate: "twats" and "nancy boys."<sup>240</sup> This humor gave them a sense of power and authority at work, permitting them to "negate and distance"<sup>241</sup> their managers, even though their shop jobs required monotonous, repetitious tasks.

Their use of humor also allowed the men to exercise pressure on the group to conform to working-class masculinity. The shop followed the concept of "survival of the fittest."<sup>242</sup> For example, men were expected to take a joke and to laugh at themselves and spar with others, act aggressively and critically,

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236. See David L. Collinson, *'Engineering Humor': Masculinity, Joking and Conflict in Shop-floor Relations*, 9 *ORG. STUD.* 181, 184-185 (1988).

237. See *id.*

238. *Id.* at 186.

239. See *id.*

240. See *id.*

241. See *id.*

242. See *id.* at 187.

treat others disrespectfully, and create embarrassment in others.<sup>243</sup> Newcomers were especially vulnerable to the mistreatment. They “had to negotiate a series of degrading and humiliating initiation ceremonies,” designed to teach them how to take a joke and be a man.<sup>244</sup> The ability to survive these ceremonies signaled to the group that the initiate was willing to follow the precepts of the male group. The ridicule included displays of “tough masculinity” and the testing of it in others. The jokes centered on a “preoccupation with male sexuality and the differentiation of working class men from women.”<sup>245</sup> Through this performance, the workers constructed their identities as independent, powerful, and sexual, and dismissed women as passive and dependent.<sup>246</sup>

Men who others perceived as outsiders were kept at a distance or had to put up with the joking in any event. For example, the author of the study, David Collinson, clearly an outsider to the blue-collar workplace because of his education, observed that he endured joking. The humor directed at him emphasized his university degree and included derogatory comments comparing him to a woman—a “lazy cunt.” Finally, only after he proved his endurance and that he would not challenge the power dynamics at the workplace, the men gave him a card accepting him into the “dumb fuckers club.”<sup>247</sup>

The men emphasized two competing masculine identities on the shop floor: that of sexual conqueror and that of breadwinner. For the younger men, there was a display of sexuality through active construction of women as sexual objects. Derogatory comments about women as sexual objects and boasts of sexual conquests, combined with nude photographs of women displayed openly on walls of the shop floor, created an atmosphere of explicit compulsory male heterosexuality. For the older men, their role as breadwinners was a crucial part of male self-respect.<sup>248</sup> Men emphasized that it was their prerogative not to let their wives know how much money they earned,<sup>249</sup> and they judged themselves and others by their ability to purchase a home.<sup>250</sup> All engaged in peacocking behav-

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243. *See id.*

244. *Id.* at 188.

245. *Id.* at 190.

246. *See id.* at 191.

247. *Id.* at 190.

248. *See id.* at 191.

249. *See id.* at 192.

250. *See id.* at 197.

ior—strutting their masculine prowess—by using foul language and rough discussion of women. Collinson observes, however, that many of the men admitted to him that they did not act this way at home.<sup>251</sup> Indeed, their behavior was a performance that established their identities as masculine men, a performance that was necessary to survive the work environment. The gendered behavior did not exist outside of the workplace; rather, the men's gender identities were socially enacted at work through their performances and their interactions with one another.<sup>252</sup>

Tension on the shop floor illustrated a conflict between these two competing masculinities. There was tension between the men's informal culture and the collective bonus system.<sup>253</sup> Both reflected contradictory definitions of masculinity. The informal culture, which emphasized the working class masculinity of the workers and their sexual prowess, discouraged increased productivity and encouraged solidarity in resisting managerial control.<sup>254</sup> The collective bonus system, however, encouraged increased productivity, which, in turn, enhanced the masculinity of members of the group by helping men earn more and achieve the status of good providers.<sup>255</sup> Within this contradictory framework, the men used humor to control and discipline workers who were perceived as lazy. Humor related to a fellow worker's laziness often touched a nerve in the victim and led to battles and unwillingness to talk to coworkers.<sup>256</sup> Ironically, "[a]s a result of these shop-floor battles for dignity, which emerge in jokes but collapse into mutual disdain, hierarchical control becomes unnecessary."<sup>257</sup>

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251. See *id.* at 192.

252. For a description of how outsider employees perform their identities in the workplace and for an argument that making adverse employment actions based on an employee's failure to perform an "insider" identity should violate Title VII, see generally Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). Professors Carbado and Gulati explain that the performance of identities helps outsiders become more acceptable in the workplace but may lead to a denial of oneself. See *id.* at 1288. While masculinities behaviors in the shop context are performed to allow the worker to fit in with coworkers rather than as a signal to superiors or supervisors (and are often in reaction to supervisors), these behaviors also appear to be performance of identities in order to gain acceptance.

253. See Collinson, *supra* note 236.

254. See *id.*

255. See *id.*

256. See *id.*

257. *Id.* at 197.

The men used humor to mask serious criticism and fragile relationships. The relationships between the men were mostly defensive and superficial. A number of the workers admitted that the joking sometimes went too far and that they engaged in the practice as a performance in order to comply with the culture's demands.<sup>258</sup> Collinson noted:

The whole masculine style of shop-floor joking was aimed at testing and displaying the individual's inner strength to withstand teasing and ridicule. Yet, paradoxically, many of the men who subscribed to the culture and articulated its demands could not, in fact, handle them. The pressing and pervasive desire to secure male dignity in the eyes of others was repeatedly found to be incompatible with a concern to display impregnability and a disregard for the crit/witicisms of others. The sensitivity of working-class male identity meant that joking was often misinterpreted, when used as a pretense of hostility, and construed correctly when employed to 'make a point.'<sup>259</sup>

Often a worker would "snap" as a result of the joking aimed at him, which at times would have a malicious intent. In one case, the victim of the jokes suffered a "total emotional breakdown."<sup>260</sup>

These studies demonstrate that men in all-male environments often engage in hazing and horseplay behaviors that serve many purposes. First, the hazing assures that new members live up to the masculine ideals that identify the environment; second, it establishes the masculine norms of behavior; third, it provides proof of the masculinity of individual members for their friends and colleagues; and fourth, as in the shop floor example, hazing and horseplay are used as a form of resistance or fighting back against a more oppressive form of masculinity.

### 3. Harms Caused by Bullying

Collinson noted the damage caused by masculine behaviors on the shop floor. The rough behavior caused hurt feelings, anger, damaged relationships, and a total nervous breakdown in

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258. *Id.* at 193.

259. *Id.*

260. *See id.* at 194.

one case.<sup>261</sup> Men who “did not act that way at home” felt forced to perform their masculine identities in hyper-masculine ways at work in order to fit in.<sup>262</sup>

Other researchers have also found that bullying, hazing and harassment in the workplace cause serious harm to the victims. Pervasive negative behaviors correlate with low job satisfaction<sup>263</sup> and damaged psychological health,<sup>264</sup> and affect not only the victims’ work relationships but also their family relationships.<sup>265</sup> Studies have reported that bullying victims are depressed,<sup>266</sup> and one study reported that forty-four percent of victims experienced symptoms at the level of Post Traumatic Stress Disorder.<sup>267</sup>

This research demonstrates that hazing behaviors cause many serious harms. With an understanding of masculinities

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261. *See id.*

262. *Id.* at 192–93. Although these men are not outsiders (in the sense that they do not belong to outsider race, gender, or national origin groups) in Collinson’s shop, their behavior resembles the performance of identities that outsiders negotiate in workplaces in order to gain acceptance. *See* Carbado & Gulati, *supra* note 252, at 1288. Collinson explained the burden on some of these “insiders” in order to conform to the workplace norms. As Carbado and Gulati note, there is a cost to outsiders of performing identities that are at odds with their social and political images. *See id.* at 1290. Unless Collinson’s workers performed masculinities, they feared (and were probably correct) harassment from others in the group. *Id.* at 187–89. Instead of standing up to the group, they participated in behaviors that were often harmful to themselves. *Id.* at 193–94. This behavior is similar to the “comforting” that Carbado and Gulati describe as performing “comforting acts to make insiders comfortable with their outsider status,” but that take their toll on the performer. *Id.* at 1301 (citing Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions between “Different” Minorities*, 85 CORNELL L. REV. 313, 400 (2000)).

263. Nathan A. Bowling & Terry A. Beehr, *Workplace Harassment from the Victim’s Perspective, A Theoretical Model and Meta-Analysis*, 91 J. APPL. PSYCHOL. 998, 1008 (2006); *see also* Cortina et al., *supra* note 160, at 75 (demonstrating the relationship between low job satisfaction and victimization); Maarit Vartia & Jari Hytti, *Gender Differences in Workplace Bullying Among Prison Officers*, 11 EUR. J. OF WORK & ORG. PSYCHOL. 113, 124 (2002) (same).

264. Einarsen & Raknes, *supra* note 211, at 256.

265. *See* Sian E. Lewis & Jim Orford, *Women’s Experiences of Workplace Bullying: Changes in Social Relationships*, 15 J. CMTY. & APPLIED SOC. PSYCHOL. 29, 42 (2005).

266. *See* Vaez et al., *supra* note 159, at 576–79.

267. Tehrani, *supra* note 154, at 363; *see also* Helge Hoel et al., *Bullying is Detrimental to Health, but all Bullying Behaviors are not Equally Damaging*, 32 BRIT. J. GUIDANCE & COUNSELING 368 (2004) (finding harm similar to PTSD); David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 483 (2000) (cataloguing the illnesses caused by bullying at work).



theory, these harms should be compensable under Title VII because the behaviors occur because of sex.

*C. Reconciling Sexual and Gender Harassment, Bullying, and Hazing*

1. Using Masculinities to Identify Similarities

Although scholars who study bullying, harassment, and hazing come from diverse fields, the behaviors described are virtually the same for purposes of legal analysis. The bullying and mobbing research originated in studies of children in schools and moved to persons in the workplace. Researchers from fields as diverse as educational psychology and management approach the research from different perspectives. Some focus on the characteristics of the bullies and the victims while others focus on the importance of the organization in generating and preventing bullying behaviors. The behaviors demonstrate a remarkable similarity across the board, whether the perpetrators and/or victims be children or adults, and whether the behavior occurs in schoolyards, in fraternities, in shops, or in the upper echelons of management. Moreover, while the incidence of bullying or harassment may vary depending on geographical location, in Scandinavia, Germany, the United Kingdom, or the United States, the behaviors are comparable. There is a common incidence of serious harassing/bullying behavior in workplaces and schools in all of the locations studied.

For research purposes, scholars distinguish among bullying, harassment, and incivility, and many researchers consider sexual harassment a separate category. Because Title VII law requires only that harassing behavior be unwelcome, sufficiently severe or pervasive to alter the terms or conditions of employment, and occur because of sex, the distinctions that researchers draw among bullying, harassment, and incivility are not always relevant for the law's purposes.

Unlike the narrow definitions of bullying, harassment, and incivility, Title VII reaches behavior that creates unequal employment opportunity for men, women, masculine, and feminine persons. It reaches behavior that is sexual in nature, gendered, or gender-neutral. The only common requirements are that the behavior occur because of sex and that it be sufficiently severe or pervasive and unwelcome. As demonstrated in Part II.C.1. below, "because of sex" includes behavior that

intentionally treats someone differently because of sex or gender, but some courts correctly conclude that it also includes behavior that has a differential effect on men and women and persons who are gendered feminine and masculine.

Not all bullying or harassing behavior occurs because of sex under this definition, but masculinities research combined with the new research on bullying suggests that much of the behavior occurs because of sex, even though bullying researchers may not define the behavior as sexual harassment. Without masculinities theory, many of these common behaviors appear to belong to different categories. However, masculinities theory demonstrates the gendered structures in the workplace and the gendered nature of much workplace behavior, even behavior in which gender is invisible. The theory demonstrates that many men engage in bullying tactics in an effort to prove their masculinity to their peers and that the behaviors reinforce the gender norms of the workplace. Because these behaviors become associated with the definition of work, women may also engage in many of these behaviors. That some women engage in competitive, masculine bullying behaviors does not mean, however, that the behavior is not gendered. Masculinities theory demonstrates that the masculine practices in the workplace harm both women and men, but the practices often have a disparate impact on women.

## 2. Reasons for Denying that Bullying is Gendered

### *a. Definition of Gender as Relating to Biological Sex Only*

As discussed above, most bullying scholars do not define bullying as involving gender or race. Although some scholars, especially those in the United Kingdom and the United States, found that men bully more than women and that men bully women who are their superiors, a practice in which few women engage, the Scandinavian studies conclude that bullying is not gendered.<sup>268</sup>

The earlier Scandinavian and German scholars tended to define sexual harassment narrowly. Ordinarily, sexual harassment occurs using their narrow definitions only if there are unwanted sexual advances. However, recent research has

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268. See Einarsen, *supra* note 93, at 386; Salin, *supra* note 156, at 427, 435.

linked bullying to gender. Unlike the Scandinavian and German scholars' narrow definition, Title VII defines illegal harassment to include sexualized and gendered behavior, and should include gender-neutral behavior if the plaintiff can prove that it occurs because of sex.<sup>269</sup>

*b. Political Palatability*

Deborah Lee contends that bullying scholars disagree about whether bullying is linked to gender.<sup>270</sup> She posits that scholars make a political decision when they define bullying as gender-neutral because claims of sexual and racial harassment are met with hostility and perceived as requests for "special treatment."<sup>271</sup> She argues that bullying as a gender-neutral phenomenon is safe because it applies to all abuses of power and does not ask for a privileged status.

Law professor David Yamada has worked at the forefront of legal academics who apply bullying research to United States law. He has proposed a status-blind statute that would proscribe bullying in the workplace. His proposed statute on bullying is similar to the law of hostile work environment under Title VII.<sup>272</sup> In *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*,<sup>273</sup> Professor Yamada justifies the statute by demonstrating that American common law and statutory law do not adequately remedy workplace bullying.<sup>274</sup> He models his bill on current Title VII hostile work environment law and argues that a reason for passing the gender-neutral, anti-bullying law is that courts have failed to interpret Title VII to capture harassing behavior that is gender-neutral in cases in which there is both sexual and gendered treatment and gender-neutral treatment.<sup>275</sup> Under Yamada's proposal, a plaintiff would not have to prove that the behavior occurred because of sex.

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269. See generally Schultz, *supra* note 4.

270. See Lee, *supra* note 140, at 209.

271. *Id.*

272. See generally Yamada, *supra* note 267; see also David C. Yamada, *Introduction to the Symposium on Workplace Bullying: Crafting a Legislative Response to Workplace Bullying*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 475, 516-21 (2004) (including a draft of "The Healthy Workplace Bill," which creates a cause of action for bullying).

273. Yamada, *supra* note 267.

274. See *id.* at 493-514.

275. See *id.* at 512.

Rather, she would merely have to prove that the behavior constitutes illegal bullying. There is much to be said for this approach. It is pragmatic and may be the best practical method of penalizing the behavior described. Something important is lost, however, if we fail to recognize that men construct their masculine identities at work at the expense of women and at the expense of those men who are unable or unwilling to join the harassing behaviors.

## II. THE LEGAL LANDSCAPE OF SEXUAL HARASSMENT

This Subpart discusses the jurisprudence of the Supreme Court in the area of gender and sexual harassment law under Title VII and the scholars' and lower courts' interpretation of this jurisprudence. It focuses especially on the because of sex element of harassment law. It then uses masculinities theory and the new bullying research to analyze the four fact patterns described in the Introduction and to demonstrate that often these behaviors occur because of sex under Title VII.

### A. *The Supreme Court's Jurisprudence*

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of an individual's race, color, religion, sex, or national origin. The express language of the Act does not mention harassment. Nonetheless, federal courts have recognized that racial harassment creates a cause of action under Title VII, based on an intimidating, hostile, or offensive working environment, when that environment alters the terms or conditions of the plaintiff's employment. For example, in *Rogers v. EEOC*, the Fifth Circuit held that a Latino plaintiff established a violation of Title VII by demonstrating that his employer had created a hostile work environment for its Latino workers when it treated its Latino customers with disrespect.<sup>276</sup>

Lower courts subsequently found illegal harassment based on a plaintiff's race, religion, and national origin.<sup>277</sup> Following

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276. 454 F.2d 234 (5th Cir. 1971).

277. See, e.g., *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (finding illegal discrimination on the basis of the employee's national origin); *Vaughn v. Westinghouse Elec. Corp.*, 620 F.2d 655, 661 (8th Cir. 1980) (finding illegal discrimination on the basis of the employee's race), *aff'd*, 702 F.2d 137 (8th Cir. 1983); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 551 (6th Cir. 1975) (finding illegal discrimination on the basis of the employee's religion), *va-*

the lower courts, the EEOC issued guidelines in 1980 for Title VII liability in sexual harassment cases. The guidelines distinguished between harassment that is directly linked to an economic quid pro quo and harassment that alters the terms or conditions of employment because it creates an abusive environment based on a person's sex. In either case, the guidelines state, the conduct constitutes actionable sexual harassment under Title VII if it has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."<sup>278</sup> After the guidelines were issued, lower courts uniformly held that a cause of action existed under Title VII for a hostile work environment based on sexual harassment.<sup>279</sup>

In *Meritor Savings Bank, FSB v. Vinson*,<sup>280</sup> the United States Supreme Court confirmed that the creation of a hostile work environment that is sufficiently severe or pervasive to alter a person's work environment constitutes sex discrimination under Title VII. The plaintiff in *Meritor* presented evidence that her supervisor had subjected her to repeated demands for sexual favors, fondling, and forcible rape.<sup>281</sup> Adopting the reasoning of the EEOC Guidelines, the Court held that the statutory language prohibiting discrimination in the "terms, conditions or privileges of employment" protects workers from abusive working environments based on sex, as well as race and national origin.<sup>282</sup>

While *Meritor Savings Bank* recognizes a cause of action for severe or pervasive sexual harassment, it also demonstrates that the Court's original conception was that sexual harassment arises from an interest on the part of an individual heterosexual male in establishing a romantic relationship with a female employee. This conception represents a distorted view of the behavior described in *Meritor Savings Bank* and most

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cated, 433 U.S. 903 (1977), *dismissed on remand* by 561 F.2d 658 (6th Cir. 1977); see also *Jackson v. Quanex Corp.*, 191 F.3d 647, 657 (6th Cir. 1999) (stating that Title VII provides a cause of action for racial harassment in the workplace); *Latimore v. Polaroid Corp.*, 99 F.3d 456, 463 (1st Cir. 1996) (noting that workplace harassment may take the form of racial discrimination); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir. 1991) (recognizing a Title VII claim on the basis of racial harassment).

278. See 29 C.F.R. § 1604.11(a)(3) (2007).

279. See, e.g., *Katz v. Dole*, 709 F.2d 251, 254–255 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

280. 477 U.S. 57 (1986).

281. See *id.* at 60.

282. *Id.* at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

other sexual harassment cases. It characterizes the harassing behavior as a mistaken advance by a well-meaning man who simply followed his natural urges and did not understand the line between work and pleasure. A close look at the facts in *Meritor Savings Bank* demonstrates, however, that the employer was less interested in a romantic relationship than in bolstering his own power and masculinity. Michelle Vinson alleged that her supervisor, Sidney Taylor, subjected her to four years of continuous sexual harassment, including repeated demands for sexual favors, fondling her in front of other employees, demeaning her and other female employees, and following her into the restroom.<sup>283</sup> His behavior, according to the plaintiff, culminated in forty instances of unwelcome sexual intercourse as well as forcible rape on several occasions.<sup>284</sup>

Less egregious but similarly offensive behavior occurred in *Harris v. Forklift Systems, Inc.*,<sup>285</sup> where the male company president targeted the female plaintiff with unwanted sexual innuendos, name calling, suggestions that they negotiate her raise at a hotel, and embarrassing false accusations of sexual behavior.<sup>286</sup> The Court held that a plaintiff need not demonstrate severe psychological damage to state a cause of action for a hostile work environment; rather, a plaintiff proves a violation of Title VII when she shows that the harassment is sufficiently severe or pervasive, by objective and subjective measures,<sup>287</sup> to alter the terms or conditions of employment.

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283. *Id.* at 60

284. *Id.*

285. 510 U.S. 17 (1993).

286. *See id.* at 18–19.

287. *Id.* at 21 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)). There is a split among the circuits concerning whether the objective standard is the “reasonable woman” standard or the “reasonable person” standard. Jurisdictions that use the “reasonable woman” standard examine whether the behavior is sufficiently severe or pervasive to alter the terms or conditions of a “reasonable woman” in the workplace. Those employing a “reasonable person” standard examine the severity or pervasiveness of the behavior from the viewpoint of a “reasonable person” rather than a “reasonable woman.” *See* Gray v. Genlyte Group, Inc., 289 F.3d 128 (1st Cir. 2002) (applying the “reasonable woman” standard in a case applying Massachusetts law); *Richardson v. N.Y. State Dep’t of Correctional Services*, 180 F.3d 426, 436 (2d Cir. 1999) (refusing to adopt the “reasonable woman” standard because it would reinforce stereotypes about women); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (adopting the “reasonable woman” standard and noting that use of a “reasonable person” standard might reinforce the “prevailing level of discrimination.”). Although the Supreme Court did not address the issue directly in *Harris v. Forklift Systems, Inc.*, the Court defined an objectively hostile work environment as one that “a reasonable person would find hostile or abusive.” 510 U.S. at 21. *Harris* did not settle the

Although *Meritor Savings Bank* and *Harris* establish important rights for plaintiffs in sexual harassment cases, the opinions ignore the key roles that power and masculinity play in sexual harassment. Instead of benign romantic pursuit, the harasser's behavior in both *Meritor Savings Bank* and *Harris* was disrespectful, coercive, demeaning, and decidedly unromantic. The perpetrators in *Meritor Savings Bank* and *Harris* sought to establish their masculinity by acquiring power over the victims by means of intimidation, sexual innuendo, and, in *Meritor Savings Bank*, rape.

After *Meritor Savings Bank* and *Harris*, lower courts and commentators struggled with the issue of whether Title VII created a cause of action for victims of same-sex harassment.<sup>288</sup> This issue was important to persons who suffered from harassment perpetrated by members of their own sex. But it was also important because it made visible courts' underlying assumptions in other sex harassment cases that harassment occurred because of sexual desire or romantic interest. The same-sex cases raised the question of whether Title VII forbids only sexually harassing behavior that is motivated by sexual desire or romantic pursuit. If not limited to the desire-dominance motivation, the cases raised the question of whether Title VII forbids sexual or non-sexual harassing behavior that

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question of whether the reasonable woman standard is still good law. *See id.* *Oncale*, which was decided after *Harris*, notes that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (citing *Harris*, 510 U.S. at 23). This standard is consistent with the reasonable woman standard because it requires the fact finder to consider the plaintiff's position. *See id.* at 80. The Ninth and First Circuits continue to use the "reasonable woman" standard after *Harris*. *See, e.g.*, *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir., 2007); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1173 (9th Cir. 2003) (using the "reasonable woman" standard); *Gray v. Genlyte Group, Inc.*, 289 F.3d 128, 133 (1st Cir. 2002) (using the "reasonable woman" standard).

288. *See e.g.*, *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (concluding there was a cause of action under Title VII where it was alleged that the perpetrator was motivated by sexual attraction, but declining to decide whether it was necessary for the perpetrator to be a homosexual for a cause of action to lie); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996) (holding that a cause of action exists under Title VII for same sex harassment where the perpetrator is a homosexual); *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1374, 1379 (8th Cir. 1996) (holding that there was a cause of action under Title VII where a male plaintiff was exposed to physical and verbal assaults over two years by other men because he was subjected to disadvantageous conditions at work); *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996) (holding that there was no cause of action under Title VII for same-sex harassment).

occurs because of the sex or gender of the victim. They also raised the question of whether sexual behavior is necessary or sufficient for a Title VII sexual or gender harassment case. In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>289</sup> the Supreme Court attempted to answer some of these questions. The case involved egregious male-on-male harassment. Joseph Oncale, a roustabout on a Texas oil rig, alleged that coworkers and supervisors restrained him while one placed his penis on Oncale's neck and arm, threatened to rape him, and used force to "push a bar of soap into Oncale's anus" while he was in the shower.<sup>290</sup> Oncale testified at his deposition that he quit his job because he was afraid that he would be raped.<sup>291</sup> The Supreme Court held that Title VII creates a cause of action for sexual harassment where the harassers and the victim are of the same sex if the environment discriminates "because of sex."<sup>292</sup> In *Oncale*, the Court suggested that there are at least three ways to prove that the behavior occurred because of sex. First, the plaintiff may prove that the defendant's employee was homosexual and harbored sexual desire for the plaintiff.<sup>293</sup> Second, the plaintiff may prove that the harasser or harassers objected to persons of his or her sex in the workplace.<sup>294</sup> Third, the plaintiff may demonstrate that there was differential treatment of men and women at work.<sup>295</sup> While there is debate concerning whether these are the exclusive means of proving that the behavior occurs because of sex,<sup>296</sup> the *Oncale* Court offered these means of proof as illustrative, rather than exclusive.<sup>297</sup>

*Oncale* gives almost no guidance as to the meaning of "because of sex," and significant confusion has resulted concerning the interpretation of the requirement. The Supreme Court remanded *Oncale* to the lower court with instructions to allow a fact finder to determine whether the behavior occurred because

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289. 523 U.S. at 77.

290. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-119 (5th Cir. 1996), *rev'd and remanded*, 523 U.S. 75 (1998).

291. *See Oncale*, 523 U.S. at 77.

292. *See id.* at 80.

293. *See id.*

294. *See id.*

295. *See id.* at 80-81.

296. Some courts have held or assumed that these are the exclusive means of proving that the harassment occurs because of sex. *See infra* note 299.

297. *See Oncale*, 523 U.S. at 80-81.



of sex. However, the case settled days before the scheduled trial.<sup>298</sup>

All federal courts of appeal that have dealt with the issue since *Oncale* have concluded that the use of sexual conduct or language alone to harass another person does not automatically prove that the harassment was *because of sex*; however, they disagree about the requirements for determining whether behavior occurs because of sex.<sup>299</sup>

Although not a sexual harassment case, *Price Waterhouse v. Hopkins*,<sup>300</sup> which was decided nine years before *Oncale*, has played a key role in sexual harassment law, especially in the context of same-sex harassment. It is an important case because it expanded the definition of “because of sex” to include a prohibition to discriminate because of a person’s gender. Gender, the societal expectations of the behavior of a person of a particular biological sex, is a much broader category than biological sex. Thus, after *Price Waterhouse*, it is illegal to engage in gender harassment. That is, it is illegal to harass a person because of his failure to conform to gendered expectations.<sup>301</sup>

In *Price Waterhouse*, Ann Hopkins, a successful accountant at the defendant firm, was denied partnership because the partners perceived her as too masculine and aggressive.<sup>302</sup> Her mentor explained to her that she could improve her chances of election to partnership if she would “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>303</sup> The Court explained that Title VII forbids

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298. See Mary Judice, *LA Offshore Worker Settles Sex Suit; Harassment Case Made History in Supreme Court*, TIMES-PICAYUNE (New Orleans, La.) Oct. 24, 1998, at C1; L.M. Sixel, *Same-sex Harassment Suit Settled; Oil Rig Worker's Case Went to Supreme Court*, THE HOUSTON CHRONICLE, Oct. 27, 1998, at 1.

299. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006) (assuming that there are only three ways of proving same-sex discrimination). Compare *Pedroza v. Cintas Corp.* No. 2, 397 F.3d 1063, 1068–70 (8th Cir. 2005) (stating that the list in *Oncale* is non-exhaustive, but apparently assuming that “bawdy” “locker room” behavior does not occur because of sex), and *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1264 (10th Cir. 2005) (holding that proving discrimination because of sex by means of *Oncale*’s first prong requires a showing that the defendant was motivated by sexual desire but not that the defendant identified as a homosexual), with *La Day v. Catalyst Tech.*, 302 F.3d 474, 480 (5th Cir. 2002) (considering the behavior of the harasser toward the victim to decide whether there was sufficient evidence that the harasser may be homosexual).

300. 490 U.S. 228 (1989).

301. See, e.g., *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

302. See *Price Waterhouse*, 490 U.S. at 235, 250.

303. *Id.* at 272 (O’Connor, J., concurring) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

stereotyping that would place women in a double bind in a competitive work environment:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.<sup>304</sup>

The Court concluded that evidence of sex stereotyping tainting the decision-making process in *Price Waterhouse* was sufficient to prove that sex was a motivating factor in the refusal to promote Hopkins. Justice O'Connor concurred, decrying the use of stereotyping in employment and treating stereotyping of this sort as if it were direct evidence of conscious discriminatory intent:

It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.<sup>305</sup>

Under *Price Waterhouse*, adverse decision making resulting from an employee's failure to adhere to sex stereotypes is discrimination because of sex. A number of courts have relied on *Price Waterhouse*'s reasoning to conclude that Title VII forbids sexual or gendered harassment that is directed at an individual because of his or her failure to conform to gender norms

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304. *Id.* at 251 (internal citations omitted); see also *Bellaver v. Quanex*, 200 F.3d 485 (7th Cir. 2000) (reversing district court's grant of summary judgment because a reasonable jury could conclude that the defendant discharged the plaintiff because of sex stereotyping where there was evidence that she was aggressive but that men who were aggressive were not discharged).

305. *Price Waterhouse*, 490 U.S. at 272-73 (O'Connor, J., concurring).

and stereotypes.<sup>306</sup> *Price Waterhouse*, combined with *Oncale*, has a potentially powerful effect on same-sex harassment cases. This issue is discussed at greater length in Part II.C.2. below.

### B. *Legal Scholars' Views of Sexual Harassment*

This Subpart discusses groundbreaking legal scholarship that has analyzed the concept of sexual harassment "because of sex." It draws upon this scholarship to elucidate workplace behavior and how it should be interpreted under Title VII. It also applies the new research on masculinities theory, bullying, and hazing that was developed above, in order to go beyond this scholarship and suggest an even more nuanced explanation of how "because of sex" should be interpreted under Title VII.

In *Reconceptualizing Sexual Harassment*,<sup>307</sup> law professor Vicki Schultz criticizes the sexual-desire-dominance paradigm that underlies court decisions in sexual harassment law. Her critique focuses on the way this model encourages courts to consider only sexual behavior and to ignore the most damaging gender-based behavior.<sup>308</sup> She demonstrates that courts disaggregate evidence of sexual and gendered behavior into two different causes of action, sexual harassment and sex discrimination, a practice that led to the dismissal of many suits in which women suffered severe, hostile work environments because of their sex.<sup>309</sup>

Schultz decries courts' use of a different standard for non-sexual harassing behavior directed at women at work,<sup>310</sup> and she notes that courts do not understand that apparently neutral behavior may occur because of sex. For example, Schultz demonstrates that courts do not recognize competence-destroying behaviors—such as refusing to train women, sabo-

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306. See, e.g., *Hamm*, 332 F.3d at 1062; *Spearman*, 231 F.3d at 1085–86.

307. See Schultz, *supra* note 4, at 1741.

308. See *id.* at 1689, 1713–16, 1720–29.

309. See *id.* at 1713–20. Social science research supports Schultz's argument that much, if not most, of the harassing behavior directed at women does not result from sexual or romantic desire, but from an interest in removing the women from the job. See, e.g., Louise F. Fitzgerald et al., *Measuring Sexual Harassment in the Military: The Sexual Experiences Questionnaire (SEQ-DoD)*, 11 MIL. PSYCHOL. 243, 249 (1999) (concluding that "natural attraction" plays little role in sexual harassment but that sexism plays a major role as demonstrated by research results that sexual attention virtually never occurs without some form of hostility or coercion).

310. See Schultz, *supra* note 4, at 1739–44.

taging women's work, and forcing women to perform stereotypically female tasks—as occurring because of sex.<sup>311</sup>

Linking harassment to workplaces and jobs that are sex-segregated, Schultz proposes that a “competence-centered” paradigm replace the desire-dominance paradigm.<sup>312</sup> She observes that most jobs are segregated according to gender. Men hold “masculine” jobs that are more prestigious and better paid than those held by women, while women hold less prestigious, lower-paid “feminine” jobs.<sup>313</sup> Schultz argues that men perceive themselves as having a property interest in the “masculine” jobs and use harassment to undermine women's competence in order to preserve the job as masculine.<sup>314</sup>

Schultz concludes that a competence-centered paradigm would account for same-sex harassment as well. Just as men harass women in order to preserve the masculinity of the job and to undermine women's competence, men may also harass men who they see as insufficiently masculine to perform the job.<sup>315</sup> Schultz proposes that the harassment is gender-based “if it denigrates the harassee's manhood or otherwise prescribes how the harassee should be or should behave on the job.”<sup>316</sup>

In *What's Wrong with Sexual Harassment?*,<sup>317</sup> law professor Katherine Franke explores the meaning of “because of sex” and articulates a theory to justify the conclusion that sexual harassment is sex discrimination. She notes that courts and scholars have advanced three justifications for finding that sexual harassment is sex discrimination: (1) the equality principle; (2) the anti-sex principle; and (3) the anti-subordination principle.<sup>318</sup>

The equality principle uses a “but for” test to decide whether harassment occurred because of sex. If members of the “opposite” sex would not have been harassed by the harasser, then this principle would conclude that the behavior occurred because of sex. Like Schultz, Franke rejects the sexual desire premise.<sup>319</sup> Franke also criticizes the equality principle

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311. *See id.* at 1751–54.

312. *Id.* at 1690–91.

313. *Id.* at 1756–61.

314. *Id.* at 1755 n.387.

315. *See id.* at 1777.

316. *Id.*

317. *See* Franke, *supra* note 21.

318. *See id.* at 704.

319. *Id.* at 732–39.

because it grants undue attention to the subjective motivations of the perpetrator.<sup>320</sup> Title VII, she argues, is aimed at the consequences or effects of the employment practices more than at the motivations of the perpetrators.<sup>321</sup> She attacks the “but for” test because it relies upon and emphasizes a heterosexist approach to sex discrimination law in that it “has the effect of reenacting and reinforcing the fundamental heterosexist assumption that all or virtually all intersexual interactions have some sexual aspect to them, and that all intrasexual interactions are presumed devoid of sexual desire or interest.”<sup>322</sup> By conflating sexism and heterosexism, the law unintentionally reinforces the “mindset that produces sexual harassment.”<sup>323</sup>

Franke also rejects the anti-sex principle. According to Franke, sexual content does not necessarily mean that the behavior is discrimination “because of sex.” The anti-sex principle, she argues, is too restrictive of workers’ freedoms. It ignores the agency of women as sexual beings and relies on a paternalistic assumption that women do not have the capacity to consent or object to sexual activity in the workplace.<sup>324</sup>

Finally, Franke concludes that the anti-subordination principle relies too heavily on the harm that men do to women and fails to account for same-sex harassment.<sup>325</sup> Franke suggested that the anti-subordination account would be greatly improved if it conceptualized the problem “as one of gender subordination defined in hetero-patriarchal terms.”<sup>326</sup>

Franke proposes a theory of sexual harassment that describes sexual harassment as the “technology” of sexism.<sup>327</sup> Its purpose is to punish the failure to conform to gender norms and to reinforce those norms. While Franke focuses less on workplace segregation and the role the workplace plays in creating gender stereotypes, her view is very similar to that of Schultz in that she sees harassment as occurring in order to police gender norms.

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320. *See id.* at 745–46.

321. *See id.* at 745.

322. *Id.* at 735.

323. *Id.* (quoting Jane Gallop, *The Lecherous Professor: A Reading*, DIFFERENCES: J. FEMINIST CULTURAL STUD., Summer 1995, at 11).

324. *See id.* at 746.

325. *See id.* at 760.

326. *Id.*

327. *Id.* at 693.

In *The New Jurisprudence of Sexual Harassment*,<sup>328</sup> law professor Kathryn Abrams defends the anti-subordination principle because it accommodates a variety of reasons for harassment while maintaining the focus on women's subordination in the workplace. She argues that harassment in the workplace is problematic because work is "a setting where women have historically been marginalized or relegated to distinct and limited roles and where they continue to face hostility and systematic obstacles to professional progress."<sup>329</sup> Because work provides the locus of women's potential liberation and resistance to discrimination, Abrams explains, harassment at work is especially destructive. Abrams notes that harassing practices may either intentionally or unintentionally drive women out of the workforce and, in doing so, preserve male control over the job.<sup>330</sup> Abrams criticizes Franke for her failure to focus on what sexual harassment means for women in the workplace; she emphasizes the importance of the workplace as a place of women's resistance to male subjugation.<sup>331</sup>

Like Schultz, Abrams argues that sexual harassment functions as a means of establishing male control in the workplace and of perpetuating masculine norms at work.<sup>332</sup> She notes that some forms of harassment are aggressive, while others are more subtle. Even when directed at individual women, sexual harassment operates against women as a group, sending the message that women do not belong in the job or workplace.<sup>333</sup> Moreover, like Schultz, Abrams notes that the reaffirmation of masculine norms is accomplished by denigrating the female at work.<sup>334</sup> Masculine practices, such as circulating pornography or bagging, according to Abrams, "express a vaguely sexualized form of masculine camaraderie."<sup>335</sup>

While there are differences in the theories presented by Schultz, Franke, and Abrams, there is also substantial agreement among all three scholars that the sexual de-

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328. See Abrams, *supra* note 22.

329. *Id.* at 1185.

330. See *id.* at 1198.

331. See *id.* at 1170, 1198. Abrams also criticizes the work of Bernstein, *supra* note 23, who advocates a gender neutral approach and a focus on the dignity of the individual. See Abrams, *supra* note 22, at 1185.

332. See *id.* at 1205.

333. See *id.* at 1206-08.

334. See *id.* at 1209.

335. *Id.* at 1211.

sire/dominance paradigm is not a proper theoretical foundation for sexual harassment law.

How would these authors decide the four types of cases posed in the Introduction? Abrams, who focuses on sexual harassment law as a means of avoiding the subordination of women at work, would likely agree that in the first case, where a group of men in a formerly all-male workplace harasses a woman using means that are not specifically directed at the woman, the woman has a cause of action for hostile work environment. Even though women are not specifically targeted in workplaces, if the workplace is sex segregated and permeated with behavior and comments derogatory to women as sexual objects, Abrams would likely take the position that the behavior should be regulated because it subordinates women to male power in the workplace, an important location of women's resistance. Schultz and Franke do not comment on this particular fact pattern, but they, too, may agree. As we shall see, however, at least one court reads Schultz to conclude that sexual behavior, even when it is degrading to women, does not create a hostile work environment for women.<sup>336</sup> Franke might criticize courts for using the "but for" analysis where the behavior occurred before women entered the workforce and continues after their presence in the workforce.

In the second case, where men harass other men for not conforming to gender norms, all would agree that same sex harassing behavior aimed at punishing gender non-conforming men violates Title VII because it alters the terms and conditions of employment based on gender. All would likely be concerned with courts' attempts to distinguish between discrimination because of sex and because of sexual orientation, but Franke may be particularly troubled since courts' analyses reinforce a heterosexist interpretation of the law.

Neither Schultz nor Abrams deals directly with the third case, in which men harass men through hazing and horseplay in an all male environment. Schultz focuses on the male perpetrators' motivation to undermine the competence of the women or gender non-conforming men who are harassed in order to assure that the job remain a masculine job. Hazing and horseplay, however, are directed at gender-conforming men in order to assure that the men are tough enough to do the masculine

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336. See *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 364–365 (4th Cir. 2002), *rev'd en banc*, 335 F.3d 325 (4th Cir. 2003).

job. Like the behavior Schultz describes, the hazing and horseplay assure that the job remains a masculine job. While Abrams also is concerned about undermining women as employees, her work does not deal with hazing of male employees in order to assure the masculinity of the job's holders and of the jobs themselves.

Franke, in contrast, explores hazing and horseplay, but she concludes that, although there should be liability under Title VII, the issue is one of standing.<sup>337</sup> She would require that a man indicate his objections to his coworkers and then be targeted because of his failure to conform to workplace norms in order to prove that he has suffered a Title VII violation.<sup>338</sup> Although recognizing that this is a higher standard than other hostile work environment cases, she finds the higher standard acceptable because the larger cultural norms of women as sex objects and men as sex subjects are not reproduced by this conduct. Furthermore, she concludes that it would be inadvisable for the law to dismantle every hyper-masculine and hyper-feminine workplace because such a result would impose orthodoxy.<sup>339</sup>

Finally, none of the three scholars deals directly with the fourth case, in which harassment is directed at women but contains no sexual or gendered content. All three scholars would likely conclude that the content of the behavior is irrelevant so long as there is proof that the behavior occurred because of sex. Schultz specifically argues that courts should aggregate all harassment that is sexual, gendered and gender-neutral in order to determine whether a hostile work environment occurred because of sex. She criticizes courts for not understanding that gender-neutral behavior, such as a failure to train, often occurs because of sex. Because Schultz argues that the history of the hostile work environment cause of action would require courts to consider gender-based and gender-neutral behavior as well as sexual behavior, it is unlikely that she would conclude that a case with gender-neutral behavior alone cannot occur because of sex. It is likely that all three scholars would agree that gender-neutral harassing behavior can occur because of sex and a cause of action should exist even where the behavior is gender neutral. The problem is that it is very difficult to prove that gender-neutral harassing behavior occurs because of gender.

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337. See Franke, *supra* note 21, at 768-69.

338. See *id.*

339. See *id.* at 769.



The issue, as discussed in Part II.C.4. below, will likely be a proof issue. Masculinities theory and the new bullying research that links gender to bullying may help resolve those proof problems.

C. *Lower Courts' Jurisprudence of "Because of Sex" Pre- and Post-Oncale*

With this introduction to masculinities theory, bullying research, and the legal theories of Schultz, Franke, and Abrams, this Article returns to the four scenarios posed in the Introduction to discover how courts have handled them and how masculinities theory and bullying research can enlighten the decision making.

1. Men's Non-Directed Harassment of Women in Male Jobs

This category includes behavior that is sexist and sexual but may not be directed specifically at a particular woman in a man's job. Examples of this behavior include the prevalence of pictures and calendars depicting women as sexual objects and derogatory comments about women that are not directed at a particular woman. In many workplaces, this environment pre-existed the women's employment in the workplace.

*Robinson v. Jacksonville Shipyards, Inc.*<sup>340</sup> offers a pre-Oncale example of this type of behavior. In *Robinson*, the plaintiff was one of a very few women welders in a shipyard.<sup>341</sup> The court found that the environment was saturated with "girlie" calendars and nude, erotic photographs of women.<sup>342</sup> The men who worked in the shipyard also subjected the plaintiff and other women to direct harassing behavior based on their sex. When Robinson complained, the harassment escalated.<sup>343</sup>

The court concluded that the nude photographs of women that were evident throughout the workplace, along with the behavior of coworkers, created a hostile work environment for the women. Based on expert testimony and the plaintiff's testimony, the court concluded that the presence of the pictures

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340. 760 F. Supp. 1486 (M.D. Fla. 1991).

341. See *id.* at 1491.

342. *Id.* at 1493–97.

343. See *id.* at 1514–16.

had a disproportionate effect on women workers.<sup>344</sup> It noted that display of the pictures fell into a category of actionable conduct "that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment."<sup>345</sup>

Citing to an earlier article by Kathryn Abrams, the court concluded that the "social context" defense, which, in effect, asks that women assume the risk of injury from offensive harassing behavior in a rough, male, blue-collar environment, is inconsistent with Title VII's promise of equal employment opportunity.<sup>346</sup> The court stated: "A pre-existing atmosphere that deters women from entering or continuing in a profession or job is no less destructive to and offensive to workplace equality than a sign declaring 'Men Only.'"<sup>347</sup> This behavior is actionable as sexual harassment even if it existed before the women entered the work environment, and even if the posting of the offensive materials did not originate with the intent to offend women workers.<sup>348</sup> The key, according to the court, is whether the behavior is sufficiently severe or pervasive to alter the terms or conditions of a reasonable woman's working environment. It is not necessary that all women be offended by the behavior.<sup>349</sup>

In *Steiner v. Showboat Operating Co.*,<sup>350</sup> another case decided before *Oncale*, the Ninth Circuit Court of Appeals rejected the defendant's argument that the supervisor yelled at

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344. See *id.* at 1522-23.

345. *Id.* at 1523.

346. *Id.* at 1526 (citing Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 n.118 (1989)) (citation omitted).

347. *Id.*

348. See *id.* at 1522-23.

349. See *id.* at 1525. The court also rejected the defendant's arguments that the lewd pictures constituted the employer's protected speech, concluding that although the speech may have been protected outside of the workplace, certain speech can be regulated in the workplace. *Id.* at 1535. Here, the women were a captive audience, the restriction was a time, place, and manner restriction and not a total ban. *Id.* Moreover, the court noted, the employer did not claim that it sought to express itself by means of sexually-oriented pictures or verbal harassment. *Id.* at 1534. Even if the speech were protected, the court concluded, the governmental interest in protecting the women's interest would outweigh the employer's speech interest. See *id.* at 1534-35. But see Eugene Volokh, *What Speech Does "Hostile Work Environment" Law Protect?*, 85 GEO. L.J. 627 (1997) (arguing that sexual harassment law unlawfully restricts employee speech).

350. 25 F.3d 1459 (9th Cir. 1994).

both men and women, and therefore, his behavior was not directed at Steiner because of her sex.<sup>351</sup> The court noted that the supervisor's abusive treatment of men and women differed—his yelling at women was of a sexual or gender-specific nature, whereas the abuse of the men did not include gender-specific terminology.<sup>352</sup>

Furthermore, the court observed that the supervisor could not cure his abuse toward the women by using "sexual epithets equal in intensity and in an equally degrading manner against male employees,"<sup>353</sup> because the standard for determining whether a hostile work environment exists is whether a reasonable woman would find the environment hostile. The court further noted that "although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment."<sup>354</sup>

After *Oncale*, defendants have argued, and some courts have agreed, that when men and women are both subjected to offensive sexual behavior or comments, and the behavior is not directed specifically at one sex, the behavior does not occur because of sex.<sup>355</sup> For example, in *Ocheltree v. Scollon Produc-*

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351. Her supervisor called her offensive gender-based names such as "dumb fucking broad," "cunt," and "fucking cunt." *Id.* at 1461. He also reprimanded Steiner because she "comped" a breakfast for two men who had played blackjack at her table. *Id.* The supervisor approached her in a threatening manner and yelled, "[w]hy don't you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?" *Id.*

352. *Id.* The court stated:

The numerous depositions of Showboat employees reveal that Trenkle was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct. While Trenkle may have referred to men as "assholes," he referred to women as "dumb fucking broads" and "fucking cunts," and when angry at Steiner, suggested that she have sex with customers. And while his abuse of men in no way related to their gender, his abuse of female employees, especially Steiner, centered on the fact that they were females. It is one thing to call a woman "worthless," and another to call her a "worthless broad."

*Id.* at 1463–64 (citation omitted).

353. *Id.* at 1464.

354. *Id.* (noting also that racially derogatory language, such as "UFO's—ugly fucking orientals . . . differs fundamentally" from less specific terms like "jerk" and "asshole").

355. See, e.g., *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351 (4th Cir. 2002), *rev'd en banc*, 335 F.3d 325 (4th Cir. 2003); cf. *Holman v. Indiana*, 211 F.3d 399, 403–04 (7th Cir. 2000) (upholding dismissal of the complaint where both husband and wife alleged that the same supervisor propositioned each one of them for sex;

tions, Inc.,<sup>356</sup> the plaintiff was the only woman working among ten or eleven men in a shop that produced costumes.<sup>357</sup> During the first year, the shop became increasingly polluted with sexual banter and sexual conduct. Three incidents were directed specifically at the plaintiff: a vulgar song, a book with pierced male genitals, and a pantomime of sexual acts with mannequins.<sup>358</sup> There was also evidence that male coworkers touched mannequins in sexual ways when the plaintiff walked by, and that the plaintiff was berated for calling her son who was home recovering from a broken tailbone. The company Vice President commented that if the plaintiff did not like his rule that she should not use the telephone, she should go home and be a housewife because she was not cut out for work at the defendant's place of business.<sup>359</sup>

Additionally, there was daily sexual banter that included use of profanity, male coworkers' use of explicit sexual insults to bother one another, and protracted discussion of their sexual exploits with their wives or girlfriends in extremely graphic terms.<sup>360</sup> Much of this discussion took a decidedly misogynist character. For example, the workers made comments about sexual experiences such as, "she swallowed, she gave good head, . . . I fucked her all night long."<sup>361</sup> One employee spoke about his wife "sucking his dick and swallowing and letting it run down the side of her face."<sup>362</sup>

Because the Fourth Circuit concluded that the three incidents obviously directed at the plaintiff were not sufficiently severe or pervasive to alter the terms or conditions of her employment, and that the other comments and gestures were not directed specifically at the plaintiff, it held that the behavior could not have occurred because of her sex. It overturned the lower court's denial of the defendant's Rule 50 motion for

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because the defendant allegedly subjected both men and women to the behavior, he was an "equal opportunity harasser" and the behavior could not have occurred because of either's sex).

356. 308 F.3d 351 (4th Cir. 2002).

357. *See id.* at 367 (Michael, J., dissenting in part and concurring in the judgment in part).

358. *See id.* at 368.

359. *See id.*

360. *See id.* at 369.

361. *Id.*

362. *Id.*

judgment as a matter of law after a jury verdict for the plaintiff.<sup>363</sup>

The majority in *Ocheltree* cites Vicki Schultz' and other feminists' work for the proposition that eliminating sexual content in the workplace is not a valuable goal of sexual harassment jurisprudence, and that women are as comfortable as men in a sexually explicit workplace.<sup>364</sup> It concluded that to permit sexual harassment law to regulate sexual content at work would be an attempt "to transmute Title VII into a neo-Victorian chivalry code designed to protect what the dissent imagines to be the tender sensitivities of contemporary women," and would constitute preferential and paternalistic treatment of women.<sup>365</sup>

The dissent argued that there was evidence in the record from which one could reasonably conclude that men and women were treated differently.<sup>366</sup> Moreover, the dissent cited to Schultz, Franke, and Abrams to argue that the environment may have occurred because of sex for two reasons: first, the behavior occurred in order to rattle the plaintiff; and second, given the context, the behavior had a disparate effect on a reasonable woman employee.<sup>367</sup> The dissent agreed with Schultz' position that sexual content is not automatically discriminatory or demeaning to women.<sup>368</sup> However, the dissent posited that, based on the context of the sex segregated workplace and the tone of the comments, a reasonable jury could conclude that the harassment of the plaintiff was "rooted in male resentment of Ocheltree's intrusion into 'their' workplace and in resentment of her demands that they clean up their act."<sup>369</sup> The dissent stated:

[A] reasonable jury could find that even if very few of the sexual remarks were made in response to Ocheltree's presence in the production shop, her male coworkers' relentless, graphic descriptions of their sex lives count as sex-based harassment because they portray women as sexually subor-

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363. See *id.* at 358–66 (majority opinion). This decision was affirmed in part and reversed in part when the case was reviewed en banc. See 335 F.3d 325 (4th Cir. 2003) (en banc).

364. See *Ocheltree*, 308 F.3d at 364 (citing Schultz, *supra* note 4, at 1794).

365. *Id.* at 365.

366. *Id.* at 372 (Michael, J., dissenting in part and concurring in the judgment in part).

367. See *id.* at 367–76.

368. See *id.* at 374 (citing Schultz, *supra* note 4, at 1795).

369. *Id.* (citing Abrams, *supra* note 22, at 1211).

dinate to men. Ocheltree's coworkers made her uncomplaining submission to an atmosphere suffused with degrading images of female sexuality an implicit condition of her employment, and this harassment was 'because of sex' in the sense that it made the workplace more hostile to Ocheltree precisely because she was a woman.<sup>370</sup>

The dissent noted that the behavior of the men portrayed women as sexually subordinate to men and could be considered sexual harassment because the comments reinforced a hierarchical gender regime in which men are portrayed as sexual subjects and women as sexual objects.<sup>371</sup> Without attempting to speak for Professor Schultz, it appears that the dissent understood her message better than the majority in this case. While Schultz argued that courts unduly focus on sexual behavior in their sexual harassment jurisprudence, her article should not be interpreted to conclude that sexual behavior can never constitute part or all of a hostile work environment. Moreover, Schultz focused on the problem of sex segregation in the workplace and the reaction by groups of male coworkers to the introduction of women into those workplaces. This fact pattern seems to illustrate Professor Schultz' competence paradigm—that is, men in formerly all-male, masculine jobs harass women in order to undermine their competence and to preserve the job as a male enclave. It appears, based on the context of this case, that it is a permissible inference that the men subjected Ocheltree to severe, misogynist behavior in order to undermine her competence, to drive her from the workforce, and to establish the shop and the job as masculine. It seems less likely that either they were unaware of Ocheltree's presence in making their comments or that they believed that she was enjoying the banter.

Sitting en banc, the Fourth Circuit overturned the panel decision. In an opinion written by Judge Michael, who had dissented in the panel decision, the Fourth Circuit held that there was sufficient evidence that the discussions which took place in the plaintiff's presence were aimed at the plaintiff in order to make her uncomfortable.<sup>372</sup> A reasonable jury could therefore conclude that the behavior occurred because of her sex.<sup>373</sup> Cu-

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370. *Id.* at 370.

371. *See id.* at 374–75 (citing *Abrams*, *supra* note 22, at 1205–25; *Franke*, *supra* note 21, at 762–72).

372. *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 332 (4th Cir. 2003).

373. *Id.* at 332–33.

riously, the en banc opinion did not discuss the question of whether behavior that is more offensive to women because of its degrading content may occur because of sex even if it is not directed specifically at women in the workplace.<sup>374</sup> The en banc court did not reach the thorny question of whether a plaintiff may prove that offensive behavior occurs because of sex if the behavior is not directed specifically at women but has a disparate effect on women because it is more offensive to them.

A few other courts have reached this question and concluded that courts should consider subjectively different reactions women may have to similar treatment. For example, in *Petrosino v. Bell Atlantic*,<sup>375</sup> the Second Circuit overturned the lower court's grant of summary judgment to the defendant on a hostile work environment claim.<sup>376</sup> The court reasoned that even though both men and women were exposed to the hostile environment and even though the conduct ridiculed some men, it "also frequently touted the sexual exploits of others."<sup>377</sup> Moreover, the court noted, "the depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men."<sup>378</sup> The court concluded that "[s]uch workplace disparagement of women, repeated day after day over the course of several years without supervisory intervention, stands as a serious impediment to

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374. Because of the procedural posture, the question was whether the lower court had properly denied the defendant's motion for judgment as a matter of law. *Id.* at 327. The en banc court concluded that there was sufficient evidence of differential treatment. *Id.* at 332–33.

375. 385 F.3d 210 (2d Cir. 2004).

376. The plaintiff submitted evidence that the workplace was permeated by offensive profanity and crude humor, including comments by male workers who insulted one another by bragging about imaginary sexual exploits of their coworkers' wives. *See id.* at 214 n.3. The plaintiff was also subject to sexually harassing behavior directed at her. *Id.* at 214–15. The plaintiff was physically attacked from behind in a parking lot by a coworker who groped and kissed her; other coworkers made frequent disparaging remarks about her "ass," her "tits," her menstrual cycle, her weight, and her eating habits, and at least one terminal-box drawing depicted her performing a sex act on a supervisor." *Id.* at 215. Her supervisor made hostile gender-based comments about her, referring to Petrosino as "a damn woman," and "telling her to calm her 'big tits down.'" *Id.* Another manager stated that women were too "simple," "too sensitive," and "too damn thin-skinned." *Id.* Petrosino was told to "keep her mouth shut" when she tried to complain about the environment. *Id.* at 216.

377. *Id.* at 222.

378. *Id.*

any woman's efforts to deal professionally with her male colleagues."<sup>379</sup>

In a case that took place in a predominantly female workplace, *EEOC v. National Education Association*,<sup>380</sup> the EEOC brought suit on behalf of three women who worked for the NEA, alleging that they were subjected to a hostile work environment. According to evidence in the record, the interim director created a general atmosphere of intimidation in the workplace and women were afraid of him.<sup>381</sup> The trial court granted the defendant's motion for summary judgment, concluding that there was insufficient evidence that the treatment was because of sex.<sup>382</sup> The Ninth Circuit overturned the lower court's grant of summary judgment, concluding that the lower court erred when it held that the defendant's acts must be either of a sexual nature or motivated by discriminatory animus toward women.<sup>383</sup> The Ninth Circuit stated that in a workplace where there is a majority of women, the evidence raised the inference that the interim director was "more comfortable when bullying women than when bullying men."<sup>384</sup>

In determining whether a hostile work environment occurs because of sex, the Ninth Circuit looked to the differences between the objective treatment of men and women and the subjective effects of that treatment.<sup>385</sup> The court noted that there was sufficient evidence in the record to conclude that the women were treated more harshly than men and that there was a marked difference in the subjective effects on the women.<sup>386</sup> This case goes beyond *Steiner* because it concludes

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379. *Id.* Petrosino adopted the views expressed in the dissenting opinion in *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part). See *Petrosino*, 385 F.3d at 222. In *Brennan*, Judge Newman opined that "commonality of exposure cannot be permitted to defeat *all* claims of gender discrimination," and explained that the determination of whether discrimination occurs through exposure to sexual or racially provocative displays "turns in large part on the perspective . . . of a reasonable person or that of a reasonable member of the protected class." 192 F.3d at 320. Like Judge Newman in *Brennan*, the majority in *Petrosino* rejected the defendant's "argument that the common exposure of male and female workers to sexually offensive material necessarily precludes a woman from relying on such evidence to establish a hostile work environment based on sex." *Petrosino*, 385 F.3d at 223.

380. 422 F.3d 840 (9th Cir. 2005).

381. See *id.* at 843-44.

382. *Id.* at 842.

383. *Id.* at 844-45.

384. *Id.* at 845.

385. *Id.* at 845-46.

386. *Id.* at 846.



that evidence of differences in the effects that behavior has on men and women is relevant to the question of whether the behavior occurred because of sex “even where the conduct is not facially sex—or gender—specific.”<sup>387</sup>

The key question in these cases is whether “because of sex” requires a conscious intent to create a hostile work environment for women because they are women. Cases holding that the hostile work environment is not actionable if both men and women are exposed to the same environment implicitly read the statute to require that the creator of a hostile work environment have the conscious intent to do so. In *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*,<sup>388</sup> I analyzed Title VII jurisprudence and concluded that the “because of sex” requirement refers to causation rather than a conscious intent in discrimination cases.<sup>389</sup> Other authors have agreed.<sup>390</sup> Whether other discrimination cases require a conscious intent or not, hostile work environment cases have never required a conscious intent on the part of the perpetrator.<sup>391</sup> This is obvious from the 1980 EEOC guidance, which has been applied by courts ever since. The guidance states that harassing conduct creates actionable sexual harassment under Title VII if it has the “purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>392</sup> By its terms, the guidance requires plaintiffs to prove either the intent or the effect of the behavior was discriminatory because of the person’s sex or gender. It does not require a conscious intent to offend because of sex. While the term “because of sex” could be interpreted to mean that the conscious intent of the perpetrator is to harm someone because of his or her sex or gender, the sexual harassment cases do not focus on intent. It makes more sense to conclude, given the language of the guid-

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387. *Id.*

388. Ann C. McGinley, *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415 (2000).

389. *See id.* at 419, 477–79.

390. *See, e.g.*, Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1192 (2003) (noting that courts employed the Title VII proof constructs to capture both conscious and unconscious decision making before *Hicks*); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (2005) (concluding that unconscious discrimination plays a “significant role” in employment decisions).

391. *See, e.g.*, *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 65–67 (1986).

392. *See* 29 C.F.R. § 1604.11(a)(3) (2007).

ance, that the “because of sex” requirement is a causation, rather than an intent, requirement. Using a causation requirement, rather than a conscious-intent requirement, a perpetrator’s actions resulting from unconscious or hidden stereotypes can fulfill the “because of sex” requirement. This conclusion is consistent with *Price Waterhouse*’s holding that discriminatory behavior based on gender stereotypes occurs because of sex and violates Title VII. Gender stereotypes may be consciously or unconsciously held by the actor.

The few cases that conclude that behavior having a disparate effect on women can occur because of sex may create a tempest in a teapot. They include behavior that is specifically directed at women and behavior that is not.<sup>393</sup> If courts properly analyze the evidence, they will look at the totality of the evidence to determine whether it is sufficiently severe or pervasive to create an illegal hostile work environment.<sup>394</sup> But even when there is evidence of specific mistreatment of the plaintiff because of her sex or gender, some courts, like the Fourth Circuit panel in *Ocheltree*, disaggregate the evidence.<sup>395</sup> These same courts conclude that the behavior is not because of sex if it is not directed at the plaintiff and therefore cannot be included in the analysis of whether a sexually hostile work environment existed.<sup>396</sup> Because some behavior is directed at women in these cases, courts should aggregate all of the behavior to determine whether it is sufficiently severe or pervasive.

Nonetheless, a reading of the term “because of sex” that takes into account a woman’s reasonable reaction will better serve one essential purpose of Title VII: to create equal employment opportunity by eliminating discriminatory terms and conditions of employment. Workplaces that are saturated with misogynist comments and behavior, whether or not they are specifically directed at women, make it more difficult for many

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393. See, e.g., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), discussed *supra* notes 350–54 and accompanying text; *EEOC v. Nat’l Educ. Ass’n*, 422 F.3d 840 (9th Cir. 2005), discussed *supra* notes 380–87 and accompanying text.

394. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), discussed *supra* notes 285–87 and accompanying text.

395. See e.g., *Ocheltree v. Scollon Prods.*, 308 F.3d 351 (4th Cir. 2002), discussed *supra* note 356–74 and accompanying text; *Petrosino v. Bell Atl.*, No. 99 CV 4072(JG), 2003 U.S. Dist. LEXIS 4616, at \*19–22 (E.D.N.Y. Mar. 20, 2003), *aff’d in part, rev’d in part*, 385 F.3d 210 (2d Cir. 2004), discussed *supra* notes 375–79 and accompanying text.

396. See *Ocheltree*, 308 F.3d at 356–58; *Petrosino*, 2003 U.S. Dist. LEXIS 4616, at \*19–20.

women to perform their work. Women in these workplaces are seen not as colleagues and competent workers, but as inferior intruders because they are women. This environment is antithetical to one's ability to succeed at work.<sup>397</sup>

Masculinities theory supports this interpretation. Masculinities theorists observe that men engage in homosocial competitive behavior in order to prove their masculinity to other men.<sup>398</sup> The presence of women in the organization provides men the opportunity to prove their manhood to other men.<sup>399</sup> The process of constructing masculinity, social scientists conclude, is not only about demonstrating the commonalities among men; it also requires a highlighting of difference.<sup>400</sup> When women enter "men's" jobs, the men use the women as foils, permitting men to demonstrate what they are not.<sup>401</sup> This behavior, which includes the exploitation of women and the derogation of the feminine, not only reinforces the masculinity of the job and the men performing it, but also creates structural disincentives for women to work in these jobs.<sup>402</sup>

A workplace in which both men and women are exposed to misogynist behavior and/or language and jokes creates a hostile environment for women because of their sex. By making it more difficult for women to be taken seriously as workers, a

397. Professor Volokh would argue that the government should not restrict this speech. See Volokh, *supra* note 349, at 647–48. The Supreme Court, however, has interpreted the First Amendment rights of employees narrowly. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 422–26 (2006) (holding that an assistant district attorney's complaint about the use of perjured information was not protected by the First Amendment).

398. See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *FEMINISM & MASCULINITIES* 182, 185 (Peter F. Murphy ed., 2004). For a more thorough explanation of masculinities theory, see generally McGinley, *supra* note 29.

399. See Anastasia Prokos & Irene Padavic, 'There Oughtta Be a Law Against Bitches': *Masculinity Lessons in Police Academy Training*, in 9 *GENDER, WORK & ORG.* 439, 441 (2002).

400. *Id.*

401. *Id.*

402. Vicki Schultz notes that women are harassed most frequently when they occupy jobs that are segregated. In jobs historically occupied by men, women suffer harassment because men associate their jobs with masculinity and police the jobs by harassing women and gender non-conforming men. The harassment occurs as a result of women's job segregation and continues to reinforce it. See Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2132 (2003). This conclusion is consistent with masculinities theory. Men harass women to reaffirm themselves as powerful and masculine in the view of other men. See, e.g., Thomas Dunk & David Bartol, *The Logic and Limitations of Male Working-Class Culture in a Resource Hinterland*, in *SPACES OF MASCULINITIES* 39 (Bettina van Hoven & Kathrin Horschelmann eds., 2005); Collinson & Hearn, *supra* note 33, at 294–98.

misogynist environment has a disparate negative effect on women's terms or conditions of employment.

Julie Ahearn Greene, in *Blue Collar Women at Work with Men*,<sup>403</sup> catalogued a compelling example of misogynist workplaces. She described extensive interviews with seventeen women working in blue-collar jobs. The women encountered degrading gender treatment, some of which was explicitly sexual or gendered and some of which appeared to be caused by their sex or gender, although sex or gender was not explicit.<sup>404</sup> The treatment included assault and threats of assault, inadequate training, inappropriate work assignments, subjection to men who exposed themselves regularly, verbal harassment, and derogation of their job competency.<sup>405</sup> It would undermine the purposes of Title VII to conclude that this behavior does not occur because of sex.

This behavior is not limited to blue-collar jobs. Sociologists Margaret and David Collinson studied sexual harassment of women managers in insurance sales.<sup>406</sup> Women were isolated not only from the men, but also from one another.<sup>407</sup> The men used a "divide and conquer" strategy in which they spoke disparagingly to each woman about the other women.<sup>408</sup> In response, the women distanced themselves from the other women at work.<sup>409</sup> But this response did not protect the women.<sup>410</sup> No matter what response the women attempted to make—speaking out against the harassment, ignoring the harassment, or trying to be "one of the guys"—the management enabled the harasser by blaming the harassment on the women's reaction.<sup>411</sup> The authors found that the small number of women in the male environment occupying traditional male jobs "seems to reinforce men's highly masculine culture and solidarity. Re-

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403. JEANIE AHEARN GREENE, *BLUE COLLAR WOMEN AT WORK WITH MEN* (2006).

404. See *id.* at 147 (describing inadequate training and inappropriate work assignments as having a gender component).

405. See *id.* Greene's interviews also revealed that some of the men—the "good guys"—treated the women with respect and mentored them. *Id.* at 131.

406. Margaret Collinson & David Collinson, *'It's Only Dick': The Sexual Harassment of Women Managers in Insurance Sales*, in 10 *WORK, EMP. & SOC'Y* 29 (1996).

407. *Id.* at 49.

408. *Id.* at 43, 49.

409. *Id.* at 42–49.

410. *Id.*

411. *Id.* at 42–43.

ducing women entrants to sexual objects of ridicule, the dominant male culture reproduced and even reinforced itself.”<sup>412</sup>

The introduction of the women into the male dominated workplaces in Greene’s and the Collinsons’ accounts resulted in harassing behavior that courts would agree is sufficiently severe or pervasive to constitute a hostile work environment. Masculinities theory demonstrates that courts should also agree that there is at least a question of fact concerning whether the behavior occurred because of sex.

## 2. Men Harassing Men Who Do Not Conform to Gender Norms

Since *Oncale*, plaintiffs in same-sex hostile work environment cases have used the sex stereotyping doctrine of *Price Waterhouse*, with varying degrees of success, to prove that their harassment occurred because of sex.<sup>413</sup> Male plaintiffs compare their situation to that of Ann Hopkins, who was denied partner status because she did not live up to the ideals of femininity held by the partners. Male coworkers and supervisors harass male plaintiffs, they argue, because they do not embody the traditional ideal of masculinity.<sup>414</sup> Many post-*Oncale* courts accept that the *Hopkins* stereotyping doctrine applies to hostile work environment harassment cases.<sup>415</sup> They struggle, however, with the question of whether the hostile work environment is due to sex stereotyping, which would create a cause of action under Title VII, or to the alleged victim’s sexual orientation (or perceived sexual orientation), which they hold is not covered by Title VII.<sup>416</sup> The cases demonstrate that drawing this line is virtually impossible.<sup>417</sup>

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412. *Id.* at 45.

413. See cases cited *infra* note 419.

414. See, e.g., *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1063–66 (7th Cir. 2003); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1082–85 (7th Cir. 2000).

415. See, e.g., *Hamm*, 332 F.3d at 1064 (accepting the use of the *Hopkins* sex stereotyping theory where applicable, but concluding that the plaintiff’s case was not a sex stereotyping case as a matter of law); *Spearman*, 231 F.3d at 1085 (affirming lower court’s grant of summary judgment because evidence showed that plaintiff was harassed because of his apparent homosexuality, and not sexual stereotyping). But see David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1743 (2002) (concluding that *Oncale* does not stand for the proposition that harassment based on non-conformity to gender norms is sex discrimination).

416. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (agreeing that *Price Waterhouse* creates a cause of action for sex discrimination

Since *Oncale*, the courts of appeal are split. A number of courts have held that the plaintiff made out a cause of action for sex stereotyping.<sup>418</sup> With nearly identical facts, others have held that the plaintiff did not; in this latter group, courts have held that, as a matter of law, the plaintiff was harassed because of his sexual orientation or perceived homosexuality rather than for his failure to conform to sex stereotypes.<sup>419</sup>

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based on an individual's failure to conform with gendered expectations, but holding as a matter of law that the plaintiff's complaint could be interpreted only to allege a cause of action for discrimination based on homosexuality or perceived homosexuality); *Linville v. Sears, Roebuck & Co.*, 335 F.3d 822, 824 (8th Cir. 2003) (upholding grant of summary judgment to the defendant because, although the plaintiff suffered assaults in the scrotum, he did not prove the defendant was motivated by the plaintiff's sex); *Hamm*, 332 F.3d at 1062 (affirming the district court's grant of summary judgment in Title VII case alleging same-sex hostile work environment because the evidence supported only work performance conflicts or harassment based on perceived sexual orientation, not sex stereotyping). *But see* *Nichols v. Sanchez*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that the plaintiff, an effeminate man, had a cause of action under Title VII and the *Price Waterhouse* sex-stereotyping theory for same-sex hostile work environment harassment where his coworkers subjected him to taunts).

417. One court states that such a claim requires navigating the tricky legal waters of male-on-male sex harassment. *See Hamm*, 332 F.3d at 1062.

418. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068–69 (9th Cir. 2002) (en banc) (plurality decision reversing the district court's grant of summary judgment to the defendant, with three judges concluding that Rene had preserved his case of sex stereotyping for appeal where the plaintiff was openly gay and his coworkers had teased him about the way he walked, whistled at him, caressed his buttocks, blew kisses at him, touched his body and his face, and called him "muneca," or doll); *Nichols*, 256 F.3d at 872–73 (holding that the district court improperly granted judgment in a bench trial to the defendant where plaintiff's male coworkers and a supervisor subjected him to name-calling by referring to him as "her" and "she," mocked him for carrying a tray "like a woman" and for not having sex with a waitress who was his friend, and called him "faggot" and "fucking female whore"); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (holding that the lower court improperly granted a motion to dismiss a heterosexual male's claim alleging that his coworkers harassed him, called him a "homo" and "jerk off," unbuttoned his clothing, patted him on the buttocks, asked him to perform sexual acts, scratched his crotch, and humped his door frame, concluding that "simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is [not] thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation").

419. *See, e.g., Vickers*, 453 F.3d at 763 (agreeing that *Price Waterhouse* creates a cause of action for sex discrimination based on an individual's failure to conform to gendered expectations but holding as a matter of law that the plaintiff's complaint could be interpreted only to allege a cause of action based on discrimination based on homosexuality or perceived homosexuality); *Hamm*, 332 F.3d 1058 (affirming grant of summary judgment to defendant because no reasonable jury could conclude that the harassment plaintiff suffered was sex stereotyping rather than a result of his work performance or perceived homosexuality where coworkers regularly threatened plaintiff in vulgar terms, called him "faggot," "bisexual," and "girl scout," passed rumors that he was gay, and warned others not to bend

These cases are factually indistinguishable. They all arose in an all-male, or virtually all-male, environment.<sup>420</sup> In all of the cases, coworkers and/or supervisors used vulgar verbal taunts as well as physical attacks, often to sexual organs of the victim, to harass the victim. Moreover, the taunts invariably included comments questioning the victim's masculinity and his sexual orientation. Terms such as "bitch," "fag," "queer," "homo," and "sissy," actions such as grabbing of testicles, questions asking whether a person is male or female or "takes it up the ass," and threats of rape are common to all of the cases.<sup>421</sup> It would be

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over in front of him); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 260, 264 (3d Cir. 2001) (affirming district court's grant of summary judgment because the plaintiff did not present sufficient evidence that the harassment was because of sex where the plaintiff, a gay man, was assaulted at work and told by his assaulter "everybody knows you're a faggot," and "everybody knows you take it up the ass," called a "sissy," mistreated by his supervisors, and where he had alleged he was discriminated against because of his sexual orientation).

420. There are cases in which women, mostly in predominantly female environments, allege that other women created a hostile work environment because of the plaintiffs' sex, but because these cases are so few it is difficult to draw any generalizations from them. See, e.g., *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1260–61 (10th Cir. 2005) (reversing the lower court's grant of summary judgment to the defendant where the female plaintiff alleged that her female coworkers and supervisor engaged in various behaviors including attempting to pinch the plaintiff's breasts, shoving a sex toy in the shape of a penis toward the plaintiff, and making references to oral sex while bending over without wearing underwear because a reasonable jury could conclude that the plaintiff had demonstrated that the harassers were motivated by sexual desire under *Oncale's* first prong); *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1066 (8th Cir. 2005) (affirming lower court's grant of summary judgment to the defendant where the female plaintiff alleged that the female harasser held her hand, repeatedly tried to kiss her, grabbed her face, kissed her, rubbed her own buttocks, and told the plaintiff "kiss it," "you love it, honey" and "I want you, honey" because the behavior did not occur because of sex as a matter of law).

421. In his dissent in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1070–78 (9th Cir. 2002), Judge Proctor Hug attempts to distinguish *Nichols v. Sanchez*, 256 F.3d 864 (9th Cir. 2001). While *Nichols* was allegedly heterosexual and *Rene* homosexual, Judge Hug does not overtly base his distinction on this difference. *Rene*, 305 F.3d at 1077. Instead, he argues that *Nichols* was discriminated against based on his effeminate behavior at work, whereas *Rene* was discriminated against based on his sexual orientation. See *id.* This distinction is amorphous, unless courts want openly to distinguish between heterosexuals and homosexuals. It would deny rights to a whole class of persons—homosexuals—and it would lead to intrusions into the privacy of individuals. Finally, some courts have already concluded that a harassing environment based on "perceived homosexuality" is permissible. See, e.g., *Vickers*, 453 F.3d at 763; *Hamm*, 332 F.3d at 1058. Thus, in these cases, heterosexuals would also suffer harassment without recourse. In *Hamm*, Judge Posner assumes that the sex stereotyping doctrine applies only to heterosexual men and that homosexual men cannot use this doctrine to create a cause of action. 332 F.3d at 1067 (Posner, J., concurring). When Posner makes this argument, he implicitly recognizes the impossibility of separating harassment based on sexual orientation and harassment based on a person's fail-

impossible for courts, juries, or even victims or perpetrators to distinguish between behavior that is motivated by the victim's failure to conform to gender stereotypes and behavior motivated by the victim's sexual orientation.

Yet courts' analyses demonstrate a stark misunderstanding that draws on stereotypes of men and boys, uninformed by social science research. In an attempt to follow *Oncale*, many courts conclude as a matter of law that this behavior did not occur because of sex either because it occurred because of sexual orientation or perceived sexual orientation,<sup>422</sup> or because the harassers engaged in normal horseplay.<sup>423</sup> In concluding that the behavior occurred because of sexual orientation, courts point to the specific language used to harass, much of which, admittedly, references sexual orientation.<sup>424</sup> But, without the help of social science literature, courts are blind to the fact that the motivation and purpose for engaging in this harassment is to denigrate the masculinity of the victim, to compare the victim to women, and to enhance the masculinity of the harassers in the eyes of their male colleagues.

As masculinities theory demonstrates, masculinity and heterosexuality are inseparable in the minds of the men engaging in this behavior.<sup>425</sup> Robert Connell notes that hegemonic masculinity subordinates gay men and gay masculinity, conflating it with femininity. He states:

Gayness, in patriarchal ideology, is the repository of whatever is symbolically expelled from hegemonic masculinity. . . . Hence, from the point of view of hegemonic masculinity, gayness is easily assimilated to femininity. And

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ure to conform to stereotypes. However, he excludes from the doctrine homosexuals who would otherwise be protected by the statute. This exclusion would create an incentive to prove that an employee is homosexual or that he was perceived to be homosexual, a prospect that may lead to perjury, discovery abuse and further harassment. Other courts reaching this question are in clear disagreement. According to these courts, the sexual orientation of the plaintiff is irrelevant in deciding whether the discrimination is because of sex. See *Rene*, 305 F.3d at 1068 (Fletcher, J., for four members of the court); *Bibby*, 260 F.3d at 265.

422. See *supra* note 419 and *infra* note 424 and accompanying text.

423. See, e.g., *Linville v. Sears, Roebuck & Co.*, 335 F.3d 822, 824 (8th Cir. 2003) (affirming the lower court's grant of summary judgment because, although the plaintiff was "backhanded in the scrotum" repeatedly by a coworker, the behavior did not occur because of sex).

424. See *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (concluding behavior occurred because of perceived homosexuality); *Bibby*, 260 F.3d at 261-64.

425. R.W. CONNELL, *MASCULINITIES* 78 (1995).



hence, in the view of some gay theorists, the ferocity of homophobic attacks.<sup>426</sup>

Concepts of masculinity and sexual orientation are inextricably intertwined. Connell notes that in this society "hegemonic masculinity is defined exclusively as heterosexual."<sup>427</sup> Even the most aggressive, competitive, and masculine gay men are considered not masculine, merely because of the identity of their sex partners.<sup>428</sup>

Moreover, masculinities research shows that men in predominantly male work environments often denigrate women and other males who do not conform to gender norms, by using gender specific language that equates inferiority with being female or feminine.<sup>429</sup> The greatest insults lodged against other men, whether heterosexual or homosexual, challenge their masculinity.<sup>430</sup> These insults include references to the victim's gender; they refer to him in terms used to refer to women, such as "bitch," or that give him characteristics of women, such as "pussy" or "milquetoast," or that conflate a lack of masculinity with homosexuality.<sup>431</sup> This behavior, which Robert Connell identifies as a "symbolic blurring with femininity,"<sup>432</sup> maintains the superiority of the masculine over the

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426. *Id.*

427. *Id.* at 143, 162.

428. *Id.*

429. See, e.g., Sharon R. Bird, *Welcome to the Men's Club: Homosociality and the Maintenance of Hegemonic Masculinity*, 10 GENDER & SOC'Y 120, 122, 125-129 (1996) (concluding from her study of heterosexual males that homosociality, the attraction of men in non-sexual ways to one another, is used to reinforce meanings of hegemonic masculinity and differentiation from that which is feminine; when heterosexual men associated with each other they constantly reinforced the hegemonic masculine behaviors of emotional detachment, competition, and sexual objectification of women and encouraged suppression of "feminine" characteristics such as expressing one's feelings); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L. J. 68, 68-69 (2002) (describing the hostile treatment of Shannon Faulkner, the first woman to integrate The Citadel, a military college in South Carolina; the male students screamed obscenities at Shannon, addressed death threats to her, scrawled on the bathroom wall "Let her in, then fuck her to death"). This behavior begins early—boys attack other boys as being "girls" or "sissies" on the playground in elementary school. See BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 115-118 (1999) (noting the prevalent use of "sissy" as a derogatory term to refer to boys who like to do "girl things," as opposed to the use of "tomboy" to refer relatively positively to girls who are athletic or like comfortable clothing).

430. CONNELL, *supra* note 425, at 79.

431. *Id.*

432. *Id.*

feminine, of men over women. Gender scholars attribute this behavior to attempts to preserve the job in question as masculine and the exclusive domain of men.<sup>433</sup> In blue-collar jobs, these practices—which are often violent in nature—reinforce the masculine identities of the job holders, protect their fragile place in the hierarchy, and permit them to challenge the “limp wristed” paper-pusher managers whose jobs are less masculine.<sup>434</sup>

If permitted by law, the conflation of certain types of work with men, and men with hegemonic masculinity, privileges gender-conforming men over women and gender non-conforming men. It leads to environments that are abusive to women and gender non-conforming men because of their sex, and it creates a class of jobs that excludes all but the most daring women and gender non-conforming men. Courts that do not recognize that this behavior discriminates because of sex, in violation of Title VII, reinforce the hegemonic masculinity, the superiority of masculine men and the inferiority of women, and the gender differences in pay and experience.

Even if courts conclude that it is impossible to distinguish behavior that is directed at a man because of his homosexuality from behavior occurring because he is effeminate, Title VII provides other avenues to conclude that the employer has discriminated because of sex. First, like the cases where courts consider the effects of the behavior on women in concluding

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433. See WILLIAMS, *supra* note 41, at 77–79; James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 314 (1998) (finding that predominantly male environments are more physically hostile and threatening to women, and men are more likely to mark their work environments with symbols of the sexual objectification of women); Patricia Yancey Martin, *Gender, Interaction, and Inequality in Organizations*, in GENDER, INTERACTION AND INEQUALITY 217 (Cecilia L. Ridgeway ed., 1991) (men attempt to exclude women peers because they fear that women's presence will undermine the masculinity requirements of the job leading to lower status and pay); Schultz, *supra* note 4, at 1687; *cf.* Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 STAN. L. REV. 777, 793–96 (2000) (“hypermasculinity,” including aggression and violence in police work, is a means of maintaining masculine identity of the job and the men in the job). Sociologist Barrie Thorne has found that boys who are good athletes, popular and masculine can more easily “cross over” to play with the girls in elementary school without harming their reputations. THORNE, *supra* note 429, at 122–23.

434. See Collinson, *supra* note 236, at 185–86 (noting that on shop floors workers see their positions as signifying masculinity in contrast to management who they saw as feminine); see also WILLIAMS, *supra* note 41, at 78 (stating that the hidden injuries of class experienced by male blue-collar workers create the incentive to define their own work as truly masculine).

that the behavior occurs because of sex,<sup>435</sup> courts should consider the effects of the behavior on men who are gendered “feminine.” Hyper-masculine behaviors will likely have a more discriminatory effect on men who are gendered “feminine” than on those who are gendered “masculine.”

A second avenue for concluding that this behavior occurs because of sex would characterize the case as a mixed motives case: the behavior occurs because the target is homosexual *and* because he is effeminate. In a mixed motives case under Title VII, defendants are liable to plaintiffs who prove that sex or gender is a motivating factor for the adverse employment action even though other legitimate factors also motivated the decision.<sup>436</sup> Once the plaintiff proves that the illegitimate factor motivated the decision, the burden shifts to the employer to prove that it would have taken the same action even in the absence of the impermissible factor. If the defendant makes this proof, it can limit the plaintiff’s remedies.<sup>437</sup>

Because discrimination based on sexual orientation is not illegal under Title VII,<sup>438</sup> sexual orientation would be the “legitimate” motive in these cases and gender nonconformity would be the “illegitimate” motive. Once it is established that an illegitimate reason motivated the defendant’s action, the employee prevails. The defendant will then have the opportu-

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435. See discussion *supra* Part II.C.1.

436. 42 U.S.C. § 2000e-2(m) states:

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

42 U.S.C. § 2000e-5(g)(2)(B) states:

On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703 (m); and
- (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

See also *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (concluding that direct evidence of discrimination is not necessary in a mixed motives case).

437. See *id.*

438. For an explanation of why Title VII should be interpreted to ban sexual orientation discrimination, see McGinley, *supra* note 29, at 410–17.

nity to demonstrate by a preponderance of the evidence that it would have acted the same way even in absence of the illegitimate factor. This burden would be difficult to meet, but if the defendant meets its burden of proof, it may limit the plaintiff's remedies.<sup>439</sup>

Masculinities research and queer theory explain the blurring of sex and gender and of gender and sexual orientation. Because biological sex is conflated with gender, women are expected to be feminine, receptive, and passive, and to possess a sexual orientation toward persons who are male or masculine.<sup>440</sup> Men should be aggressive and possess a sexual orientation toward the passive or feminine.<sup>441</sup> If a man is masculine, according to this syllogism, he will be oriented toward women sexually.<sup>442</sup> Thus, men who are oriented toward men are considered feminine.<sup>443</sup> Frank Valdes convincingly demonstrates that the hatred homosexual men experience is related more to their presumed lack of masculinity than to the identity of their sexual partners.<sup>444</sup> In one example, volunteer enlisted men investigated the homosexual activities of servicemen at the Newport Naval Training Center. Even though the volunteers engaged in sexual acts with their male subjects, they considered themselves masculine because they were aggressive, rather than passive or receptive, during the sexual activities.<sup>445</sup>

Masculinities theory demonstrates that homophobia is inextricably linked to men's sense of masculinity because masculinity is defined by that which is not feminine; masculine beings are aggressive whereas feminine beings are passive. The sex act between men and women is symbolic of this difference. Masculine men ("real men") are aggressive, and feminine women are passive and accepting of the man's behavior. Even the most masculine men whose orientation is homosexual are considered effeminate and nonconforming with the norms of hegemonic masculinity.<sup>446</sup> Thus, men who harass other men

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439. See *supra* note 436 and accompanying text.

440. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 51-56 (1995).

441. See *id.*

442. See *id.*

443. See *id.*

444. See *id.* at 72-74, 95-99.

445. *Id.* at 72-74.

446. See CONNELL, *supra* note 31, at 143, 162; McGinley, *supra* note 29, at 408-09.

conflate femininity and homosexuality in their harassing behaviors. Men who are harassed for failure to conform to accepted notions of masculine behavior and dress are, therefore, discriminated against because of their gender, whether they are heterosexual or homosexual in their orientation.<sup>447</sup>

### 3. Men Harassing Men—Hazing, Horseplay, and Incivility

Another type of harassment of men at work may involve hazing or horseplay. As this Article uses the terms, hazing occurs at the beginning of the working relationship or when an individual transfers to work with a new group, whereas horseplay may occur throughout the employment relationship. While the behaviors that constitute hazing or horseplay may be indistinguishable from behavior creating a hostile work environment, courts have drawn a line between horseplay/hazing and actionable harassing behavior.<sup>448</sup>

For example, in *Shafer v. Kal Kan Foods, Inc.*,<sup>449</sup> the Seventh Circuit affirmed the dismissal of a sexual harassment case brought by a male plaintiff who suffered from four serious incidents at the hands of a coworker. The offender, Dill, weighed 100 pounds more than the plaintiff and remarked that the plaintiff had a “cheerleader’s ass” and that it ““would look real nice on my dick.”<sup>450</sup> He then forced Shafer’s face to Dill’s crotch, moving his groin to give the impression that Shafer was performing fellatio.<sup>451</sup> Later, Dill grabbed Shafer’s hand and moved it to Dill’s crotch while moving as if he were masturbating.<sup>452</sup> This incident was performed with so much force that Shafer was afraid Dill would break his arm. When in the locker room and Shafer had no shirt on, Dill pulled out a handful of Shafer’s chest hair, causing him considerable pain. Finally, Dill bit Shafer hard in the neck, raising welts.<sup>453</sup> The court assumed that Dill behaved this way in order to demonstrate “physical domination.”<sup>454</sup> Nonetheless, the court stated

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447. Frank Valdes demonstrates this by way of powerful examples. See Valdes, *supra* note 440, at 38–44, 51, 72–74, 95–99.

448. See, e.g., *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663 (7th Cir. 2005).

449. *Id.*

450. *Id.* at 665.

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 665–66.

that sexual horseplay differs from sex discrimination, and concluded that the behavior was not sufficiently severe or pervasive to constitute sexual harassment.<sup>455</sup>

The Seventh Circuit relied on *Oncale*, where the Court noted that Title VII does not regulate "horseplay," but requires behavior that is sufficiently severe or pervasive to alter the terms or conditions of employment.<sup>456</sup> Implicit in this view is that horseplay is harmless and insufficiently severe or pervasive to alter the terms or conditions of employment, and, perhaps, not gender-based.

*Kal Kan* and Collinson's shop study both suggest a contrary conclusion. In Collinson's study, the harassing behavior that is intended to inculcate the newcomer into the shop norms is related to sex. First, as is obvious by much of the behavior, its methodology involves sexual assault, sexual threats, and sexual comments. Federal courts conclude that sexual methodology alone is insufficient to find that the behavior occurred because of sex.<sup>457</sup> But the fact that there is sexualized behavior should not be irrelevant. The use of sexualized behavior is common in hazing and horseplay, and it is used to accomplish the goal of masculinizing the group.<sup>458</sup> Hazing occurs because of sex when its purpose is to establish the masculine credentials of the group and to assure that the newcomer adheres to these masculine norms.<sup>459</sup> Hazing uses exaggerated sexual or gender-based behavior to humiliate the newest member, who the hazer compares to women in a demeaning way.<sup>460</sup> The hazed are assaulted and are often required to humiliate themselves.<sup>461</sup> Through hazing, the perpetrators demonstrate their masculinity and require the newcomers to show their subservience to group norms.<sup>462</sup> Sanday's account of fraternity gang rape demonstrates that unity is accomplished through aggressive masculinities, which emphasize that women are sexual objects and that real men are in charge.<sup>463</sup> This emphasis occurs by imposing behavior and comments on the newcomers, com-

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455. *Id.* at 666.

456. *Id.* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

457. *See Oncale*, 523 U.S. at 80.

458. *See supra* Part I.B.2.b.

459. *See supra* Part I.B.2.b.

460. *See supra* Part I.B.2.b.

461. *See supra* Part I.B.2.b.

462. *See supra* Part I.B.2.b.

463. *See supra* Part I.B.2.b.

paring them to dirty women and exhorting them to drive out the feminine in themselves.<sup>464</sup>

This behavior occurs to induct the new male employee into the perpetrators' society or to assure that society members are still under the control of the group.<sup>465</sup> It is gendered because the purpose of the offending behavior is to establish male domination in the group.

Masculinities theory supports Schultz's conclusions that jobs are gendered and that men in traditionally male jobs harass women and non-conforming men in order to maintain the masculinity of the job.<sup>466</sup> Masculinities theory, however, goes beyond Schultz's competence paradigm to explain that men in jobs harass or haze other men, even those who are gender-conforming, in order to establish the job as a man's job and to assure unity among men. Perhaps even more important, masculinities theory explains that men behave this way because their masculinity is subordinated to other more powerful versions of masculinity.<sup>467</sup> This insight is important in understanding why hazing and horseplay occur because of sex. By accomplishing this conformity in traditional male workplaces or jobs, men, who may already be threatened by a more powerful form of masculinity, not only reinforce masculine norms, but also indirectly screen out women from men's jobs.

As Franke noted, the behavior occurs to reinforce heteropatriarchal norms; however, it is important to recognize that reinforcing these norms in the workplace will, consciously or not, eliminate women's opportunities to perform the job.<sup>468</sup> Like a secret male society, these groups of men continuously

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464. See *supra* Part I.B.2.b.

465. See *supra* Part I.B.2.b.

466. See *supra* Part I.A.

467. There are multiple forms of masculinity. Stephen Whitehead divides them into hegemonic, subordinated and conservative. See Stephen Whitehead, *Disrupted Selves: Resistance and Identity Work in the Managerial Arena*, 10 GENDER & EDUC. 199, 203 (1998).

468. The argument presented here is similar to that of Professor Abrams' criticism of Franke's work. See Abrams, *supra* note 22, at 1193-94. While I agree with much of Franke's position that the purpose of the harassment is to reinforce hetero-patriarchal norms, I also agree with Abrams that Franke seems not to focus sufficiently on the importance of the workplace as a site of resistance and power for women. Franke is correct, however, that we should not ignore the harassment that occurs in schools because, in my view, school-based harassment teaches us a great deal about how groups of boys (and later, men) behave when engaging in homosocial competition. See Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1247-49 (1998).

police both the gender of their members and the job itself. Katherine Franke expressed discomfort with the male-on-male horseplay as a category that creates a potential cause of action under Title VII.<sup>469</sup> She noted that this relationship should require a higher proof standard of harm in order to prove that the man bringing the action has standing to sue.<sup>470</sup> I disagree. Masculinities theory explains that the men who perform masculine practices are often subliminated to other men. As in the example of Collinson's shop, men do not belong to a monolithic group that enjoys the rough behavior. In fact, many men find it difficult, painful and stress-inducing.<sup>471</sup> So long as those men are able to prove, as is required by the statute, that the behavior is unwelcome, severe, or pervasive and that they have suffered injury as a result, they should have a cause of action.<sup>472</sup>

The law should support men who are willing to resist the shop horseplay because the horseplay harms not only gender-conforming men, but also gender-nonconforming men and women.<sup>473</sup> Ultimately, the introduction of substantial numbers of women to desegregate these male jobs is necessary in order to ensure equality for men and women; desegregation will only occur once we have eliminated the roughest behavior that still takes place in order to establish the shop as a men's club.

#### 4. Men Harassing Women Using Gender-Neutral Behavior or Language

Sexual and gendered harassment present a variety of fact patterns. When men harass women, ordinarily their behavior combines sexualized and gendered behavior. Sometimes, the

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469. See Franke, *supra* note 21, at 768–69.

470. See *id.*

471. See *supra* notes 258–60 and accompanying text.

472. A failure to recognize this as discrimination would also fail to acknowledge that these men are required to perform their gender identity in a way that is uncomfortable to them in order to comfort those around them. Cf. Carbado & Gulati, *supra* note 252, at 1288–89; Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 717–28 (2001) (arguing that if outsiders are discriminated against for failing to perform their identity in order to comfort those at the workplace, they may have a cause of action under Title VII); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Inter-group Solidarity*, 77 IND. L.J. 63, 80–82 (2002) (arguing that men who are insiders and who refuse to discriminate against outsider groups should have a cause of action under Title VII beyond an associational right).

473. Cf. Zatz, *supra* note 472, at 74–78.



behavior is only sexualized or only gendered. A less obvious fact pattern occurs when harassment occurs because of sex (or gender), but content is sex-neutral and gender-neutral. This final fact pattern is rarely litigated. These cases are particularly difficult to prove because the men involved may use and abuse legitimate work standards to criticize women.

One example of this gender-neutral sexual harassment was observed by sociologist Anastasia Prokos in a police training academy.<sup>474</sup> Both men and women were exposed to similar behavior, but Prokos concluded that although the training was explicitly gender neutral, very strong implicit messages were sent to women that they were inferior.<sup>475</sup> This was accomplished by treating the women students as outsiders, exaggerating the differences between men and women, using visual images in training movies that sexually objectified women, resisting authority of powerful women by treating women instructors with less respect, ignoring the training on domestic violence, and verbally denigrating women students.<sup>476</sup> Male instructors and students used the women's presence to "further the project of masculinity construction."<sup>477</sup>

Gender-neutral behavior may occur more commonly in white-collar jobs where the harassers are more sophisticated and attempt to hide their purpose in harassing their female subordinates, superiors, or colleagues. Cortina explained that women lawyers suffered from differential treatment in the court system.<sup>478</sup> The women stated that they were excluded from conversations between male lawyers.<sup>479</sup> They also noted that male lawyers and judges questioned or undermined the women's professional competence, engaged in gender disparagement, made comments on women's appearance, and mistook them for non-lawyers.<sup>480</sup> Eight percent of the women stated that they had received unwanted sexual attention from male lawyers or judges.<sup>481</sup> In interviews, the women explained that although much of the behavior is not explicitly anti-female, they believe it occurs because of gender.<sup>482</sup> Ironically, other

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474. See Anastasia Prokos & Irene Padavic, *supra* note 399.

475. *Id.* at 446.

476. See *id.* at 446-54.

477. *Id.* at 454.

478. See Cortina et al., *supra* note 163, at 246-47.

479. *Id.* at 247.

480. *Id.*

481. *Id.* at 254.

482. *Id.* at 253.

women insisted that the behavior does not occur because of gender.<sup>483</sup> Cortina concluded that in either event, women suffer something men do not. They are constantly trying to figure out whether gender is affecting the behavior of others toward them, a task which imposes a cognitive burden on women.<sup>484</sup>

Masculinities theory can provide the theoretical support for new bullying research regarding gender-neutral bullying of women workers. Researchers who study bullying recently have found that women are subjected to more gender-neutral bullying than men and that male supervisors manipulate systems designed to protect workers from abuse in order to bully or harass women.<sup>485</sup> Moreover, research demonstrates that, unlike men who suffer less bullying as they move higher in the organization, women who rise in the ranks of the organization are bullied at a greater rate.<sup>486</sup> While organizational power is used to bully the first set of women, it cannot protect women who are in higher positions from bullying by subordinates, co-workers, and superiors. But theorists believe that while male subordinates lack organizational power, they have power derived from the superior position of men in society.<sup>487</sup> Because they have more power derived from their gender, male subordinates at times use that gender power to harass women who are their superiors. Gender is a key factor in the analysis.

### III. A PROPOSAL: POLICY CONSIDERATIONS AND POSSIBLE SOLUTIONS

This Article uses masculinities theory and bullying research to demonstrate the location of gender within organizational contexts. It notes that gender is deeply embedded in organizations to the point that it is almost impossible for organizations to detect. This Part argues that there are very important reasons, nonetheless, to support a project that eliminates the harmful gender constructs within organizations. Subpart A juxtaposes two case studies on organizational behavior. The first is the loss of the Challenger shuttle, which the authors attribute, at least in part, to the presence of masculinities in the workplace. The second is the study of an oil rig that

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483. *Id.*

484. *Id.*

485. *See supra* Part I.B.2.

486. *See supra* Part I.B.2.

487. *See* Juliano, *supra* note 154, at 505–06.

all but eliminated competitive and destructive masculine practices. After the case studies, Subpart B discusses the reasons for eliminating competitive masculinities from workplaces. These reasons include harm to women, harm to men, and harm to organizations and society.

A. *Two Case Studies: Organizational  
Encouragement/Discouragement of Masculinities*

1. The Challenger Disaster: The Role of Masculinities

Even within an organization that employs primarily white, middle-class workers, there are competing masculinities, some of which are subordinated to others. Sociologists Mark Maier and James Messerschmidt studied the competing masculinities in the decision to launch the ill-fated space shuttle, the Challenger,<sup>488</sup> which tragically exploded only seventy-three seconds into flight.<sup>489</sup> A Presidential Commission found that the disaster was caused by the failure, due to freezing temperatures, of a rubber O-ring in the Solid Rocket Booster.<sup>490</sup> The Commission also concluded that there were serious flaws in the decision-making process that led to the launch of the spacecraft despite the fact that engineers had warned of potential dangers.<sup>491</sup> While not discounting the role of factors such as technological failures, managerial hubris, or conflicting organizational cultures, Maier and Messerschmidt observe that gender played a key role in the shuttle disaster.<sup>492</sup>

NASA proceeded with the shuttle program in the mid-1970s with the idea that it would fly approximately sixty missions a year.<sup>493</sup> The most it ever flew were nine missions in 1985. In 1986, the year of the Challenger launch, NASA officials hoped to fly fifteen missions. There were concerns about the rocket boosters proposed by contractor Morton Thiokol as early as 1977 when NASA engineers first warned about the deficiencies of the design. Nonetheless, Morton Thiokol won the contract to produce the rocket boosters. When the shuttle began flying in 1981, the concerns were confirmed when hot gases

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488. Maier & Messerschmidt, *supra* note 37.

489. *Id.* at 325.

490. *Id.*

491. *Id.* at 325, 328–329.

492. *Id.* at 326.

493. *Id.* at 327–30 (describing the facts leading up to the Challenger disaster that are incorporated in the following two paragraphs).

inside the rockets began to erode the twin rubber O-ring seals. In spite of increasing erosion, the flights continued. In 1985, there were two near-disasters: one in cold weather in which hot gases burned through the primary O-ring, and a second when a primary seal in a nozzle failed, allowing the secondary O-ring to be partially corroded. A Thiokol rocket engineer wrote a blistering memo to the Vice President of Engineering at Thiokol warning about the possibility of loss of human life. These near-disasters led to the establishment of a task force at Morton Thiokol. Unfortunately, the task force did not accomplish its purpose. When a meeting occurred between Thiokol and NASA personnel, the NASA Director insisted that Thiokol alter its presentation to downplay the importance of the failure of the O-rings. While Thiokol downplayed the problem, it stressed that the lack of a secondary joint seal was crucial. NASA decided to continue to fly the shuttle "as is."

One week before the Challenger launch, NASA announced that it was seeking bids from four competitors to supply additional rocket boosters for the shuttle. Thiokol's exclusive control was threatened. The evening before the launch, which had been postponed three times due to cold weather, Thiokol engineers recommended against the launch. The NASA program manager attacked the Thiokol position aggressively, pressing for quantitative proof that it was unsafe to launch. Thiokol then took a break. Managers at Thiokol told the engineers that it was a management decision. The engineers were visibly upset and urged their supervisors to stand by the original decision. The Senior Vice President disciplined at least two of the engineers by giving them unfriendly looks. The senior managers did not listen to the engineers and, finally, decided to change their recommendation. NASA accepted the recommendation as a "green light."

Meir and Messerschmidt explain that the decision to launch illustrates commonalities among men as well as a number of masculinities in competition with one another: careerism, entrepreneurialism, and authoritarianism. The authors observe that the managers and engineers at both NASA and Morton Thiokol shared the masculine concept of career, defined by masculinities theorists as an "acute preoccupation with professional ambitions and progress so that men engage in specific practices—such as working long hours—that negate the possi-

bility of other practices—such as domestic responsibilities.”<sup>494</sup> NASA managers worked excessively and the Presidential Commission that reported on the failure of the Challenger attributed the decision to launch, in part, to managers’ lack of sleep.<sup>495</sup>

Moreover, the Morton Thiokol managers’ definitions of masculinity clashed with those of their engineers. The managers’ masculinity centered on achieving entrepreneurial organizational goals (keeping their contract for the shuttle boosters) while the engineers’ masculinities revolved around acquiring and proving their technical competence.<sup>496</sup> Morton Thiokol managers engaged in entrepreneurial risk taking in order to achieve their economic goal of keeping the contract with NASA, while NASA managers took entrepreneurial risks because they wanted to prove that they could fly more missions in 1986 than NASA had flown before. The meeting on the evening before the launch between Thiokol engineers and senior managers demonstrates “how the definition of masculinity is not only the collective work of a group of people—in this case corporate managers and engineers—but that it is constructed differently through social interaction.”<sup>497</sup> The meeting of the Thiokol engineers and managers demonstrated conflicting masculine values held by the two groups. The managers, who were vested with the decision whether to recommend the launch, used their power, and the engineers succumbed to the authoritarian masculinity of the managers.<sup>498</sup> In turn, the NASA managers used their authority to pressure the Morton Thiokol managers into a reversal of their original recommendation.<sup>499</sup> As the Morton Thiokol managers engaged in dominant masculinities in their treatment of their engineers, they also engaged in a subordinate masculinity in their willingness to allow the NASA managers to dominate them.<sup>500</sup>

The authors conclude that masculinities are varied and complex and that they play out in social situations. Moreover, they state, “[g]ender . . . is powerfully present among a group of ‘men only,’ not just salient when women and men share the

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494. *Id.* at 331 (citations omitted).

495. *Id.*

496. *Id.* at 332.

497. *Id.* at 336.

498. *Id.*

499. *Id.* at 337.

500. *Id.* at 338.

same space.”<sup>501</sup> While it is unlikely that these masculine behaviors violated Title VII in this case study, the study demonstrates that the presence of masculinities may have been at least partially responsible for the disastrous failure of the shuttle. Organizational structures that curb the practice of masculinities would likely further the goals of the organization.

## 2. The Oil-Rig: Attempting to Create a Safer Workplace

A recent study suggests that is not impossible for employers to eliminate harmful masculinities from workplaces. Understanding the invisible gendered nature of the workplace and enforcing the law to eradicate the practices that harm women and many men at work could potential transform the American workplace. While some economists argue that the American workplace necessarily engages masculine, aggressive, competitive, and hard-driving tactics in order to compete in a global market, new research suggests the opposite. It may be that eliminating the most destructive masculinities at work will have a positive effect not only on work relationships but also on productivity and efficiency.

Organizational experts, Robin Ely and Debra Meyerson, performed an ethnographic study of two offshore oil platforms.<sup>502</sup> Work on oil rigs, like other dangerous work performed predominantly by all-male workforces, historically presents an important site for expression of masculinity and the enhancing of masculine credentials.<sup>503</sup> Men reaffirm their masculinity in these workplaces by appearing physically tough, technically infallible, and emotionally detached.<sup>504</sup>

On the rigs studied by Ely and Meyerson, management was concerned with safety issues and adopted a new policy: Safety 2000.<sup>505</sup> This initiative caused workers to construct their individual and group identities around the workplace norm of safety.<sup>506</sup> As a result, there was a decline in the accident rate by eighty-four percent while the company's production (number of barrels of oil), efficiency (cost per barrel), and

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501. *Id.* at 342.

502. *See generally* Ely & Meyerson, *supra* note 28.

503. *Id.* at 9.

504. *See id.* at 9–12.

505. *Id.* at 13.

506. *Id.* at 2.

reliability (production time) exceeded the industry's previous benchmark.<sup>507</sup>

Workers explained that the atmosphere on the oil rigs had changed due to the safety initiative. Gone were the fights, the displays of masculinity, the horseplay, the physical practical jokes, and the macho treatment of others. The authors observed that workers developed close interpersonal relationships; openly admitted their mistakes, their shortcomings, and their fears; and showed sensitivity toward others. The authors concluded that there was a "*transformation in how men experienced themselves and their relationships with one another*. This transformation—spurred by organizational practices and norms stemming from the safety initiative—released men from the performance of masculinity traditionally associated with dangerous work."<sup>508</sup>

The authors further concluded that the primary difference between the men working on the oil rigs during the safety initiative and those who worked on oil rigs before the initiative began was that the men who acted aggressively toward one another during earlier studies were primarily motivated by a need to prove their masculinity.<sup>509</sup> In contrast, the men in this study were motivated primarily by collective goals—the safety and well being of coworkers and the accomplishment of the work.<sup>510</sup> Ely and Meyerson looked to social psychology to explain this result. They noted that research on the self suggests that the goals of self-validation and other-orientation elicit different behavior. When self-validating, the enhancement of the self is the goal. When other-orientated, people see the self as an agent but not as the goal itself. These different goal orientations, posit Ely and Meyerson, result in different relational processes.<sup>511</sup>

Earlier platform workers engaged in stereotypically masculine displays of physical strength, technical infallibility, and emotional detachment.<sup>512</sup> The men Ely and Meyerson observed, in contrast, did not. Instead, they enhanced safety by conceding personal limitations and publicly revealing their mistakes and shortcomings.<sup>513</sup> They openly shared their fears

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507. *Id.* at 13.

508. *Id.* at 18 (emphasis in original).

509. *Id.* at 17–19.

510. *Id.* at 19.

511. *See id.* at 19–20.

512. *Id.* at 20.

513. *Id.* at 20–26.

and acknowledged their vulnerabilities.<sup>514</sup> This behavior "had a profound effect on their sense of who they were and could be as men."<sup>515</sup> The men did not abandon identity construction but became engaged "in a different process of masculine identity-construction."<sup>516</sup> Their process was generative rather than defensive in that it was designed to enhance the safety of the group and the group's production goals.<sup>517</sup> As a result, the men developed deeper, more intimate relationships with one another. They discussed their fears and their families without shame. They were open and not condemning toward one another.<sup>518</sup> For example, men openly admitted that they had adopted more feminine traits such as compassion.<sup>519</sup>

They did not, however, repudiate their masculine traits. While continuing to exercise physical strength and demonstrate technical expertise, they did not have to prove themselves to one another.<sup>520</sup>

Ely and Meyerson suggest that organizations can play a role in disrupting the cultural norms of aggressive masculinity. Three organizational conditions must precede this disruption: a connective purpose, psychological safety, and the decoupling of masculinity and competence.<sup>521</sup> While men will continue to construct gender identities, they do not feel a need to *prove* those identities.<sup>522</sup>

Ely and Meyerson raised the question of whether masculine traits themselves are destructive, or whether the need to prove masculinity is the real problem.<sup>523</sup> If it is the need to prove one's masculinity that is destructive, many of the masculine characteristics that society finds laudatory and from which the society benefits—such as leadership and heroism—need not be compromised by an attempt to reward connective purpose and behavior. It would be the drive to prove these masculine traits that should be curbed. Besides the drive to prove masculinity, harm also results where positive "masculine" traits are conflated with the male body: the concept that all men should

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514. *Id.* at 20.

515. *Id.*

516. *Id.* at 25.

517. *Id.*

518. *Id.*

519. *Id.* at 26.

520. *Id.* at 27.

521. *Id.* at 28–35.

522. *Id.*

523. *Id.* at 40.



possess these traits, and if they do not, they are not "real men," and the conclusion that women do not or should not possess these traits.

This case study is important because it suggests that organizations can create structures and policies that eliminate the most damaging masculinities in the workplace without condemning those masculine traits that further individual, organizational, and societal good.

### *B. Eliminating Destructive Gender Constructs at Work*

In order to ensure a just workplace, it is necessary to eliminate the destructive gender constructs at work. The reasons for this project are threefold. First, gender constructs harm women. Because of the presence of a gender construct that uniformly brands women as inferior, women continue to suffer adverse economic and emotional consequences relative to their male counterparts. If the purpose of prohibiting sex discrimination under Title VII is to eliminate gender or sex as a reason for making employment decisions and as a basis for altering the terms and conditions of a person's employment, Title VII is far from reaching its goal. A neutral playing field cannot exist until gender becomes more visible, is acknowledged, and, to some extent, is vanquished from the workplace.

Second, gender constructs harm men. While men as a whole benefit from masculinities, the aggressive competition created by the need to prove masculinity places pressure on all men, particularly on those men who cannot live up to the hegemonic masculinity—which is most men. Even if all men could live up to the hegemonic definition of masculinity, some men would prefer not to engage in the competition or the destructive behavior.

Third, gender constructs at work harm the organization. Maier and Mayerschmidt's account of the Challenger launch<sup>524</sup> and Ely and Meyerson's description of the men working on oil rigs<sup>525</sup> demonstrate, in contrasting ways, that competing masculinities may lead to less favorable results and that cooperating may enhance men's relationships with one another as well as productivity and efficiency in the workplace.

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524. See Maier & Messerschmidt, *supra* note 37.

525. See *supra* notes 502–23 and accompanying text.

A close study of masculinities theory, bullying, hazing, and harassment demonstrates that many behaviors courts consider normal or not occurring because of sex actually take place, whether consciously or unconsciously, to establish the job or workplace as an all-male enclave or to reinforce the masculine credentials of the job and the masculinity of the job holders. Even absent an intent to marginalize women and certain men, many of these behaviors have a disparate effect on most women and on men who do not conform to gendered expectations. The research examined in Part I, therefore, supports the view that the four scenarios studied here all occur in a gendered environment and should be recognized by Title VII as taking place because of sex.

Courts should recognize that severe or pervasive misogynist behavior in a previously all-male workplace creates a hostile work environment for women entering the workplace because of their sex, even if the behavior is not specifically directed at women. They should also conclude that group behavior that harasses individual men who fail to conform to masculine norms occurs "because of sex." Furthermore, this article demonstrates that hazing and horseplay, when they are sufficiently severe or pervasive, can occur because of sex and should be prohibited when they do. Finally, gender- and sex-neutral harassing behavior directed at men or women because of their sex should be illegal if it is sufficiently severe or pervasive to alter the terms or conditions of employment.

The purpose of Title VII is to guarantee equal employment opportunity to all persons regardless of their sex, gender, race, color, national origin, or religion.<sup>526</sup> Permitting severe or pervasive harassing behavior that is intentionally gendered or that disparately affects women and/or men who are not sufficiently masculine contravenes the purpose of the statute and prevents Title VII from fulfilling its promise of equality at work.

## CONCLUSION

Workplaces are sites of construction of male gender identity. While there may be nothing wrong with constructing gender identity at work, masculinities research and the new bullying research demonstrate that men's proving masculinity in

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526. See *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987).

the workplace can be destructive to many men and to women. Title VII's hostile work environment law provides a vehicle that, when interpreted properly, permits courts to conclude that severe or repetitive harassment or bullying behavior, especially when it is performed by groups in sex segregated workplaces, discriminates against the target because of sex.

