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# Postscript Spring 1998: A Response to Professors Bernstein and Franke

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# POSTSCRIPT, SPRING 1998: A RESPONSE TO PROFESSORS BERNSTEIN AND FRANKE

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In the year since this forum first began to take shape, the term "sexual harassment" has been almost constantly on the lips of pundits and in the headlines of newspapers. Allegations that President Clinton engaged in sexual misconduct with a series of female employees have, of course, claimed the lion's share of attention. Public response to the allegations, and counter-allegations, has conditioned not only the way that people view the Presidency, but also the way that they respond to the claim of sexual harassment itself.[1] But factors other than the allegations against the President have helped to keep sexual harassment in the public eye. It is these other factors which may be a portent of the future direction of this body of law.

The Supreme Court has taken a record number of sexual harassment cases this term. The four on the docket comprise twice as many as the Court has decided in the history of the claim, and they reflect many areas which have heretofore evaded decisive resolution: same-sex sexual harassment,[2] respondeat superior liability,[3] the application of these elements to cases involving the public schools,[4] and more.[5] Moreover, the first case, *Oncale v. Sundowner Offshore Services, Inc.*,[6] was resolved in an unusually brief, unanimous opinion by Justice Scalia,

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† Professor of Law, Cornell Law School. I am grateful to the organizers and participants at Yale Law School's Sexual Harassment Symposium, at which I first presented some of these ideas, and to Martha Chamallas, Katherine Franke and Bill Kell for conversations that helped to develop them.

1 This point was made recently in an editorial by Professor Anita Hill. Anita Hill, *A Matter of Definition*, N.Y. TIMES, Mar. 19, 1998, at A21. Hill argues that

> [I]n our new national conversation on sex, including our discussions of the Paula Jones lawsuit and the resulting revelations from Monica Lewinsky and Kathleen Willey, the references to sexual harassment have expanded far beyond the legal prescriptions. The term has become a cliché, and the perception of sexual harassment as a civil rights violation is now diminished.

*Id.*

2 *See* Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 988 (1998).

3 *See* Faragher v. Boca Raton, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997).

4 *See* Gebser v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir.), *cert. granted*, 118 S. Ct. 595 (1997).

5 *See* Jansen v. Packaging Corp. of America, 123 F.3d 490 (7th Cir. 1997), *cert. granted in part, sub nom.* Burlington Indus. v. Ellerth, 118 S. Ct. 876 (1998).

6 118 S. Ct. 988 (1998).

holding that same-sex sexual harassment can be actionable under Title VII.[7]

*Oncale* is in many respects an enigma. In an effort to give a conclusive answer to a case that, by all appearances, he would have preferred not to have had to consider,[8] Justice Scalia skirted the "what," the "how" and the "why" of sexual harassment. He declined to discuss all but the most basic outline of the facts,[9] offered no theory of the wrong that purports to explain why same-sex cases should be included in Title VII's ambit, and provided only a few hints as to how decisionmaking in these cases should occur. Yet in other respects the case is implausibly promising. Scalia's invocation of the "reasonable person in the plaintiff's position, considering 'all the circumstances'"[10] has a greater potential for group-based specificity than even the much-lauded opinion in *Harris v. Forklift*.[11] The *Oncale* opinion contains a remarkable call for contextualization in the assessment of sexual harassment,[12] tempered only by Scalia's confident and perhaps solipsistic

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7 *Id.* at 1003.

8 Justice Scalia's opinion strikes me as holding the sexual harassment claim somewhat uncomfortably at arms length. My perception may be colored in part by the striking lack of solicitude Justice Scalia has manifested toward constitutional discrimination claims raised by women, and gays and lesbians. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264, 2299 (1996) (Scalia, J., dissenting) (arguing against recognition of equal protection claim brought by women against Virginia's maintenance of exclusively male military college); Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting) (argning that Colorado constitutional amendment, which prevents homosexuals from receiving legislative, executive, or judicial protection from discrimination, does not violate the Equal Protection Clause). But it is also shaped by some of the unusual features of the *Oncale* opinion. I draw this inference partly from Scalia's reluctance to discuss the case's facts, *see infra* note 9, and partly from the brevity with which he disposes of the case, punctuated by hasty reassurances that difficult cases can be resolved by reference to common sense. *Oncale*, 118 S. Ct. at 1003.

9 Scalia states, "[t]he precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally." *Oncale*, 118 S. Ct. at 1000. Presumably the Court is referring to the dignity of Joseph Oncale, although the conclusion that reciting the facts of an actionable legal wrong somehow disgraces its victim seems both anachronistic (a throwback to a time when sexualized injury was thought to reflect badly on the victim) and surprisingly gender-specific (this reluctance is rarely manifest in cases involving the sexualized injury of women). Perhaps Justice Scalia means to suggest that in the interests of preserving the dignity of the Court, he will not recite these distasteful facts.

10 *Id.* at 1003 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)).

11 510 U.S. 17 (1993).

12 In a passage that strikes me as a model of judicious context-specificity, Justice Scalia writes:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distingnish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

suggestion that one can resolve these cases with a healthy dose of common sense.[13] Most importantly, the opinion throws the door open to an entirely new—and heretofore almost entirely marginalized[14]—group of claimants.

While the Supreme Court has limited itself to fairly general suggestions about the contours of the sexual harassment claim, many commentators have imparted a clearer and more specific message. A dominant theme in both scholarly and popular commentary has been that the sexual harassment claim risks distracting us with a censorious focus on sex, when the real focus should be on denial of equal employment opportunity. Some commentators have advanced this claim with care and nuance. Vicki Schultz, for example, encouraged courts to see the continuity between sexualized and nonsexualized forms of harassment and to consider harassment to be a mode of establishing masculine competence as a requirement for the most desirable lines of work.[15] Other variants of this claim have been less nuanced and more disturbing. *The New Yorker* has run a series of articles that describe sexual harassment law as threatening to undermine claims of discrimination that do not involve sexual misconduct. The most disturbing of these articles was a recent piece by Jeffrey Toobin,[16] which criticized Catharine MacKinnon for entrenching the view that there is "no sex without harassment . . . and no harassment without sex,"[17] and presented Vicki Schultz's focus on non-sexualized harassment as a competing model or antidote.[18]

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*Oncale*, 118 S. Ct. at 1003.

13 Judicial reference to common sense seems to me all too frequently to presage the application of a judge's often gendered intuitions. I make this point in Kathryn Abrams, *Social Construction, Roving Biologism and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1033-34 (1992).

14 The paradigmatic case prior to *Oncale* had been Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988), which denied recovery to a man who had been subjected to punishing verbal and physical harassment because of his perceived gender nonconformity.

15 *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

16 Jeffrey Toobin, *The Trouble With Sex: Why the Law of Sexual Harassment Has Never Worked*, THE NEW YORKER, Feb. 9, 1998, at 48.

17 *Id.*

18 *Id.* at 55. To my mind this article mischaracterizes MacKinnon, who has not argued either that all sexual expression in the workplace constitutes harassment or that nonsexualized conduct is excluded from the definition of harassment. *See* Catharine A. MacKinnon, Letter to the Editor, THE NEW YORKER, Feb. 23 & Mar. 2, 1998, at 28. It also mischaracterizes Schultz, who describes a focus on sexualized harassment as insufficient, but proposes that her emphasis on nonsexualized harassment be added to the definition of harassment, not used to replace it. *See* Schultz, *supra* note 15, at 1690 ("It is not enough to focus on the harm to women as sexual beings; the law must also address women's systematic disadvantage. . . ."). Toobin's article has the additional defect of attempting to play feminist scholars off against each other: it uses the appeal of Schultz's new focus to try to forge opposition to MacKinnon. *See* Toobin, *supra* note 16, at 55.

These developments make for a confusing, yet potentially pivotal, moment in the public understanding of sexual harassment. Since they arise from public events and enlist popular opinion, and since some antagonize rather than reinterpret the sexual harassment claim, these developments may effect a more substantial realignment than anything I glimpsed in *The New Jurisprudence of Sexual Harassment.*[19] In this scenario, the Supreme Court is not the primary culprit, although its failure to resolve *Oncale* in a fully elaborated way creates a potential problem. If the Court has opened the gates, it has made little effort to define the terrain that lies inside. Into this vacuum moves a public overwhelmed by the pervasiveness of alleged sexual scandals and disillusioned with the difficulties of parsing sexualized misconduct. Also converging on this space are a series of commentators such as Toobin, who comfortingly suggest that the problem with which we should be concerned is not sex, but rather discrimination—a comparatively tractable problem that places liability on familiar, readily-identifiable villains. Before long, the public will lose the will to sort out appropriate sexuality from coercive sexuality, to see inequality in exchanges or relationships where inequality had not been glimpsed before, and to connect these problems—as Vicki Schultz invites us to do[20]—with harassing or unequal treatment that does not take a sexualized form. If these consequences occur, they will decisively contract the horizons that Supreme Court doctrine appeared to open in *Vinson*,[21] *Harris*,[22] and *Oncale*.[23] In this moment, it seems to me, we need a theory of sexual harassment that reminds us of the harm that can be done to women, and men, when sex is used as a vehicle for entrenching inequalities of power. At the same time this theory must combine this insight with an understanding that many means of instantiating a power hierarchy between men and women, masculine and feminine, do not rely on sex. It is with this thought that I turn to the responses of Professors Bernstein and Franke.

## I

I admire Professor Bernstein's spirited defense of her article,[24] particularly the witty, articulate thrust and parry for which she has become well-known. While a part of me wants simply to watch the sparks fly, I will offer a few thoughts on the grounds of our disagreement.

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19 Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) [hereinafter *The New Jurisprudence*].

20 Schultz, *supra* note 15.

21 477 U.S. 57 (1986).

22 510 U.S. 17 (1993).

23 118 S. Ct. 998 (1998).

24 Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231, 1244 (1998).

Professor Bernstein and I may never agree about the "respectful" versus the "reasonable" person, and there is no doubt some irony in the positions that we espouse: the advocate of systematic change defends the old term, while the proponent of "an old jurisprudence" flies the banner of the new. Yet I am less concerned with my decade of investment in the term "reasonable" than with courts' comparable investment. If the decisive question, as I suspect Bernstein agrees, is less the particular word used than the gloss that comes to be placed on it by triers of fact, it seems unproductive to distract the courts from this process of elaboration by the interjection of a new term. This is particularly true if the presently-used term—in this case, reasonableness—can be construed in a way that will do the job. Here, of course, Professor Bernstein and I differ. She argues that a largely Republican-appointed judiciary[25] will have no patience for my suggestions, let alone the academic language in which they are sometimes couched.[26] Yet, interestingly, the actual record of judicial performance here is more promising. Nearly a dozen federal and state courts have used or cited the work of feminist commentators on the "reasonable woman" standard.[27] Perhaps more importantly, the Supreme Court has signalled a willinguess to take account of feminist thinking on the "reasonableness" standard. When Justice Scalia is willing to talk about "a reasonable person in the plaintiff's position, considering 'all the circumstances',"[28] we may have a trajectory with which we can work.

However, as I argued in *The New Jurisprudence*,[29] and as Justice Scalia's perplexing opinion in *Oncale* made clear,[30] the particular standard used for assessing pervasiveness is ultimately less important than the characterization of the wrong of sexual harassment itself. Here Professor Bernstein and I continue to have differences as well. Bern-

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25 Professor Bernstein is correct that I have aimed my interpretive proposals at the judiciary (and of course, at advocates), *see id.* at 1238, preferring to let those who are far more experienced than me frame these matters for jurors.

26 *Id.* at 1238-39.

27 Bernstein notes that seven judicial opinions have cited the elaboration of the reasonable woman standard offered in *Gender Discrimination and the Transformation of Workplace Norms*. *Id.* at 1231 n.4 (discussing citations to Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989)). My own subsequent research revealed that a comparable number of courts had cited work by feminist legal scholars such as Nancy Ehrenreich and Naomi Cahn. Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992); Nancy Ehrenreich, *Pluralist Myth and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

28 *Oncale*, 118 S. Ct. at 1003 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)).

29 *The New Jurisprudence*, *supra* note 19, at 1184.

30 *See supra* text following note 9 (arguing that Oncale opinion, while promising in some of its context-specific language, does not offer an account of the wrong of sexual harassment that explains why same-sex cases should be included within Title VII's coverage).

stein argues that she has not obscured the gender-based harm of sexual harassment.[31] She has simply left that harm to be debated and elaborated through the political process, while she has introduced into the adjudicative context a more palatable proxy appropriate to the single-litigant, private right context of a Title VII action.[32] She argues that in my endorsement of a gendered, politically-situated account of the harm, I have invoked an unacceptably anachronistic concept of group rights that is ill-suited to the private law structure of Title VII.[33]

Bernstein's argument conflates two things: first, the legal or institutional approach to addressing a wrong; and second, the conceptualization or understanding of that wrong itself. My approach is aimed at the latter, yet Bernstein describes it as aiming at, or at least implicating, the former.[34] Professor Bernstein is no doubt correct that I endorse some conceptions of group rights and the innovative judicial roles they occasion.[35] However, this has little to do with my position on sexual harassment. *The New Jurisprudence of Sexual Harassment* does not propose class actions, structural injunctions, judicial management of complex lawsuits, or any of the other features that effected a convergence between adjudicatory and more broadly participatory politics. I make recourse to a statute that recognizes private rights, closely interrelates rights and remedies, and is substantially party-initiated and party controlled.[36] Contrary to Bernstein's claims, these features need not dictate our understanding of the wrong that the statute serves to right.

Feminist legal reform has often made use of statutes that grant a private right of action to address a wrong that has individual manifestations, but collective significance.[37] In finding this private injury a

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31 Bernstein, *supra* note 24, at 1233-34.

32 *Id.* at 1241-43.

33 *Id.* at 1241-42.

34 *Id.* at 1240-43.

35 *See* LARRY YACKLE, REFORM AND REGRET (1989) (examining Judge Johnson's structural injunctive approaches to reform in schools, prisons and mental institutions).

36 I accept Bernstein's description, arguendo, although I would note that this description obscures the often important role of the EEOC in bringing actions under Title VII, encouraging conciliation, issuing right-to-sue letters, and more.

37 I would place Title VII (both its broad contours and the sexual harassment claim pioneered by Catharine MacKinnon) in this category, as well as the MacKinnon-Dworkin Anti-Pornography Ordinance, *see* GERALD GUNTHER, CONSTITUTIONAL LAW 1125-26 & n.1 (12th ed. 1991) (discussing the ordinance), and the more recent Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.). An interesting case interpreting the Act that sheds light on this notion of an injury with individual manifestations but group-based significance is Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997), *vacated reh'g granted en banc* (Feb. 5, 1998). The Fourth Circuit reversed a lower court decision, Brzonkala v. Virginia Polytechnic Inst. and State Univ., 935 F. Supp. 779 (W.D. Va. 1996) in which the court sought to distinguish between rapes motivated by "gen-

matter of public concern, the statute commits itself to addressing a kind of wrong that has a group-based character and a political salience.[38] But the public, or political character of the wrong is not relevant simply in bringing the individual instances under the statutory ambit. It is relevant to the way that they are adjudicated. Though the plaintiff alleges an individualized injury to establish her standing and make out her claim for relief, she makes recourse to the social or group-based significance of that injury in order to interpret her claim and distinguish it from those that may not belong under the statute. This is, as Katherine Franke has argued,[39] why we need a collective, politically-grounded account of the wrong of sexual harassment to explain why same-sex cases should come under the statute. And this is what is ultimately unsatisfying about Justice Scalia's intermittently promising opinion in *Oncale*: he recognizes the individual injury (and by implication, some others sufficiently like it), but leaves the collective, integrative account of the wrong to another day.

I am willing to credit Professor Bernstein's argument that her strategy is less a knowing depoliticization of sexual harassment than a

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der animus" and rapes motivated by the victim's personality. *See id.* at 785 ("date rape could involve in part disrespect for the victim as a person, not as a woman"). As the latter quote indicates, the lower court judge sought to characterize a particular kind of injury solely in relation to an individual transaction and not in relation to its broader group-based significance.

A slight variation of this theme in the context of a non-civil rights statute is provided by the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1994). This act specifies procedures to be followed, and individual and tribal rights that must be respected in the context of custody proceedings termination of parental rights, or foster care placements, involving an Indian child. *See* 25 U.S.C. §§ 1911-1912 (1994). Although the actions concern the placement or custody of an individual child, the rights of interveution or jurisdiction granted reflect collective familial and tribal interests in such placement or custody, as well as a relation between tribal interests and the welfare of the individual Indian child.

38 Bernstein correctly notes that Professors Fiss and Chayes largely confined their conceptions of 'structural litigation' to the constitutional context. Bernstein, *supra* note 24, at 1240-41. Yet her suggestion that the concept of group rights never extended beyond the constitutional realm and, particularly, that, now that the Equal Protection Clause has become a font of "individual" rights, statutory discrimination claims must follow suit, *supra* note 24, at 1241, seems to me incorrect. Statutory claims like Title VII or the Voting Rights Act do consider injured plaintiffs as member of groups and sometimes even award group-conscious remedies. *See* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994) (observing that some courts are willing to characterize claimants as members of one group, but that those courts experience conceptual and doctrinal difficulty when plaintiffs present themselves as members of more than one group). This is why an increasingly conservative Court has used the Fourteenth Amendment to put brakes on what can be done remedially under these statutes. The voting rights area is a case in point. Since the Court's decision in Shaw v. Reno, 509 U.S. 630 (1993), claimants may invoke the Equal Protection Clause to challenge race-conscious districting schemes, which have been the remedy of choice under the Voting Rights Act. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996) (finding race-conscious districting violates Equal Protection Clause); Miller v. Johnson, 515 U.S. 900 (1995) (same).

39 *See* Katherine Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691-98 (1997).

relegation of more politicized accounts of this injury to other, more appropriately political fora.[40] But this is still a worrisome abdication for reasons that both Justice Scalia's *Oncale* opinion and the present public ferment over sexual harassment make clear. The courts have not functioned in these private claim/public law cases as an apolitical arena for the adjudication of politically-neutralized claims. On the contrary, they have played a leadership role in declaring the social significance of the injury and defining its contours. Sexual harassment has become a social issue in large part because it has become a legal issue, and citizens often use the increasingly Delphic pronouncements of the Court[41] as a means of interpreting the social practices they see around them.[42] When the courts fail to do justice to this role, as Justice Scalia demonstrates and Professor Bernstein seems to recommend, a confused public can assign less satisfactory, even politically regressive, meanings to the practices they observe. It is this larger challenge of providing a group-based, or politically-situated, account of sexual harassment that Professor Franke addresses, and to which I now turn.

## II

Katherine Franke is surely correct when she writes that our differences appear obvious only to "the overinitiated."[43] In fact, I am convinced that even the most overinitiated—namely, she and I—see our approaches as converging on a common understanding and set of goals. Although the following discussion seeks to clarify some of the differences in emphasis that may remain, its primary object is to reaffirm the shared enterprise and identify some of the future challenges that follow from that enterprise.

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40 Bernstein, *supra* note 24, at 1243.

41 In conversations about the *Oncale* opinion, I have found that many people, including lawyers, seem to view the extreme brevity of the opinion (and its Supreme Court predecessor, Harris v. Forklift Systems, Inc., 510 U.S. 517 (1993)) as an advantage. While I do not necessarily endorse the extended, fractured opinions we have come to recognize as Supreme Court decisions, I wonder whether a four or seven page opinion can provide the clarification that may be required for a complex evolving claim such as the sexual harassment claim.

42 Two stories in *The New York Times* published on the day I wrote this section document this point. First, a front-page story juxtaposes the public confusion over the meaning of sexual harassment evident in the debate over President Clinton's alleged conduct with the clarifying role played by the Court and suggests that the record number of cases to be decided by the Court this year may help to mitigate this confusion. Second, in an op-ed defense of President Clinton, Gloria Steinem distinguishes his conduct from that of Senator Bob Packwood and other alleged harassers by arguing that his conduct does not satisfy the requirements of an actionable case of sexual harassment. *See* Tamar Lewin, *Debate Centers on Definition of Harassment*, N.Y. TIMES, Mar. 22, 1998, at A1; Gloria Steinem, *Feminist and the Clinton Question*, Mar. 22, 1998, at D15.

43 Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply To Professor Abrams*, 83 CORNELL L. REV. 1245, 1246 (1998).

I agree with Professor Franke's suggestion that a proper approach to sexual harassment (or any other gender-based injury) has both a "local" and a "systemic" dimension: the first explains how particular institutional and cultural practices do their work, and the second locates these practices within a systemic hierarchy of power that makes men, and masculinity, dominant, and women, and femininity, subordinate.[44] If we differ, it is because her discussion of sexual harassment tends to draw the first category slightly more narrowly than I would draw it. Franke's 'local' analysis is focused on practices that "gender males as masculine and females as feminine."[45] While I acknowledge that this "gender confinement" is one salient dynamic that occurs in the workplace, I argue that there are also other dynamics concerned with the subordination of women or the devaluation of the feminine, the marking of workplaces as normatively masculine, and more.[46] These other dynamics—some of which highlight the subordination of women more strongly than does Franke's explanation—are not only implicit in the systemic hierarchy; they also pervade local practices, such as sexual harassment. We need an account of discrimination that highlights this variety of dynamics at both local and systemic levels. This was a central goal in my interpretation of sexual harassment as "preserv[ing] male control and entrench[ing] male norms in the workplace."[47]

The emphasis on gender confinement in Franke's analysis of sexual harassment is one factor that led me to question the viability of a theory of hetero-patriarchy for interpreting this claim. I worried that a focus on the formation and disciplining of masculinity and femininity—which seemed to characterize Franke's analysis—might displace a focus on women's subordination, which seemed to me to be appropriately at the center of sexual harassment analysis. This worry seemed to be borne out by the fact that Franke made little reference to the workplace as the site of harassment or to the agonistic dynamic between men and women that has characterized that site. Franke's defense of her approach, however, relieves some of these concerns. While acknowledging the dynamics specific to the workplace that I cite, she describes her account as comprehending a broader domain of harassment that includes schools as well as the workplace.[48] Moreover, she vigorously defends the flexibility of a theory of hetero-patriarchy, noting,

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44 Franke, *supra* note 43, at 1252.

45 *Id.* at 1252.

46 *The New Jurisprudence*, *supra* note 19, at 1205-12.

47 *Id.* at 1172.

48 Franke, *supra* note 43, at 1247-50.

> [o]ne of the explanatory features of hetero-patriarchy that I find so satisfying is its capacity to provide an account for multiple trajectories of power: sex-based, gender-based, and sexual orientation-based. These dynamics tend to be mutually constitutive in a particular context . . . . Hetero-patriachy is designed to be flexible enough to respond to each of these complex situations.[49]

I suspect that the difference between a theory of hetero-patriarchy that traces variation in the operation of its different dimensions and a theory of gender subordination that comprehends effects on both women and men is more illusory than real. This does not deny that some differences in emphasis or application may remain. As her response suggests, Franke's interpretation of harassment is premised on a conception of that term that comprehends both the workplace and such phenomena as peer harassment in the educational context.[50] I would argue that a theory of hetero-patriarchy, or of gender subordination, must address 'local' practices at a level that is even more institutionally-specific. While I acknowledge the similarities Franke sees between the work and school settings, I also see a number of salient differences between these settings, including: the degree of gender socialization of perpetrators and targets; the presumed competence of perpetrators and targets to make choices about their sexual lives; the degree of hierarchy that is present in the environment; the level of control that perpetrators exercise over the structure of the setting; and the history of female access to or male entitlement in the particular environment.[51] A theory of hetero-patriarchy, in the end, may differ little from a theory of gender subordination that acknowledges coercive or constraining effects on men.[52] Either theory, however, should exhibit enough nuance to highlight different dynamics and the influence of different circumstances.

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49 *Id.* at 1252-53.

50 *Id.* at 1247-50. Franke suggests that this more comprehensive definition explains why she did not focus in particular on dynamics specific to the workplace. *Id.* at 1250.

51 Admittedly these factors may also differentiate one workplace from another or differentiate a school case involving a teacher-perpetrator from a school case involving a student-perpetrator. As a general matter, however, these factors are likely to make the analysis different in school cases than in workplace cases, and I believe they call for institutionally-specific 'local' analyses. I took the workplace as a focus because it has tended to be paradigmatic in sexual harassment litigation; however, I might have added that school-based harassment is also harassment, although it may exhibit a different combination of dynamics or institutional factors.

52 Contrary to Professor Franke's suggestion, *see* Franke, *supra* note 43, at 1253, I would argue that my account grasps the reflexive effect of sexual harassment on men. *See The New Jurisprudence*, *supra* note 19, at 1219 (stating that the socially constructing effects of sexual harassment "affect perpetrators as well as targets"). I see Professor Franke's point, however, since this element was partially submerged in a discussion that sought to emphasize a dynamic of women's struggle against subordination.

The priority placed on highlighting variability may be another factor that slightly distinguishes Professor Franke's theory from my own. This difference may arise in part from the different postures that we assume in introducing our arguments. Professor Franke—like Professor Schultz[53]—sought to bring to the center of sexual harassment law an element that had been excluded or relegated to the margins.[54] This effort at inclusion virtually requires a presentation that focuses on that particular element, even if this gives the theory as a whole a more unitary or less variable tone than the author might otherwise prefer. I, on the other hand, have had the luxury of observing these arguments for inclusion, and of reflecting on the way that these arguments are assimilated by a public and commentators who seem to search endlessly for a single, unitary explanation of gender-based phenomena, or who play one explanation (or feminist commentator) off against another. Buttressed by the contributions of scholars such as Professors Franke and Schultz, I can argue for a theory that underscores both its own diversity of dynamics and the contingency of these dynamics in their application to different circumstances.[55]

But whatever the source of this difference, I believe a theory that directs attention specifically to the multiplicity and variability of the dynamics that characterize sexual harassment is essential. It is part of the struggle that I described in *The New Jurisprudence* when I sought to highlight the complexity of the phenomenon of gender subordination more generally. And it is particularly necessary at a point when the public may feel overtaxed with the difficulties of sorting out one particular dynamic—the sexualized oppression of women by men—and may be looking for an opportunity to replace it with another, be it non-sexualized harassment, sexual harassment as gender confinement, or something else. We must be clear that no single dynamic excludes any other, and a theory of sexual harassment as "preserv[ing] male control and entrench[ing] masculine norms in the workplace"[56] begins to convey this understanding.

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53 Schultz, *supra* note 15.

54 A task at which, I would note, Professor Franke has largely succeeded.

55 One of the aspects of sexual harassment in which I try to document diversity is the way that it affects women's agency. In her response, Professor Franke focuses on the relationship between sexual harassment and women's sexual agency, *see* Franke, *supra* note 43, at 1254-55, which is appropriately one part of the picture. But I did not primarily intend to use interference with sexual agency as an indication of when sexual harassment had occurred; rather, I intended to suggest more broadly that sexual harassment is a practice that interferes with women's agency in different contexts: as sexual subjects, as workers, as women who seek to make the sometimes-validating transition to the world of work, and as human beings who seek to project themselves in different ways.

56 *The New Jurisprudence*, *supra* note 19, at 1172.

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As Professors Bernstein and Franke would doubtless agree, many heads—and many distinct understandings—are needed to negotiate this difficult moment in the public understanding of sexual harassment. I am grateful that they have participated so provocatively and so thoughtfully in this forum with me.

# HISTORY AND STATE SUABILITY: AN "EXPLANATORY" ACCOUNT OF THE ELEVENTH AMENDMENT

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*When States are departed from their original Constitution, and that original by tract of time worn out of memory; the succeeding Ages viewing what is past by the present, conceive the former to have been like to that they live in, and framing thereupon erroneous propositions, do likewise make thereon erroneous inferences and Conclusions.*[1]

## INTRODUCTION

At the heart of debates over the meaning of the Eleventh Amendment to the United States Constitution lies the question what role history should play in the interpretation of the constitutional text. The relevant text itself is not in dispute: the Amendment provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[2] A few salient historical points also appear relatively free from doubt: President John Adams proclaimed the Amendment to be a "Part of the Constitution" on January 8, 1798,[3]

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1 SIR HENRY SPELMAN, *Of Parliaments, in* RELIQUIÆ SPELMANNIANÆ: THE POSTHUMOUS WORKS OF SIR HENRY SPELMAN 57, 57 (Oxford, Printed at the Theater for Awnsham and J. Churchill 1698).

2 U.S. CONST. amend. XI.

3 For the text of the Adams proclamation, see 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 637-38 (Maeva Marcus ed., 1994)