

# *The Male/Female Model and Same-Sex Sex Harassment*

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As we've seen, the Supreme Court recently held that same-sex sex harassment can be sex discrimination that is actionable under Title VII. The Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.* specified that Title VII provides no remedy when a man harasses a man, or a woman a woman, because the target is homosexual. Purely anti-gay harassment (if such a thing occurs) is specifically excluded. But when same-sex harassment occurs "because of sex" (as distinguished from sexual orientation) it is now actionable. Same-sex harassment will be deemed to be "because of sex" if it has erotic content and if the perpetrator is found to be homosexual; otherwise, "common sense" will guide juries in determining the sex discriminatory import of the underlying conduct. Under these general rules, same-sex cases are making their way into the mainstream of sex harassment litigation.

How did we get here? A classic feminist theory - that of Catherine A. MacKinnon - was decisive in persuading courts to regard cross-sex harassment as sex discrimination; and her brief in *Oncale* may well have contributed important elements to its doctrinal outcome. In this section I'll first set out Catherine A. MacKinnon's theory of sexual harassment and then analyze her application of it to the *Oncale* case.

## 1. The Male/Female Model

The facts alleged by Joseph Oncale are disturbing. Working on an oil rig in an all-male workforce, he was repeatedly threatened and assaulted by his supervisor and two co-workers. They threatened to rape him; twice they held him down while placing their penises up against his body; once they grabbed him in the shower and did something (one cannot be sure quite what) with a piece of soap. His complaints were ignored, and he quit under protest.

The trial and appeals courts ruled that Oncale did not have a sex discrimination claim. They followed a case that takes us directly back to the origins of sex harassment law in Catharine A. MacKinnon's theory of sexual injury. This case had held that sex harassment was about sex inequality, that sex inequality was the social dominance of women by men, and that therefore sex harassment could occur only when women suffered at the hands of men. The major and minor premises are a simple, common sense translation of the basic theory of sex harassment proposed by MacKinnon in the book that did more than anything else to inaugurate sex harassment law, *Sexual Harassment of Working Women*, published in 1979. Here's the male/female model of sex harassment as MacKinnon stated it in her book:

Analysis of sexuality must not be severed and abstracted from analysis of gender. What the current interpretations of rape [as an exercise of power, not of sexuality] fail to grasp ... is the argument most conducive to conceiving sexual harassment as sex

discrimination: a crime of sex is a crime of power. Sexual harassment (and rape) have everything to do with sexuality. Gender is a power division and sexuality is one sphere of its expression. One thing wrong with sexual harassment (and with rape) is that it eroticizes women's subordination. It acts out and deepens the powerlessness of women as a gender, as women. (220-21)

This paragraph uses a number of ambiguous terms, but it gives them very stable, intelligible meanings. Sex appears here both as the difference between men and women (I will call this sex1, to indicate bodily dimorphism, the purportedly stable difference between male and female bodies) and as erotic appeal, genital eroticism, and everything that makes "fucking" a central focus of attention (I will call this sex2). Sexuality is the structural rather than interpersonal dimension of sex2; when she used the term in this paragraph, it appears that MacKinnon was not thinking about sexual orientation at all.

The crucial term, however, is gender. Rape and sex harassment are homologous crimes of sex1 because they use sex2 to generate gender. Gender renders men as men (that is, superordinate) and women as women (that is, subordinate). Women as women are powerless. Their gender is this subordination.

In the important theoretical article that MacKinnon published in the feminist journal *Signs* in 1982 but that she had written well before the publication of *Sexual Harassment of Working Women* MacKinnon restated this point and elaborated it.

Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality.

As MacKinnon suggested in 1979 and as she explicitly states here, gender renders sex hierarchy as what men and women are; it produces rather than reflects sex1. This is one of the most radical elements of MacKinnon's theory of sex2. The reality of sex1, and the consciousness in which that reality seems real, natural, and inevitable, are effects of power. Sex hierarchy is ontologically and epistemologically "nearly perfect": by producing both its own reality and our every mode of apprehending that reality (with the sole exception of feminist method as MacKinnon defines it), it almost completely occupies the horizon of possibility.

I will call this the male/female model. It is a neat, tight system; indeed, for all its constructedness and contingency, it is total, structural, complete. Purportedly operating on the ground of sex1 but actually producing it, men use sex2 to make themselves superordinate, and that is their gender; and to make women subordinate, and that is our gender. They win, we lose.

Of course, this is not inevitable: rather, it is a historical catastrophe. Almost luckily, rape and sex harassment are especially concentrated forms of sex2. Just like myriad other rituals of heterosexual interaction, but with particular force and clarity, rape and sex harassment give men and women gender (that is, makes them men and women), which, for MacKinnon, means their relative place in a male/female hierarchy. And here is where MacKinnon places her Archimedes' lever. According to MacKinnon's theory of legal remediation, the genealogy of which I will attempt to trace in the following pages, the law of rape and of sex harassment, when they provide a remedy for the injury of sex2 based on a woman's claim to women's point of view, provide ways of exposing this terrible mistake, interrupting the ontological and epistemological seamlessness of sex2, and of enlisting the energies of the state in the project of justice.

Now the claim of any one woman to "women's point of view" is necessarily problematic. At the very least we confront the fact that some women disagree with other women who claim sexual injury, and some women disagree that sexual injury is a manifestation of women's sexual subordination. In a second important theoretical statement, published in 1983, also in *Signs*, MacKinnon recognized this problem and acknowledged that it challenges her idea that a woman claiming sexual injury speaks of women's experience from women's point of view. Boldly, she refused to explain the problem away on grounds of false consciousness ("my consciousness is true, yours false, never mind why") or of the verity of any biological woman's experience ("I know I am right because it feels right to me, never mind why"), attributing the paired objections to the object/subject polarity that feminism detects at the heart of male power. The dilemma is not feminism's fault; it arises from the historical capture of objectivity for, and as, the male point of view, and the resulting objectification of women, the rendering of their powerlessness as their subjectivity. Thus "true feminism," "feminism unmodified," MacKinnon argued, must be radical: "Women's situation offers no outside to stand on or gaze at, no inside to escape to, too much urgency to wait, no place else to go, and nothing to use but the twisted tools that have been shoved down our throats. If feminism is revolutionary, this is why."

Hence the centrality of method in the *Signs* articles: feminism does not have the truth of women, but rather seeks an unprecedented disruption in the conceptual and social order by untying women's experience from the subject/object, objectivity/subjectivity, truth/feeling dyads that are the epistemology of male power: "The project is to uncover and claim as valid the experience of women, the major content of which is the devaluation of women's experience." "The pursuit of consciousness becomes a form of political practice." And within that political practice, the radical project is "the claim of feminism to women's perspective, not from it."

The 1982 *Signs* article partially derailed this radicalism, however, when it invoked women's experience as the source of authority for the claim that sexuality is a form of power generating male superordination and female subordination. The derailment occurs in stages. MacKinnon was at first frank that her own interpretive inductions led to the

claim: "I think that feminism fundamentally identifies sexuality as the primary social sphere of male power. The centrality of sexuality emerges .... from feminist practice on diverse issues, including abortion, birth control, sterilization abuse ...." How did feminist practice - much of it by practitioners who would have resisted MacKinnon's assessment of sexual injury and of sexuality - provide this insight? "If the literature on sex roles and the investigations of particular issues are read in light of each other, each element of the female gender stereotype is revealed as, in fact, sexual." Past passive verbs; a bad sign for agency and pleine aire interpretation. But pay no attention to the man behind the curtain, for he is about to emerge as women asserting their experience of sexuality as subordination: "Women experience the sexual events these issues codify as a cohesive whole .... The defining theme of that whole is the male pursuit of control over women's sexuality." MacKinnon's interpretive insight has become the meaning of feminist practice across the board and, ultimately, the substantive centrality of sexual subordination to women's experience of gender (and thus sex1). Sexuality is sex discrimination. Q.E.D.

In the 1983 Signs article the sexual subordination idea had become so central to MacKinnon's reasoning that it could be induced and deduced in the same gesture: male dominance provides the substantive, the social, context for construing the meaning of particular sexual encounters to women - and the meaning of particular sexual encounters to women reveals that male dominance is their substantive, social context. This circularity may explain the remarkable grammatical stability of the meaning of sexual encounters from women's point of view. "[T]he injury of rape lies in the meaning of the act to its victims" - that is, surely, all women - and we know what that is:

The law distinguishes rape from intercourse by the woman's lack of consent coupled with a man's (usually) knowing disregard of it. A feminist distinction between rape and intercourse, to hazard a beginning approach, lies instead in the meaning of the act from women's point of view. What is wrong with rape is that it is an act of the subordination of women to men.

Note the exclusive article ("the meaning"): MacKinnon concludes that the subordination of women to men is structural. And note the rhetorical posture MacKinnon assumes, of hearing "the meaning" emerge "from" "women's point of view": she warrants her finding by its real authorship in the collectivity of women. (Note that the formulation is no longer "to" but "from" women's point of view - precisely what had been disavowed the year before.) MacKinnon's 1983 confidence in these inferences was so strong that she could affirm that particular women, interpreting particular sexual encounters, always have access to this meaning: "... the only difference between assault and (what is socially considered) noninjury is the meaning of the encounter to the woman."

For all the fixity of the male/female model as women's point of view, in 1983 MacKinnon was unready to suggest that, because "the woman" knows "the meaning," the rules governing rape (her primary example in the second Signs article) should be altered to affirm her experience and disaffirm his. This reticence arises in part from a bold conclusion that the state, its law and the rule of law are male. MacKinnon

"propose[d] that the state is male in the feminist sense" not only because it pursued and protected men's interests in sexual control over women by adopting particular rules (which presumably could be rewritten), but because, "[f]ormally, the state is male in that objectivity is its norm." The very "rule form ... institutionalizes the objective stance as jurisprudence," which, in liberalism, is "the law of law." Asking the law, rather than women, to speak the meaning of sexuality from women's point of view would be a hopelessly contradictory undertaking. And so rewriting the rules of rape adjudication to make women's subjective experience decisive would merely reinscribe the terms of male dominance into the feminist project:

[E]ven though the rape law oscillates between subjective tests and more objective standards invoking social reasonableness, it uniformly presumes a single underlying reality, not a reality split by divergent meanings, such as those inequality produces. . . . One-sidedly erasing women's violation or dissolving the presumptions into the subjectivity of either side are alternatives dictated by the terms of the object/subject split respectively. These are alternatives that will only retrace that split until its terms are confronted as gendered to the ground.

This at least suggests what the Signs articles repeatedly affirm, that women's subjective experience, no less than men's, is part of the epistemological dilemma posed by male dominance. To move "toward a feminist jurisprudence," for the MacKinnon of 1983, was to critique that dilemma as an opening for a feminist consciousness currently unattainable in its terms. And so, just after affirming, in the passage quoted above, that "What is wrong with rape is that it is an act of the subordination of women to men," MacKinnon turned from law and rape, to the system of meaning in which they are embedded: "the issue is not so much what rape 'is' as the way its social conception is shaped to interpret particular encounters."

It seems quite fitting, then, that the second Signs article ends in the mode of critique. The last section warns that "making and enforcing certain acts as illegal reinforces a structure of subordination," catalogues the dilemmas posed for her feminist project by liberal and left jurisprudence, insists in its last line that "[j]ustice" would require something quite "new" - and avoids any effort to reconcile the idea of a charge of rape or cause of action for sex harassment by a particular woman with the problematic relationship that may obtain between her understanding and "women's point of view."

In a 1989 volume collecting and revising much of her earlier work, including the the Signs articles, MacKinnon seeks a synthesis between her early theoretical work and two decades of her feminist law reform activism. By then she was ready to draw conclusions about law that seemed out of reach in the Signs articles. Consider this revision of the passage on rape quoted just above:

[W]hen an accused wrongly but sincerely believes that a woman he sexually forced consented, he may have a defense of mistaken belief in consent or fail to satisfy the mental requirement of knowingly proceeding against her will. Sometimes his knowing

disregard is measured by what a reasonable man would disregard. This is considered an objective test. Sometimes the disregard need not be reasonable so long as it is sincere. This is considered a subjective test. A feminist inquiry into the distinction between rape and intercourse, by contrast, would inquire into the meaning of the act from women's point of view, which is neither. What is wrong with rape in this view is that it is an act of subordination of women to men. It expresses and reinforces women's inequality to men. Rape with legal impunity makes women second-class citizens.

The changes are subtle but substantial. MacKinnon is no longer seeking to establish a feminist distinction; instead she now aims to frame the question for feminist inquiry. And while she doesn't suggest that she wants courts to ask this question, her 1983 reticence to do so has been revised away. She addresses "the act" a particular, not a general one; there is a particular accused; and we will understand his act critically if not legally by inquiring into "the meaning of the act from women's point of view." Moreover, that point of view is no longer dangerously merged into the subjectivity that male dominance has assigned women: in a remarkable shift, to inquire after it is to avoid the twin falsities of objective and subjective tests. The truth of rape's wrong is the same - - "it is an act of subordination of women to men" -- but MacKinnon now replaces her 1983 invitation to critique with a denunciation of "[r]ape with legal impunity." Legal punishment of rape apprehended from women's point of view would be a feminist project.

Once again she insists that the male point of view is not only male superordination but is also the objectivity of the law, its neutrality, and the very substance of its idea of equality. But now she also insists that, confronting this impenetrable system from within it, there can be "feminist law":

Abstract rights authorize [sic] the male experience of the world. Substantive rights for women would not. Their authority would be the currently unthinkable: nondominant authority, the authority of excluded truth, the voice of silence.

An individual woman who suffers sex harassment at work thereby exemplifies, in her sexual injury, women's gender. As long as her legal cause of action for sex harassment performs the perspective produced by women's point of view, it will allow her to interrupt the ontological seamlessness joining male superordination with the law, enabling her to make not only her injury but the injury of all women visible, audible, and interruptable.

The idea that the legal claim of one woman flawlessly reveals the injury that male superordination and female subordination inflict on all women seems quite foreign to the radicalism and the critical stance of MacKinnon's Signs articles, but nevertheless pervades her practice of legal remediation. The MacKinnon/Dworkin antipornography ordinance would have allowed an individual woman to obtain an injunction against

"trafficking" in "pornography" acting "as a woman acting against the subordination of women." Though MacKinnon and others frequently defended the ordinance on the grounds that an individual woman would have to "prove injury," that is precisely what women complainants seeking to enjoin "trafficking" in pornography were not required to do. Instead, it would have allowed one woman to act for all women, without any showing of actual harm to herself or anyone else, by enjoining the production, sale, exhibition, and distribution of a wide array of "pornography", even against defendants who thought in good faith that the materials were not subordinating to women. Nor was MacKinnon's aim providing recompense to injured individuals or securing a locale in which those seeking to avoid pornography could do so; at least in the Minneapolis phase of their activism, MacKinnon and Dworkin urged the municipal Zoning and Planning Commission to reject a zoning approach and to adopt the private right of action not because the latter would recognize harm to individual women but because any pornography anywhere is sex discrimination; as MacKinnon told the Commission, "I do not admit that pornography has to exist." Similarly, MacKinnon would remove any requirement that an individual woman prove that her employer fired her with actual illegal intent; "[s]tatistical proofs of disparity would be conclusive" because harm to an individual woman is the 100% pure distillate of the harm suffered by all women. Clearly the private lawsuit is an opportunity to remedy the injury sex<sup>2</sup> imposes on all women.

Feminist critics of MacKinnon's theory of gender, and of her prescription for using law to undo gender, have objected to this reification of all women in the body and speech of the one who happens to file a claim. The totalism of the model, the idea that women's point of view is instantiated in the plaintiff's claim, and the idea that joining these to the institutional system of rights adjudication and enforcement will liberate women from power, are all subject to question. Wendy Brown asks some of the crucial questions:

[I]f MacKinnon aims to write "women's experience into law," precisely which "women's experience(s)," drawn from which historical moments, and which cultural, racial, and class strata, is MacKinnon writing? . . . [W]hat does it mean to write historically and culturally circumscribed experience into an ahistorical discourse, the universalist discourse of the law? What happens when "experience" becomes ontology, when "perspective" becomes truth, and when both become unified in the Subject of Woman and encoded in law as women's rights?

We can trace some of the answers through MacKinnon's adaptation of the male/female model to the facts of the Oncale case.

## 2. The Male/Female Model and the Oncale Case

Almost 20 years after publishing *Sexual Harassment of Working Women*, MacKinnon wrote a brief in the Oncale case for a group of amici committed to stopping violence by and against men. Drawing on the name of the first organization listed as amicus, I'll call this the "Male Victimization Brief." It shows concisely how MacKinnon's male/female model works when it incorporates three new elements of sex harassment: men's

subordination of a man, male/male sex<sup>2</sup>, and thus sexuality reconstrued as the social dimension not of male/female sex<sup>2</sup> but of sex<sup>2</sup> more generally.

In the male/female model as the Male Victimization Brief elaborates it, Oncale suffered sex discrimination because he was injured as a man. He and other male victims of male sexual aggression are "victimized through their masculinity, violated in their minds and bodies as individual members of their gender" (7). This happens because they are given not only the worse gender, but the wrong one:

They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors. . . . For a man to be sexually attacked, by placing him in a woman's role, demeans his masculinity; he loses it, so to speak. This cannot be done to a woman. What he loses, he loses through gender, as a man (10).

What is utterly remarkable about this formulation is the endorsement it offers to a rigid, monolithic association of male bodies with male gender with superordination, and of female bodies with female gender and subordination. This endorsement is even normative to the extent that it maintains MacKinnon's project of articulating "the authority of excluded truth, the voice of silence." Adopting the perspective of male victims of male sexual violence requires us to recognize that they are persecuted by other men because they fail to represent dominant masculinity seamlessly. Here the Brief seems to detach sex<sup>1</sup> from gender, to recognize a moral project of loosening the stringencies of masculinity. But the Brief's articulation of the wrong suffered by Oncale also requires us to acknowledge that his primary, definitional injury is the loss of masculine superordination. How can this be a compensable loss in a feminist theory of injury?

The answer lies in the structural character -- the totalism if you will -- of the male/female model. Like MacKinnon's articles and books analyzed in the last section, the MaleVictimization Brief formulates the male/female model not as natural -- it is, au contraire, a historical contingency which the law can resist (11) -- but as total. This is unequivocally clear for women: a woman has no masculinity to lose. Men, however, can endure gender downward mobility. Though the Brief is careful to flag the socially constructed quality of male gender, it is equally insistent that a man who loses masculinity is necessarily feminized: there is nowhere else for him to go. Thus men who lose their masculinity do so in "their gender, as gender is socially defined" (7) but there is nothing socially negotiable about their fate "as men": because of the harassment they "are feminized" (10, emphasis added). Similarly, the Brief posits that the attacks on Oncale "violat[ed] (what is conventionally considered) his manhood" (25). This would be a nice recognition of the social negotiability of that outcome except for the parentheses, which give us the option of reading the violation as real: the attacks "violat[ed] . . . his manhood." Whether it's conventional or not, his manhood is all Joseph Oncale has got that is properly his. Take it away, and he is wronged.

The Male Sexual Victimization Brief reveals the structural ambitions, the totalism, of the male/female model again when it insists that homoeroticism and homosexuality have no independence of its terms. The latter are subsumed into the former. The Male Victimization Brief achieves this by arguing that the question of homosexuality is both irrelevant to the question of sex discrimination, and fundamentally the same as it. It is irrelevant because a homosexual harassing a person of his or her own sex is acting just like a heterosexual harassing a member of what the Brief calls "the opposite sex" (1, 24), and because victims of sex harassment are victims whether they are straight or gay (25). Harassment is harassment no matter who does it to whom; it always reproduces the paradigm of male/female harassment; and thus we need not take into account anything distinctive about the same-sex-ness of the parties. But at the same time homosexuality is really fundamentally male/female gender all over again: the sex of one's sexual object choice is a "powerful constituent" of one's gender, and anti-gay discrimination fundamentally disadvantages people for deviating from gender expectations (26-27). As MacKinnon wrote on her own behalf in 1989, "Since sexuality largely defines gender, discrimination based on sexuality is discrimination based on gender."

The Male Victimization Brief thus maintains the ontological supremacy of the male/female model by simultaneously evacuating sexual orientation of any distinct components and flooding it with gender understood as male superordination and female subordination. This is, I think, a big mistake.

The Brief itself sounds three warning notes. The first appears in the appendix, where the fourteen amici on whose behalf MacKinnon wrote the Brief provide short descriptions of themselves. Most are men's anti-violence groups, variously committed to stopping male violence against men or against men and women, to rehabilitating male abusers and to intervening on behalf of men who have suffered sexual violence; Men Against Pornography is of course among them. They all repeat the male/female model like a mantra -- with one exception, the New York City Gay & Lesbian Anti-Violence Project, the only explicitly gay organization on the Brief, which doesn't even allude to it (A-8 -- A-9). Why would a pro-gay stance cause this group to differ in this way from every other amicus on the brief?

The Male Victimization Brief's second warning note sounds when it argues that the homosexual orientation of the "perpetrator" (not the "defendant") may be relevant because it would make a male-male harassment case homologous to a male-female case. This would be a good thing for the plaintiff, the Brief acknowledges, because the court would then be in a position to say that the defendant would not have selected a woman as his target (24). This is a quick and easy route to a legal finding of sex discrimination, one that the Supreme Court explicitly opened up in its decision in *Oncale*. Gay rights organizations have fought to close this route off ever since circuit courts first opened it, however, because it is also a quick and easy route to homophobia, via the inference that because the defendant is homosexual, he probably has done this bad sexual thing. In a male-male case the inference is even richer, borrowing as it does from the male/female model: because the defendant is a male homosexual, he is a sexual dominator.

To be sure, the Brief counsels that courts may be institutionally unable to make findings of parties' sexual orientations, and it also indicates that courts allowing evidence of the parties' sexual orientations must prevent "homophobic attacks" (24). But it entirely misses the common sense status of the virulent inference from defendant's homosexuality to his character as a sexual wrongdoer. Indeed, the Brief virtually invites the Supreme Court to indulge in them by dropping an entirely unnecessary footnote quoting from Joseph Oncale's deposition testimony: "I feel that they made homosexual advances toward me," Oncale opined, according to the Brief "I feel they are homosexuals." (23 n.7).

This is the third warning note. Neither lower-court opinion in Oncale, and none of the briefs submitted to the Supreme Court, brought this detail in the record to the Justices' attention. And the Justices did not ask for it: the questions they certified for their review made no mention of homosexuality. Oncale made its way up the appellate ladder as an "Animal House" case: the plaintiff's allegations of cruel, repeated, and unwelcome sexual assaults were persistently read as male-male homosocial highjinks gone awry -- in Justice Scalia's terms, "simple teasing or roughhousing among members of the same sex" that is aberrational only in that it has become "objectively severe." Alternatively, of course, Oncale's deposition testimony could support a reading of the scene as homosexual predation. It is difficult to escape the conclusion that the Male Sexual Victimization Brief aimed to induce the Court to adopt just such a reading.

But there are two other ways to imagine the case -- neither of them antigay -- and none of the facts published in the various court decisions in the case preclude either one. I want to be very clear about what I am about to do. I am not saying anything about the human being Joseph Oncale, or making any truth claims about what actually happened on the oil rig. Instead, I want to show how his factual allegations can be read. I am going to put his allegation of unwantedness aside, as a mere allegation, and then connect the remaining dots. And since that heuristic produces the equivalent of a court's knowledge of a same-sex sex harassment case of this type up to and beyond summary judgment, the patterns I draw will become predictions about two alarming classes of cases that will make it to trial under Oncale.

In the first of these alternative readings, we can posit, at least for purposes of contemplating what sex harassment law after Oncale might authorize, that a plaintiff with these facts willingly engaged in erotic conduct of precisely the kinds described in Oncale's complaint (or that he engaged in some of that conduct and fantasized the rest; or even that he fantasized all of it), and then was struck with a profound desire to refuse the homosexual potential those experiences revealed in him.

That is to say, Oncale might have been a homosexual panic case. It would be easy enough to generate this reading of the case out of entirely gay-identity presuppositions: in that event, Oncale is actually a gay or bisexual man, but a shame-ridden one, who reacted to his own (identity-appropriate) sexual behavior and/or desires and fantasies with remorse and a lawyer. Oncale's many television appearances in which he (I am told)

affirmed his horrified heterosexuality would merely be taken, on this reading, as a closet-drama, a project in deep bad faith; my insistence on the possibility of this other reading of the case would be, then, a gesture in the direction of an outing (though note that my reading is of the record, not the human being). On this, first rereading of the case, we would have to understand Oncale as the aggressor, the other men on the oil rig as the victims, and the lawsuit (not any sexual encounter on the oil rig) as the wrong.

But a more thoroughgoing queer approach would make the case outright undecideable. Recall that I posited that a queer approach would detach male bodies from masculinity and superordination, and female bodies from femininity and subordination; it wants to undermine, historicize, celebrate every current supersession of, and generally "get beyond" discrete homo- and heterosexual identities; and it wants to notice that sexual super- and sub-ordination can both be complex objects of desire, whether they are inflected by any particular configuration of bodies, genders, or homo/hetero identifications, or go bare of all of that.

Once you try, it's perfectly easy to read the facts in Oncale in a number of ways that perform many of these detachments. We can imagine that the oil rig has a culture with rules, and that these rules draw not on the male/female model or a gay-identity script, but on the ways in which masculine and feminine performances and gay-identified and gay-dis-identified performances can diverge and converge to make the power relationships in sex expressly problematic. The rules allow Oncale to indicate a willingness to be mastered, indeed to demand that he is sexually accessible only on the stipulation that those approaching him take on the task of mastery; they submit by taking control; and something happens with a piece of soap. There's not enough in the record to say much more about how it could have been, but (assuming we are going to take Oncale's allegations about unwelcomeness as merely that -- allegations) nothing I've said so far is ruled out by the record. From this starting point, the possibilities, in terms of masculinity and femininity and in terms of gay and straight, are probably endless. Mix, match, and omit as you will:

(1) Oncale performs a feminine man in order to signal his willingness to be mastered; it's the discrepancy between his male body and his gender that gets things going; the other guys comply with a big display of masculinity; and it's the discrepancy between their mere bodily selves and the grand controlling personae they assume that keeps things going; so "man fucks woman" but with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.

(2) Oncale performs a perfectly masculine man but only one kind of masculine man; it's the discrepancy between his masculinity and that performed by the other men involved that gets things going. Femininity is not important in this version -- it's just absent; the men are differentiating themselves within some diacritics in masculinity. The terms of differentiation could sound in sentiment, age, refinement, race, moodiness, or simply (this is important; convergence is not mandated) masculinity itself. So "It's a guy thing" that creates the space for a dominance/submission sexual interaction. So "man fucks

man"-- maleness and masculinity are important products of the interaction, but with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.

(3) The other men perform a kind of femininity associated with power -- for example, they become bitchy. There is no necessary gender correlate for Oncale. He could be the heterosexual partner of the bitch and thus masculinized, but that doesn't tell us whether he's henpecked or intensely phallic. He could be their lesbian partner, but that doesn't tell us whether she's butch or femme. Or he could merely play the bottom to the power on display -- no gender at all. So "man or woman fucks man or woman," or perhaps "man or woman fucks," always with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.

(4) Possibly more than one of these is happening at the same time, or rather, perhaps, they shift in and out of focus as the scene unfolds. Or it could be that the sheer bodily homosexuality of the scene is so dominantly what it is about that any effort to attribute to it legible gender signification is simply doomed to defeat. In either case we would have a power/submission relay, but with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.

None of the above involves homosexual panic. Indeed, a person could pass through most of the scenes I've described without a sexual orientation identity; you could even do some of them "as" heterosexual; more likely homosexual and heterosexual desire would -- each -- be, at every moment, complexly achieved, defeated, and deferred. So to that extent the object of desire for any of the players would be some relationship to sexual orientation. Similarly, where gender is of any moment, it reads not as a property or determinant of the bodily self but as a performative language, as a means of transmitting desire. Certainly we can say that, when gender matters at all, the object of desire is not a gendered object, but a relationship to a gender or perhaps to gender more generally.

But I've made the assumption that the lead theme in the scene is power and submission. And here's the rub. The mix-and-match volatilities of gender and sexual orientation work to make the question of who is submitting to whom extremely difficult to answer. Indeed, the chief theme would have to be that the desire of the parties to any of these scenes has as its object a *mise en probleme* of desire itself. To the extent that the decision in Oncale allows one participant in scenes like these to have a panic about it afterward and sue, it sets courts and juries administering Title VII a deeply problematic function.

Let me re-approach that last point from the perspective of the male/female model. The re-readability of the facts in Oncale, rather than confirming the male/female model, shows what's wrong with it. It is just too complete and too settled. Men are over there with masculinity and superordination; women are over here with femininity and subordination. Sex and sexuality are never good; they are always tools by which women are assigned subordination and men either assign or suffer it. Sexual orientation both

matters and doesn't matter precisely and only to the extent it confirms this mapping. Everything is accounted for; there is nothing left over. The model produces great certainty: Oncale transparently represents all men injured by this totalized gender system because the system frames all options for understanding his injury. But if the model doesn't apply -- if homosexual panic or more complex "problematicness" panic is what the "case is about" -- that certainty will evaporate.

The resulting uncertainty intensifies, moreover, as we move from the homosexual panic hypothesis to the problematicness panic hypothesis. Things are bad enough under the former. Surely, on that reading of the facts, Joseph Oncale's hesitant sense that his attackers "are homosexuals" is volatile in a way that disables the male/female model. Does his "feeling" about his attackers tell us that they are homosexuals or that he might be? That they attacked him on the oilrig or that he attacked them by invoking the remarkable powers of the federal court to restore his social position as heterosexual? If we could know the answer to these questions, at least we'd know how to judge the case: we know we're against assault, and we know we're against homosexual panic. But how, in an actual case, would we know? Surely we would not want Justice Scalia's "common sense" to be our guide: as I've posited, homosexual panic is common sense.

Still less do I relish the idea of Sundowner Offshore Services deciding whether to put Pat Califia on the stand in an effort to persuade juries out of their common sense intuition that no one could want to be mastered sexually, or could take control by demanding to be mastered. But the problem in the problematicness panic re-reading of the Oncale facts runs much deeper than that. On that reading, it was precisely the loss of certainty about wantedness that the players were seeking. That was their desire. It's a risky desire: acting on it places one in the way of having some unwanted sex. Things can go wrong; we need to keep one eye on the cause of action for assault. But more profoundly, if things go right, the wantedness of the sex that happens will be undecideable.

On the way to confronting that, there are four more conventional reasons not to want this case ever to be tried as a sex harassment claim. First, this Oncale contradicts his own past decision when he claims access now to a less problematic set of norms about wantedness. We can and should estop him from claiming now that then he didn't want to put wantedness en abysme. Second, if we don't estop him, we set up a one-way cultural ratchet: Title VII (and the background norms we will have further confirmed when we decide to use it in this way) will always turn the normative screw in the direction of less problematic sex. The male/female model is not a transparent translation of suppressed consciousness into the law; it's a trumping move. Third, to the extent that that changes the culture of the oil rig and the culture generally, that would be a huge loss. I may not be able to convince you of it, but I think the problematic of wantedness isn't just tolerable; it's beautiful. It's brave. It's complicated and fleeting and elaborate and human.

Fourth, suppressing performances that make the problematic of wantedness explicit would not make it go away; the regulatory project would only make the problematic of

wantedness more covert; indeed regulation might intensify by narrowing the vocabularies that subversion has to mobilize. After all, it's not just the perverts who engage in scenes like those I've just affirmed as good who seek incoherent experiences in sex: I think most of us experience sex (when it's not routinized) as an alarming mix of desire and fear, delight and disgust, power and surrender, surrender and power, attachment and alienation, ecstasy in the root sense of the word and enmired embodiedness. Essential elements of the third Oncale scenario are enacted, I imagine, in many more sexual relationships than you would guess just by looking around the boardroom or seminar room, and the edgy experience of unwantedness in sex is probably cherished by more people than are willing to say so. Suppressing performances like my third Oncale scenario might make sex on Sunday afternoon, with your spouse, in the sacred precincts of the marital bedroom, more banal or more weird -- it's hard to tell which, in a domain of experience so routinely enriched by prohibition. The queer project carries a brief for the weirdness of sex wherever it appears; it is (or should be) agnostic about where, when, and among or between whom the intensities of sex are possible. But (and this is probably the queerest reason to protect the problematic of unwantedness from regulation as sex harassment) it would resist the redistribution of sexual intensities achieved under color of women's equality or moral fastidiousness.